

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-125

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX, SR (former)

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 June 22, 2005, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated May 18, 2006, 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 record to show that he was discharged from the Coast Guard in 1981 by reason of physical disability. (The applicant's military record shows that he was discharged under honorable conditions due to misconduct.) The applicant also asked the Board to restore "his rate that was lost as a result of the lack of treatment for his head injury."

The applicant alleged that while serving on board a cutter, he suffered a broken wrist and a head injury. He stated that some of the symptoms of the head injury are bipolar disorder, confusion, and poor vision. He stated that he did not discover the alleged error until January 31, 2003, because a federal law prevented him from obtaining his medical records due to earlier suicide attempts. He stated that he was only able to get medical help in 2000, after a congressman assisted him in having some of his medical records released to the applicant's brother. The applicant stated that he presented those medical records to the Department of Veterans Affairs (DVA). He

further stated that he is requesting a medical discharge so that he can obtain proper medical treatment and so that he will no longer have to live in pain.

SUMMARY OF RECORD

On March 11, 1980, the applicant enlisted in the Coast Guard. His pre-enlistment physical examination showed that he was in good health.

A September 3, 1980 x-ray report from University of Texas hospital shows that the applicant "sustained a transverse fracture through the distal part of the shaft of the middle phalanx of the second digit of the right hand. The fragments are not displaced."

In July 1981, his CO referred him to St. Mary's Hospital for an evaluation because he was becoming a major disciplinary problem. The applicant was hospitalized for evaluation from July 21, 1981, until August 17, 1981. The hospital medical report provided the following pertinent facts about the applicant's history:

[The applicant] was referred to [Dr. S.] by his officers in the Coast Guard who were concerned that he was becoming a major disciplinary problem. The precipitating incident for this consultation occurred on the Sunday prior to admission. The [applicant] and his girlfriend had a serious disagreement that the [applicant] became very angry hit his fist against a brick wall and then proceeded to crash his car into several street signs. He was ticketed by police who also called the Coast Guard . . . The following morning, as the patient was walking off the ship, he was informed by his officers that he was restricted to the ship. He then jumped ship and was later brought back to his base officers who discussed these problems with him. The [applicant] reports a similar episode on June 19, 1981, when his officers refused him a pass for a family reunion. The patient left AWOL, given severe punishment and demoted in rank. Mental examination on admission - in general the patient was well groomed, and appropriately dressed, pleasant and cooperative and alert during the interview. His speech was quiet but clear. Mood slightly depressed. Affect was appropriate to this situation and the patient had appropriate spontaneous laugh. No pre-occupation observed. The patient was oriented times three, had a good fund of general knowledge, good abstraction of proverbs, good recent and immediate memory and his IQ was judged to be average. His insight seems only fair as he did not realize his lack of self

discipline and self control leading to many of his problems. His judgment was good. His reliability seemed good to fair.

PHYSICAL EXAMINATION: . . . Back exam -- the spine was without tenderness. There was bilateral flank tenderness, right greater than left. Extremities: Without cyanosis, clubbing or edema. There was swelling of the dorsum of the right hand with limited range of motion of the right wrist.

LABORATORY DATA: . . . EEG was normal. Skull and chest x-rays were normal. X-rays of the right hand and wrist showed an old ununited fracture of the carpal navicular bone. Plain and contrast CT scans of the head were unremarkable. There were no operations or procedures.

FINAL DIAGNOSIS: Situational adjustment reaction
Immature histrionic personality disorder

The applicant was discharged from the hospital on August 17, 1981, with instructions for a regular diet, a prescription for the drug Thorazine, and to call Dr. S for an appointment in four weeks.

On July 30, 1981, the applicant's CO recommended that the Commandant discharge the applicant due to failure to adapt socially or emotionally to military life under Article 12-B-9 of the Personnel Manual (CG-207). The CO stated that the applicant's failure to adjust was evidenced by a series of UCMJ violations and non-judicial punishments that had not succeeded in modifying the applicant's behavior. The CO stated that the applicant had committed the following violations set out below.

1. On April 28, 1981, the applicant failed to go to his appointed place of duty, a violation of Article 86 of the UCMJ. He was punished at captain's mast with 14 days of extra duty.

2. On July 2, 1981, the applicant was punished at captain's mast for a 9-day unauthorized absence (UA) from June 19 - 28, 1981; a one-day UA from June 30 to July; and a violation of Article 90 of the UCMJ by failing to perform the extra duty ordered at the earlier captain's mast.

