

**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. 2012-083**

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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 February 28, 2012, 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 October 25, 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 alleged that in 1986 he was unjustly discharged from active duty due to a medical disability that the Coast Guard erroneously determined had pre-existed his enlistment and had not been aggravated on active duty. The applicant alleged that his learning disability, memory loss, delusions, and hallucinations were actually aggravated by his time in service and so he should have received a disability retirement, instead of being discharged. In support of this allegation, the applicant submitted copies of his military and medical records, which are included in the summary below.

The applicant submitted no information about the date of discovery of the alleged error or explanation for his delay in applying to the Board.

**SUMMARY OF THE RECORD**

Hospital reports show that on May 17, 1975, at the age of 18, the applicant was hospitalized following a motorcycle accident. The emergency room doctor reported that the applicant was comatose, had suffered a "massive head trauma," and had a compound fracture in his right elbow. The applicant's symptoms included "dysconjugated eye movement, rolling in all directions," swelling around his eyes, right-side paralysis, jerking movements in his legs, and projectile vomiting with large amounts of blood. On June 2, 1975, the applicant was transferred to a convalescent hospital with diagnoses of "1. Closed head injury due to motorcycle accident. 2.

Right hemiplegia and aphasia. 3. Comatose state secondary to diagnosis #1. 4. Contusion of the left temporoparietal area. 5. Fracture, right elbow. 6. Multiple abrasions over chest, abdomen and pelvic area.”

About seven years later, on February 18, 1982, the applicant underwent a pre-enlistment physical examination. On his Report of Medical History, the applicant denied that he had ever been hospitalized, incurred a head injury, or suffered a period of unconsciousness. He was found fit for enlistment.

On April 26, 1982, the applicant enlisted in the Coast Guard at age 25. On May 17, 1982, in the middle of basic training, the applicant was referred to a psychiatrist for evaluation because his trainers believed him to be incompetent. The psychiatrist stated that the applicant related no history of psychiatric illness and should be able to complete the training.

The applicant completed basic training, advanced to fireman apprentice (FA/paygrade E-2), and was assigned to xxxxxxxxxxxx. On November 5, 1982, he was punished at mast for leaving the icebreaker without his ID card and attempting to cash a check by using another member's ID card.

On December 15, 1982, the applicant received written counseling on a CG-3307 (“Page 7”) stating that he lacked the aptitude to work in the engine room and was “often overwhelmed by the simplest tasks.” On December 31, 1982, the applicant was punished at mast again for absenting himself from his place of duty without authorization for about an hour. Because of the applicant's inaptitude in the engine room, he was reassigned to the Deck Department in January 1983.

On May 11, 1983, the applicant received another Page 7 stating that although he had “worked willingly and consistently done his best at all jobs assigned, ... he is unable to understand new tasks or even retain instructions on old ones for a long period. ... he is willing to work but due to a lack of learning ability and basic skills he is not eligible for advancement at this time. ... It is recommended that [he] be placed on performance probation and if no improvement is made, that he be discharged IAW Article 12-B-9, Personnel Manual.” Thereafter, he was transferred to a shore unit, Station Humboldt Bay.

On August 9, 1983, his new command referred him for an evaluation of his “intellectual skills” because of his “problem of acquiring new knowledge.” The applicant admitted to the psychologist that he had had difficulty learning anything since 1975, when he had hit his head on a 4x4 in a motorcycle accident and was in a coma for five days. The applicant told the psychologist that he often did not know what was going on and had to follow or copy other people. The psychologist noted that the applicant complained of anxiety, nervousness, and sleep disturbance and expressed some phobic ideas. He recommended that the applicant be assessed by a psychiatrist to determine if medication would help and to determine whether the applicant was becoming schizophrenic.

On September 13, 1983, a psychiatrist reported to the applicant's command that the applicant had arrived too late for his first appointment and skipped his rescheduled appointment.

The psychiatrist noted that he had only had one short conversation with the applicant but that the possible diagnoses to be ruled out were personality disorder, developing psychosis, organic brain syndrome, and alcohol abuse.

On November 21, 1983, the applicant was counseled on a Page 7 about having “a very difficult time learning and his memory is poor, conditions reportedly caused by a prior accident. He has been transferred to Group Office xxxxxxxxxxxxxxxxxxxx for closer supervision as his condition was considered by his supervisor to be detrimental to his own well-being under the types of duty required of his rate at the Station and was adversely affecting the SAR readiness posture of Station xxxxxxxxxxxxxxxxxxxx.”

