

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-003

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XXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding 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 receipt of the applicant's completed application on October 8, 2010, 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 September 8, 2011, 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 asked the Board to remove from his record his non-judicial punishment (NJP) dated October 15, 2009, when he was punished for failing to obey an order and for fraudulent enlistment. The applicant argued that the NJP should be removed from his record because "NJP was not the proper forum to rule on those offenses." The applicant stated that he was transferred to the cutter where the NJP was awarded as a pretext to deny him the right to refuse NJP and demand trial by court-martial. He alleged that the pretextual nature of the transfer is proven by the fact that two days after the mast at which he was awarded NJP, he was transferred off the cutter. The applicant also alleged that his commanding officer violated the Health Insurance Portability and Accountability Act of 1996 (HIPAA) by viewing his medical records to determine that he had fraudulently enlisted. In support of his allegations, the applicant submitted several documents from his military record.

SUMMARY OF THE APPLICANT'S MILITARY AND MEDICAL RECORDS

On January 31, 2006, the applicant completed a pre-screening Medical History Report pursuant to his pending enlistment. On his report, he marked "No" in response to the question, "Have you ever ... seen a psychiatrist, psychologist, social worker, counselor or other professional for any reason (inpatient or outpatient) including counseling or treatment for school, adjustment, family, marriage or any other problem, to include depression, or treatment for alcohol, drug or substance abuse." He also completed a Report of Medical History on which he

denied ever having suffered depression or anxiety, received counseling, or been evaluated or treated for a mental condition. He admitted that he suffered from acne, which the doctor noted was “mild.”

The applicant enlisted in the Coast Guard on May 23, 2006, and completed a Report of Medical History the next day on which he again denied ever having suffered depression or anxiety, received counseling, or been evaluated or treated for a mental condition. While in recruit basic training on June 3, 2006, he was referred for a psychiatric evaluation. The command noted that the applicant was “distant,” made “little to no eye contact,” and was reluctant to answer any questions.

After graduating from recruit training, the applicant was assigned to a cutter in July 2006. On October 11, 2006, a health specialist on the cutter referred him to a psychologist because of his isolation and quietness. The applicant told the psychologist that he had been physically abused by his mother for seven years and that he had been “medicated with antidepressant medication because she believed he was a problem child and, therefore, had to be beaten.” The psychologist reported that the applicant was unable to cope with stressful situations and interpersonal communications and was unwilling to undergo therapy or take a psychotropic medication. The psychologist diagnosed the applicant with post traumatic stress disorder, based on his mother’s physical abuse, and an adjustment disorder with prolonged depressed mood. The psychologist recommended that the applicant be medically discharged. A senior medical officer, however, reported that it “is too early to tell whether the patient will need [a] medical board.”

While assigned to the cutter, the applicant continually sought medication and surgical treatment for acne on his face and eczema on his hands. A doctor reported on September 13, 2007, that the applicant “looks detached. Eye contact very poor. [He] is confrontational when asked questions about his well being. States that he wishes that everyone would stop asking about it. [He] evades further questioning. [He is] continuously pulling and picking at his hands, unable to sit still.”

On May 9, 2008, the applicant’s commanding officer (CO) referred him for a psychiatric evaluation because of “observed cyclical performance, mood shifts, anxiety, depression, and a withdrawn personality.” At his first evaluation, the applicant told the psychiatrist that his mother had physically and verbally abused him for years; that he “feels sad most of the time, dating back into his childhood”; and that at age 16 he was treated with medication for four months, “only because his mother made him do so.” The doctor noted that “[n]one of this was reflected on his entry physical dated 31 Jan 06.” The psychiatrist diagnosed the applicant with Dysthymia, Early Onset, and Avoidant Personality Disorder. Regarding the personality disorder, the psychiatrist reported that the applicant’s

main problem is his poor interpersonal skill. He is probably able to do specific assigned tasks, but I doubt that he will be able to perform duties requiring increased responsibility, initiative, or coordination with others. Since these issues are key to a successful CG career, I feel he is administratively unsuited to continued military service. Medically speaking, I don’t find any disqualifying conditions since the reason for his dysfunction cannot be explained merely by a diagnosis of dysthymia – it is first and foremost a difficulty in life skills, for which the member has no interest in participating in treatment. Despite my pointing out that his CG career would definitely be helped by his enhancing his interpersonal skills, he remains steadfastly uninterested in pursuing any sort

of counseling (or medication for that matter). Although the member feels that some of his psychological problems will resolve if his acne improves, this shows a degree of denial as to the depth of his psychological impairment. For the record, it is important to note that he failed to report prior mental health treatment on his entry physical.