3. On July 18, 1981, the applicant was punished at a captain's mast for a one-hour UA. His punishment consisted of forfeiture of \$100 pay per month for two months and reduction in rate to pay grade E-1.

4. On July 27, 1981, the day the cutter was scheduled to deploy, the applicant was returned to the ship under escort with an injured hand and stated to a crewmember

that he would commit suicide if required to deploy with the cutter. Although restricted to the cutter, the applicant resisted the efforts of the crew to keep him on the ship, broke free, and leapt from the cutter's pier into the water. The CO stated that after the applicant was coaxed back aboard the cutter, he was transferred to a shore command for treatment of his hand and a psychiatric evaluation while the cutter was deployed. The CO stated that the applicant was an administrative burden to the command and had not responded to discipline. He recommended that the applicant receive a general discharge due to his pattern of behavior since April 1981.

On July 30, 1981, the applicant acknowledged notification of his proposed discharge, did not object to being discharged, and waived his right to submit a statement.

On August 17, 1981, the Commander, First Coast Guard District, forwarded the CO's recommendation for the applicant's discharge to the Commandant. The Commander recommended that the applicant be discharged by reason of misconduct due to his frequent involvement with military and/or civilian authorities under Article 12.B.18. of the Personnel Manual. The Commander wrote that the applicant had been an administrative burden to the command for the fifteen months that he had been in the Coast Guard.

On August 26, 1981, the Commandant stated that the applicant should be informed that he was directing that the applicant be discharged with a general discharge by reason of misconduct due to frequent involvement of a discreditable nature with military and/or civilian authorities. The Commandant stated that the applicant should be offered the opportunity to make a new statement.

On September 2, 1981, the applicant underwent a medical examination for the purpose of discharge. He wrote in block 8. of the Report of Medical History that he believed he was in perfect health. The doctor found the applicant qualified for discharge and did not note any disqualifying conditions.

On September 2, 1981, the applicant signed an entry in his medical record stating that he had been informed of the findings of the physical examination given to him for discharge, agreed with findings of the medical physician, and did not want to make a statement in rebuttal.

VIEWS OF THE COAST GUARD

On November 8, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG argued that the applicant has failed to show why it is in the interest of justice to excuse his delay in filing an application with the Board within three years of his September 15, 1981, discharge from the Coast Guard. The JAG stated that the record rebuts the applicant's claim that he was unable to file an application earlier because he could not get a copy of his medical record due to his mental condition. In this regard, the JAG noted that the applicant asked for a copy of his record on February 1, 2000, which the National Archives provided on March 29, 2000. The JAG further noted that a congressperson also requested the applicant's record in April 2000, which the Archives provided on April 27, 2000. The JAG argued that the record does not support the applicant's contention that his records were withheld from him. The JAG stated that the applicant has failed to show good cause for the delay in filing a timely application.

The JAG argued that the applicant has the burden of proving that the Coast Guard committed an error or injustice in his case, which he failed to meet. He stated that absent strong evidence to the contrary, it is presumed that Coast Guard officials "carried out their duties lawfully, correctly, and in good faith." Arens v. United States, 969 F.2d 1034, 1037 (D.C. Cir. 1990). The JAG stated that the applicant offered no evidence to show that the Coast Guard erred in the characterization of his service. The JAG noted that the Coast Guard conducted a discharge physical that concluded that the applicant was fit for discharge, and the applicant agreed.

The JAG attached a memorandum from the Commander, Coast Guard Personnel Command as Enclosure (1) to the advisory opinion and asked the board to accept it as a part thereof. CGPC noted that the applicant's separation physical examination did not indicate any disqualifying defects and the applicant did not indicate that he believe he had any disqualifying conditions. The applicant stated that he was in perfect health.

CGPC concluded his comments as follows:

2. The record indicates that the applicant was discharged due to his continuous misconduct. The record does not indicate that the Applicant suffered from any condition that would have prompted placement in the Physical Disability Evaluation System.
3. The Applicant has not provided evidence to support this allegation of error or injustice.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On February 14, 2006, the BCMR received the applicant's response to the views of the Coast Guard. He stated that the statute of limitations should be waived in his case because he had been unable to get his medical records due to his unstable mental

health. He stated that a congressperson helped him obtain records relating to his wrist injury, but he still cannot get his mental health record.