On January 18, 1984, the applicant was admitted to a hospital for a neurological and psychiatric evaluation. He told the admitting physician that he had trouble learning and “joined the Coast Guard to ‘unfreeze’ his mind.” Upon his discharge from the hospital on January 27, 1984, a psychiatrist reported that the applicant showed no evidence of psychosis and diagnosed him with “atypical organic brain syndrome, EPTE” (existed prior to enlistment) due to a motorcycle accident in 1975. The psychiatrist recommended that the Coast Guard discharge the applicant for fraudulent enlistment.<sup>1</sup>

On May 24, 1984, the applicant was counseled on another Page 7 about “his unwillingness to follow given orders, to complete assigned tasks and on lying on his rack in his room in the BEQ, during working hours, without proper authorization.” On June 6, 1984, the applicant was counseled on a Page 7 about his “inability to perform duties as duty stander/phone watch.” The Page 7 stated that he could not learn how to use the phone system despite repeated training. On June 20, 1984, the applicant was counseled about the dangers of trespassing on airport property and taking walks on airport infields, taxiways, runways, and overruns.

On July 18, 1984, a doctor reported that the applicant had been diagnosed with atypical organic brain syndrome caused by a motorcycle accident and that, when asked why he did not report his injury during his pre-enlistment physical examination, the applicant stated that he had spoken with a “forked tongue” and “lied about it.” The doctor recommended that the applicant be discharged for fraudulent enlistment.

On August 15, 1984, the applicant was counseled on a Page 7 about the fact that he had been arrested for trespassing on airport property by walking across the runway in front of a commercial airliner that was preparing to depart.

On September 12, 1984, the applicant’s command convened a medical board to evaluate the applicant due to his “inability to retain basic instruction and his ineptness at performing tasks.” On November 28, 1984, the medical board reported that the applicant was unfit for duty and should be referred to a Central Physical Evaluation Board (CPEB) due to his diagnosed “atypical organic brain syndrome, chronic, EPTE,” which “existed prior to enlistment” and was “not aggravated by service.” The medical board reported that in 1975 the applicant had

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<sup>1</sup> Under Article 12-B-18(b)(2) of the Personnel Manual then in effect, a member could be discharged for misconduct if he obtained “a fraudulent enlistment, induction, or period of active service through any deliberate material misrepresentation, omission or concealment which if known at the time might have resulted in rejection.”

sustained a severe head injury in a motorcycle accident. He was in a coma for several days and stayed in a convalescent home for 3 months. Ever since the accident, he has experienced poor concentration and great difficulty in learning new tasks. ... In 1982 he enlisted in the Coast Guard but concealed his history of head injury. ... The remainder of the past medical history including the review of systems was noncontributory.

On January 30, 1985, the applicant submitted a rebuttal to the medical board's findings. The applicant stated that he was highly motivated to continue serving in the Coast Guard and asked the medical to "consider the impact of occupational or other forms of therapy on my condition and address the possibility of rehabilitation." The applicant stated that he had made significant progress since he enlisted and that being discharged would hinder his improvement. He also argued that a "discharge for reasons other than expiration of enlistment could make it difficult to find work." He asked to be retained until the end of his enlistment.

On February 6, 1985, the applicant's commanding officer forwarded the medical board report and the applicant's rebuttal to the Coast Guard Personnel Command (CGPC) and concurred with the medical board's findings. He noted that the applicant could be assigned to only the simplest tasks, such as base cleanup, general housekeeping, and duty driver because he was not capable of performing more complex tasks.

On June 28, 1985, the Commandant disapproved the applicant's request to be retained on active duty until his enlistment expired.

On August 31, 1985, the applicant requested reconsideration by the CPEB. (Although the CPEB's report is not in the record, other records show that the CPEB recommended that the applicant be discharged with a 30% disability rating due to atypical organic brain syndrome which pre-existed his enlistment and was not incurred in or aggravated by his military service.) The applicant argued that because the applicant was found fit for duty upon his enlistment, the CPEB's report should show that all 30% of his disability rating was due to aggravation while on active duty. The applicant also asked whether the CPEB's finding of no aggravation was an attempt to punish him for fraudulent enlistment.

On September 4, 1985, the applicant's request for reconsideration by the CPEB was denied because he had not submitted any new evidence. The CPEB noted that all members are found fit for duty upon enlistment or they would not be enlisted and that there would be no need for the CPEB if that were the only consideration. The CPEB denied any inclination or attempt to punish the applicant for fraudulent enlistment. The CPEB stated that it "does not act in a punitive manner even when there are alleged wrong-doings by the evaluatee. The CPEB prides itself in diligently working for impaired Coast Guard personnel, providing any and all benefits the law allows on the basis of the submitted documentation."

On September 23, 1985, the applicant's command informed CGPC that the applicant had rejected the findings and recommendation of the CPEB and demanded a Formal Physical Evaluation Board (FPEB). On October 15, 1985, the Commandant notified the applicant that an FPEB would convene on October 31, 1985, and appointed a lieutenant commander to serve as the applicant's attorney for the proceeding.