Thereafter, the applicant underwent several months of counseling and treatment with Celexa, an antidepressant. He repeatedly told his psychiatrist that despite his personal isolation, he wanted to remain in the Coast Guard.

On January 30, 2009, the applicant asked his doctor to restrict his duty status so that he would not have to deploy with the cutter because “[h]e wants to undergo dermabrasion cosmetic therapy for his arms, and won’t be seeing his dermatologist until 6 Feb. He states that more treatments are planned that will conflict with the deployment.” The doctor noted that the applicant had “moderate acne. Arms show no significant lesions – only mild scaling in a couple of places, no inflammatory lesions or ulcerations. Hand eczema is much improved – essentially resolved. ... Basically, this member wishes to opt out of operational duties for elective cosmetic procedures, and I cannot approve of this from a medical standpoint.”

On April 2, 2009, the applicant’s psychiatrist reported that he had diagnosed the applicant with Somatoform Disorder Not Otherwise Specified, Dysthymic Disorder Early Onset, Avoidant Personality Disorder, and acne. He noted that the applicant had stopped taking Celexa because he did not believe it was helping him.

On April 15, 2009, the command of the cutter convened a medical board to evaluate the applicant because of his diagnoses of Body Dysmorphic Disorder, which did not exist prior to his enlistment; Dysthymic Disorder, which existed prior to his enlistment; Avoidant Personality Disorder; and Acne, Xerosis, and Eczema. The applicant reported that he had been physically and emotionally abused by his mother and thus had suffered depression and anxiety in social settings since his childhood. He had “learned to avoid potentially conflictual settings” and “is socially isolated.” The doctors reported that the applicant was “excessively preoccupied by his acne condition,” sought treatment frequently, and had undergone

numerous trials of oral and topical medications and laser skin therapies. The patient experiences severe psychological distress that impairs his occupational and social functioning to the point of complete social isolation and impediment to his command’s deployment missions. The patient obsesses over his acne and avoids social interactions and feels that others think ill of him due to his condition and social isolation. The patient unrealistically desires to remain on active duty and redeploy on his ship. The patient has taken psychotropic medications on a somewhat non-compliant basis and has since discontinued taking medications. ... Psychiatric history is remarkable in that the patient was “forced” to see a psychiatrist at age 16 and was placed on a psychiatric medication for 4 months, although [he] does not recall the name of the medication. ... [T]he patient has a history consistent with Body Dysmorphic Disorder [BDD], Dysthymic Disorder and Avoidant [Personality Disorder] that are interfering with both a normal quality of life and ability to carry out his duties. ... BDD is considered a major risk factor for suicide. BDD is a chronic illness and symptoms are likely to persist, or worsen, if left untreated. The patient however is not demonstrating improvement by his continuing perception of having a severely debilitating skin condition that has prevented him from deploying with his ship and functioning adequately with his crew. The patient apparently benefited from Celexa in the past, although he denies its effectiveness and declines further treatment. The patient has maximized his dermatological treatments and still cannot adequately function within the military environment.

On August 20, 2009, a health specialist sent an email to another health specialist noting that although the applicant had admitted to a doctor that he had received “mental treatment with medication” for several months at age 16, he had failed to report this treatment during his pre-screening and enlistment physical examinations.

On September 10, 2009, the CO of the cutter advised the applicant that his pending administrative discharge for unsuitability due to a diagnosed Avoidant Personality Disorder, pursuant to Article 12.B.16. of the Personnel Manual, which had been initiated on July 26, 2009, was being held in abeyance. The CO explained that the abeyance resulted from the executive officer’s discovery, while assembling the discharge package, of a medical board report revealing that the applicant had been diagnosed with Body Dysmorphic Disorder. The CO noted that the proceedings for an unsuitability discharge would resume if an evaluation of the case indicated that the applicant should not be discharged pursuant to the Medical Manual because of his Body Dysmorphic Disorder. The applicant acknowledged this notification.

According to the applicant, he was taken to mast on October 15, 2009, and punished for disobeying an order and fraudulent enlistment. However, there is no Court Memorandum or other documentation of this NJP in the Personal Data Record received from the Coast Guard.

On November 10, 2009, the Acting CO of the cutter advised the applicant in writing that he was initiating the applicant’s honorable discharge for misconduct based on the applicant’s failure to disclose upon his enlistment medical care that he had received before he enlisted. The Acting CO advised him that he had a right to submit a statement and to object to the discharge. The applicant acknowledged this notification, objected to the proposed discharge, and requested a “second chance discharge waiver.” He submitted a statement objecting to his discharge on November 16, 2009, in which he wrote that he did not believe that he would have been refused enlistment if he had disclosed that he had been counseled by a psychiatrist before he enlisted. The applicant noted his work aboard two cutters, his receipt of a “non-rate of the month” award in June 2007, and his desire to continue serving his country. He complained that his CO refused to listen to his objections and mitigating circumstances at the mast on October 15, 2009.