The applicant stated that he has shown that he suffered a broken wrist while in the Coast Guard, which the Coast Guard knew about but refused to treat. He stated that medical records at N.H.D.P. (no explanation for acronym) would prove that he suffered a head injury that caused him to have mental disorders. (These records were not provided to the Board.) He stated that his mental disorders, which the Coast Guard refused to treat, were the cause of his misconduct while on active duty. He further stated that he was unable to submit a statement in his own behalf (at the time of discharge) due to his lack of mental capacity. The applicant concluded by saying that "[b]ecause of the denial of treatment, [lack of] access to my medical/mental health records, and my deteriorated mental state, I was unable to file in a timely manner."

Supplemental Evidence

On or about February 15, 2006, a member of the staff contacted the applicant and explained that the Board had obtained the Coast Guard medical record that included reports from St. Mary's Hospital, but did not have any other medical records. The applicant was told that if he wanted the Board to consider additional medical information, he was responsible for sending that information to the Board, and that if he did so, he would need to request a sixty-day delay in the processing of his case to allow the Coast Guard an opportunity to submit a supplemental advisory opinion, if they desired to do so. On March 7, 2006, the Board received additional medical information from the applicant along with his request for a sixty-day delay in the processing of his case.

The DVA issued a decision dated October 15, 2004, granting the applicant a service connected disability for his wrist, retroactive to January 18, 2000, the date the DVA received the applicant's claim. The DVA diagnosed the applicant as suffering from degenerative joint disease of the right wrist. In September 2000, surgery (right wrist fusion and iliac crest bone graft) was performed on the applicant's wrist. The DVA granted the applicant a 100% disability rating due to his convalescence from September through October 2000. The DVA reduced the rating to 30% effective November 1, 2000.

A DVA psychiatrist stated in a report dated June 3, 2004, that based upon a review of the applicant's C-file, discharge notes from a 1981 hospitalization, and records from CPRS (no explanation for this acronym), there was no evidence that the applicant had a head injury while in the military. The psychiatrist made the following diagnosis: " Axis I: 1. Bipolar disorder, mixed. 2. Rule out mood disorder due to general medical condition, this condition being a head injury while in the Coast Guard. Axis II. No diagnosis. Axis III: Wrist injury and acid reflux. Axis IV: Problems with primary support group and occupational problems. Axis V: Current Global Assessment of

Functioning is 40." The psychiatrist stated that in his opinion "[b]ased on this exam it is at least as likely as not that the patient's current psychiatric symptoms are caused by a result of his head injury while in the US Coast Guard."

On March 13, 2006, the additional information was sent to the Coast Guard for any response it desired to make.

On April 25, 2006, the BCMR received a supplemental advisory opinion, wherein the JAG stated that the additional evidence from the applicant did not cause a change in the original advisory opinion.

On April 25, 2006, a copy of the supplemental advisory opinion was sent to the applicant and he was given 15 days to submit a reply. The applicant did not submit a response to the supplemental advisory opinion.

SUMMARY OF APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination." Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."

Provisions of the Physical Disability Evaluation System (PDES) Manual (COMDTINST M1850.2C)

Chapter 2.C.2.a. provides that the "sole standard" that a CPEB or FPEB may use 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 through military service."

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. The applicant had been discharged for approximately twenty years before he filed this application with the Board. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.

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 stated on his application that he only discovered the alleged error in 2003 and he argued that it is in the interest of justice to waive the statute of limitations in his case because "the law" prevented him from obtaining his medical records due to his history of suicide attempts. He alleged that it was only after a congressman intervened on his behalf that he was able to obtain his records using his brother as the recipient of the records. While there is some recent evidence in the record that the applicant currently suffers from bipolar disorder, there is no evidence that the applicant suffered from a mental condition at the time of his discharge that prevented him from understanding that his discharge was by reason of misconduct and not by reason of physical disability. Prior to his discharge, the applicant was diagnosed with adjustment and personality disorders in 1981, which are not physical disabilities. See 12.B.16. of the Personnel Manual and Chapter 2A.7. of the PDES Manual. The Board further finds that the applicant's DD Form 214, a copy of which was provided to the applicant, showed that he was discharged due to misconduct. Therefore, the applicant knew or should have known the reason for his discharge at the time of his discharge in 1981. Accordingly, the applicant has failed to present sufficient evidence to show that a mental disease caused or contributed to the lengthy delay in filing his application with the BCMR.