On January 1, 2010, the Personnel Service Center issued separation orders authorizing the applicant’s honorable discharge for fraudulent enlistment pursuant to Article 12.B.18. of the Personnel Manual. The applicant was discharged on February 9, 2010.

VIEWS OF THE COAST GUARD

On May 13, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC stated that the command of the applicant’s cutter discovered that he had not revealed a prior medical condition upon his enlistment and had therefore discharged him for fraudulent enlistment. The PSC stated that it appears that the medical condition was Body Dys-

morphic Disorder. The PSC stated that the applicant's NJP should not be expunged because, contrary to his claim and pursuant to Article 1.A.5.a. of the Military Justice Manual, NJP is the proper forum for addressing minor offenses under the Uniform Code of Military Justice (UCMJ).

The PSC also stated that there was nothing pretextual about the applicant's assignment to the cutter since it was his permanently assigned unit, and NJP was imposed in accordance with Article 1.A.4.a. of the Military Justice Manual. The PSC stated that the applicant was transferred off the cutter a couple of days after the NJP because he was being processed for an administrative discharge.

Regarding the applicant's claim that his privacy rights under HIPAA were violated by his command when they reviewed his medical record before imposing NJP, the PSC stated that under Chapter 1.B.1. of the Medical Manual, the Executive Officer of a cutter without a permanently attached doctor is the medical officer of the cutter and thus has ready access to examine a subordinate's medical record for official purposes. Therefore, the PSC argued, HIPAA was not violated.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 13, 2011, the Board received the applicant's response to the views of the Coast Guard.

The applicant stated that, contrary to the PSC's memorandum, he was never diagnosed with Body Dysmorphic Disorder before he enlisted. The applicant stated that although he was treated for anxiety as a child, he suffered no anxiety after he moved out of his abusive mother's house in 2004, two years before he enlisted.

The applicant alleged that although he was permanently assigned to the cutter, he had been assigned to temporary assigned duty (TAD) ashore "for well over a year and was still TAD when my final discharge was given to me." In this regard, he noted that he was "left behind while the ship went on patrol so I could seek outside treatment for my acne." The applicant alleged that despite his acne he "was able to keep my personal feelings separated from work, and I proved to be one of the most valuable non-rates at that station."

The applicant alleged that he was under investigation by Coast Guard Investigative Services at one point but, even though the investigation found him to be not guilty, the CO of the cutter waged a vendetta against him to ensure that he was discharged even though he had not been working on the cutter for more than a year.

In support of his allegations, the applicant submitted many of his pediatric medical records, including the following:

- A doctor's notes dated March 10, 2004, state that the applicant's inflammatory acne had improved only slightly and that he reported some improvement in his depression and anxiety with the use of fluoxetine.

- A doctor's notes dated April 21, 2004, state that the applicant, who had "quite mild facial acne," was taking tetracycline and was satisfied with the gradual improvement of his acne but that his mother disagreed.
- A doctor's notes, dated May 26, 2004, state that the applicant had stopped taking Prozac as prescribed and would be prescribed Zoloft instead and that he suffered from "anxiety syndrome" and "family problems."

The applicant also submitted copies of the following documents:

- An Administrative Remarks entry dated July 1, 2007, congratulates the applicant for having been selected by the cutter's first class petty officers as the cutter's Non-Rate of the Month for June 2007.
- A citation for a Meritorious Unit Commendation shows that on October 19, 2007, the crew of the cutter was awarded this commendation for their service in counter-narcotic drug operations in the Eastern Pacific.
- An Administrative Remarks entry dated September 17, 2008, shows that the applicant had been assigned to temporary duty at a shore unit and was praised for his exemplary performance.
- A "Search Authorization" dated March 24, 2009, shows that the applicant's CO found that there was probable cause to search the applicant's room for possession of child pornography and obscene representations of the sexual abuse of children and that the CO authorized the CGIS to search the applicant's barracks room.
- A citation shows that the applicant received a Good Conduct Award on May 22, 2009.
- Correspondence from the National Personnel Records Center shows that the center was unable to find the applicant's military and medical records.