5. A cursory examination of the merits indicates that that the applicant is not likely to prevail on his request for a correction of his record to show that he was discharged by reason of physical disability rather than misconduct. The Coast Guard medical record contains no evidence that the applicant suffered from a mental disability prior to his discharge. He was evaluated at St. Mary's Hospital and diagnosed with

situational adjustment reaction and immature histrionic personality disorder, neither of which is classified as a mental disability. A June 3, 2004, DVA medical examination some twenty-three years after his discharge diagnosed the applicant as suffering from a bipolar disorder. The applicant alleged, but failed to prove, that the bipolar disorder resulted from a head injury incurred while on active duty. Again, the x-ray of the applicant's head from St. Mary's in 1981 shows no injury to the applicant's head. The DVA psychiatrist's opinion that based on his examination it is at least as likely as not that the applicant's current psychiatric symptoms are caused by a result of his head injury while in the Coast Guard is not persuasive, particularly since the DVA psychiatrist also stated in the same report that none of the records he reviewed showed that the applicant suffered a head injury while in the Coast Guard.

6. With respect to the wrist injury, there is evidence in the record that x-rays taken on September 3, 1980, showed the applicant suffered a fracture of the second digit of the right hand. Approximately, one year later, while at St. Mary's Hospital for evaluation in July 1981, x-rays of the right hand and wrist were taken and showed that the applicant had an old ununited fracture of the carpal navicular bone (in the wrist). However, there is no evidence that the old ununited fracture was related to the earlier 1980 fracture of the applicant's finger. The medical report from St. Mary's noted that the applicant had hit a wall with his fists after an argument with his girlfriend and then drove his car into several street signs. The CO noted that when the applicant was returned to the ship under police escort on July 27, 1981, he had possibly fractured his hand and/or wrist. Therefore, a legitimate question exists whether the applicant aggravated whatever injury existed to his wrist through his own misconduct. In addition there is no evidence in the record that from the time of the applicant's discharge from the Coast Guard in 1981 until 2000 that he was treated for any problems with his wrist. The record shows that the applicant did not file a claim with the DVA until August 12, 1999, claiming service connection for a wrist injury. The DVA performed surgery on the applicant's wrist in September 2000. However, the Board finds that the treatment for the applicant's wrist nineteen years after his discharge from the Coast Guard is insufficient to prove that the applicant suffered from an injury to his wrist that caused him to be unfit to perform the duties of his rate while in the Service. Chapter 2.C.2.a. states that the "sole standard" for "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 through military service."

7. Moreover, Article 12.B.16 of the Personnel Manual permits the Coast Guard to involuntarily separate a member for misconduct. There was nothing improper in the manner in which the Coast Guard discharged the applicant. In addition, even if the applicant had demonstrated that he suffered from a disability that caused him to be unfit at the time of his discharge, which he failed to do, the Board finds that the discharge was still proper. The Board is not aware of any provision of the Personnel

Manual that requires the Coast Guard to process a member through the PDES who is being involuntarily discharged due to misconduct, and the applicant has pointed to none. The record does not corroborate the applicant's argument that his head injury caused his misconduct. As stated above there is no evidence in the record that the applicant suffered from any head injury while on active duty or that he suffered from any mental disability while on active duty.

8. The fact that the DVA granted the applicant a service-connected disability for a wrist injury some twenty years after his discharge from the Coast Guard is not persuasive evidence that the applicant's discharge for misconduct was improper or that the applicant had an unfitting condition at the time of his discharge. This Board has consistently held that a disability rating from the DVA does not of itself establish that the Coast Guard committed an error or injustice by not assigning the applicant a disability rating. In Lord v. United States, 2 Cl. Ct. 749, 754 (1983), the Court of Federal Claims stated "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The Veterans Administration determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. [Citation omitted.] The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. [Citation omitted.] Accordingly, Veterans' Administration ratings are not determinative of issues involved in military disability retirement cases."

9. Accordingly, due the length of the delay, the lack of a persuasive reason for not filing his application sooner, and the lack of probable success on the merits of his claim, the Board finds that it is not in the interest of justice to excuse the untimeliness in this case. The application is denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

Toby Bishop

Steven J. Pecinovsky

Richard Walter