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

2. The applicant asked the Board to remove from his record his NJP for fraudulent enlistment and failing to obey an order. No evidence or documentation of this NJP appears in the copy of his official military records received from the Coast Guard. However, because it is possible that the Coast Guard retains some record of the NJP somewhere, the Board will consider the applicant's request. The Board begins its analysis in every case by presuming that an applicant's military record is correct and fair, and the applicant bears the burden of proving by a pre-

ponderance of the evidence that the OER is erroneous or unjust.¹ Absent specific evidence to the contrary, the Board presumes that Coast Guard and other Government officials chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.²

3. The applicant alleged that his NJP for fraudulent enlistment and disobeying an order was unfair because (a) NJP was not the proper forum for disposing of these charges; (b) he should have had the right to deny NJP and demand trial by court-martial because he was not serving aboard the cutter when NJP was imposed; and (c) under HIPAA, his CO should not have had access to the medical records he reviewed to determine that the applicant had fraudulently enlisted. However, the Board finds the applicant’s allegations to be erroneous and/or unproven as explained below:

- (a) Under Article 15 of the UCMJ, COs are expressly authorized to dispose of minor offenses under the UCMJ through NJP.³ Nothing in the record shows that the charges against the applicant were so serious in nature that they clearly required trial by court-martial.
- (b) The Coast Guard’s database shows that the applicant was assigned to the cutter from July 2006 until his discharge. The applicant was apparently temporarily assigned to shore units for certain deployment periods because of his acne treatments, but such temporary assignments did not sever his permanent assignment to the cutter. The fact that the applicant was ultimately transferred from the cutter just two days after his NJP does not prove that his assignment to the cutter was a pretext. Even if the applicant was temporarily assigned to a shore unit when he was awarded NJP, this fact would not necessarily prevent the CO of the cutter from awarding him NJP since the cutter was still his permanent duty station.⁴ The applicant has failed to submit sufficient evidence and information to support

¹ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases, including disputes over OERs, first to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

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

³ 10 U.S.C. § 815. Article 1.A.5.a. of the Military Justice Manual states that “NJP may be imposed for minor offenses made punishable by the UCMJ as defined in Part IV, MCM. Factors to be considered to determine whether an offense is minor: the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence permitted for the offense if tried by general court-martial [see, paragraph I.e., Part V, MCM]. Ordinarily, an offense should be considered minor if the maximum sentence that could be awarded at a general court-martial does not include a dishonorable discharge or confinement for more than 1 year. This general rule, however, does not prohibit imposing nonjudicial punishment for offenses that do not meet the definition of ‘minor’ in this subparagraph.”

⁴ Article 1.A.4.b. of the Military Justice Manual states that “NJP may be imposed upon TAD personnel by the commanding officer of the member’s permanent unit, or by the commanding officer of the unit to which the member is temporarily assigned.”

his contention that he was unjustly denied the right to refuse NJP and demand trial by court-martial.⁵

- (c) A military CO is responsible for the health, fitness, and discipline of the members of his command and hence generally entitled to pertinent information in a subordinate's medical records.⁶ Under Chapter 4.A.3. of the Medical Manual, the executive officer of the cutter was the custodian of the crew's medical records and thus expressly authorized to examine the applicant's medical record for official purposes, such as determining whether the applicant had falsely reported his medical history when he enlisted. Under Article 1.D.1.g. of the Military Justice Manual, the CO was entitled to review the evidence against the applicant at mast, and that evidence would have included the applicant's medical records because one of the issues was whether the applicant had gained his enlistment through fraud by falsely reporting his medical history. Therefore, the applicant has failed to prove by a preponderance of the evidence that his command violated HIPAA.

4. The applicant has not proved by a preponderance of the evidence that his NJP was erroneous or unjust. The evidence in the record shows, in fact, that upon his enlistment the applicant falsely claimed that he had never received counseling or treatment for depression or anxiety. This evidence thus supports his CO's decision to award him NJP for fraudulent enlistment and the Coast Guard's decision to discharge him for fraudulent enlistment.

5. Therefore, the application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ Article 1.B.5.e. of the Military Justice Manual states that "a member who is not attached to or embarked in a vessel [see, paragraph 3, Part V, MCM] must be informed that he or she has a right to demand trial by court-martial in lieu of non-judicial punishment."

⁶ Chapter 9.A.2.b. of the Medical Manual states that "[t]he Commanding Officer (CO) is responsible for the health and physical readiness of the crew of the unit. In the absence of a permanently attached Medical Officer (MO) the vessel's Executive Officer (XO) is designated by Coast Guard Regulations as the unit's Medical Officer."

ORDER

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

Julia Andrews

Robert S. Johnson, Jr.

James H. Martin