On November 1, 1985, the FPEB convened to hear and deliberate the applicant's case. The applicant's counsel argued that the Coast Guard "bought" the applicant "lock, stock, and barrel," when it enlisted him; that he was presumed fit for duty at that time; and that the FPEB should therefore find that the applicant's condition was incurred in or at least aggravated by his military service. The applicant testified that before enlisting he had lived with his parents and held various jobs such as serving popcorn and performing KP duty but "most of them I couldn't hold." When asked what had caused him to be fired so often, the applicant said that it was because of his mental status due to a motorcycle accident he had been in in 1975 and that he found certain jobs to be too complicated.

On November 14, 1985, the FPEB submitted a report recommending that the applicant be discharged without severance pay because he was 30% disabled by a condition that was not incurred or aggravated on active duty. The FPEB reported the following:

Atypical Organic Brain Syndrome, chronic – manifested by difficulty in learning new tasks, slow in responses and personality difficulty related to his original organic deficit "Head injury secondary to motorcycle accident".

Present Condition – 30%

Condition at Enlistment – 30%

Aggravated by Service – None

EXPLANATORY STATEMENT: The aspect of the evaluatee's condition which renders him not fit for duty is the learning difficulty. Entries in the evaluatee's records provide clear and convincing evidence that there has been no increase in this learning difficulty during his period of service.

On November 25, 1985, the applicant submitted a rebuttal to the FPEB's report. He argued that the FPEB erred in finding that his "disability existed in its entirety prior to enlistment, without any aggravation during active duty." The applicant argued that because a member is presumed fit for duty upon enlistment and he was found fit for duty upon enlistment and during basic training, all 30% of his impairment should be attributed to aggravation while on active duty. He noted that there is "no evidence to substantiate what the extent of my impairment was at the time of enlistment (if any)." However, he also said that he had "managed to take care of my disability fairly well over the last 10 years."

On December 2, 1985, a three-member Physical Review Council reviewed the FPEB's report and the applicant's rebuttal and concurred in the FPEB's findings. The case was referred to the Office of the Chief Counsel to review for legal sufficiency.

On February 18, 1986, the Office of the Chief Counsel advised CGPC that the evidence supported the FPEB's finding that the applicant's condition had not been aggravated by his Coast Guard service. In addition, the Chief Counsel stated that because the applicant had written in a letter dated January 30, 1985, that he did not want the reason for his discharge shown on his DD 214 to be disability because he thought it would make it difficult for him to find work, CGPC should consider discharging the applicant for the "convenience of the Government" instead. On

February 25, 1986, CGPC responded, stating that it would discharge the applicant for the convenience of the Government in accordance with Article 12-B-12a(6) of the Personnel Manual.”<sup>2</sup>

On March 12, 1986, the delegate of the Commandant approved the recommendation of the FPEB. On March 15, 1986, CGPC directed the applicant’s command to discharge him with a JDM separation code within 30 days.<sup>3</sup>

On April 15, 1986, the applicant received an honorable discharge for the “convenience of the Government” with a JDM separation code. He had completed 3 years, 11 months, and 20 days of active duty.

The applicant’s Department of Veterans’ Affairs (DVA) medical records show that he underwent a psychological evaluation in March 2000. The psychologist stated that the applicant was “status post severe head injury with organic personality changes and impairment in cognition.” He stated that the applicant was also severely depressed and should be treated for depression.

The applicant’s DVA records also show that he has repeatedly sought disability benefits from the DVA based on diagnoses of atypical organic brain syndrome and schizophrenic disorder. However, the DVA has consistently denied service-connection for these conditions after finding that they were not incurred during or aggravated while on active duty. The DVA has provided him with vocational testing and counseling. The DVA records also show that the applicant applied for Social Security disability benefits. On January 11, 2006, the Board of Veterans’ Appeals issued a decision finding that neither the atypical organic brain syndrome nor the schizophrenic disorder was incurred in or aggravated by the applicant’s military service.

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

On July 19, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the applicant was hospitalized while comatose with a severe head trauma on May 17, 1975, and that he did not disclose any of that information when he enlisted in 1982. PSC noted that the records show that the applicant repeatedly admitted that he had incurred his learning disability, which was what caused him to be unfit for duty, in a motorcycle accident in 1975; that the applicant stated in his rebuttal to the medical board report that his condition had improved while on active duty; and that the FPEB found, based on ample evidence, that there had been no increase in or aggravation of the applicant’s learning disability since his enlistment. PSC also noted that the DVA and the Board of Veterans’ Appeals have also reviewed the case

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<sup>2</sup> Article 12-B-12(a)(6) of the Personnel Manual then in effect authorized CGPC to discharge members before the end of their enlistments “under various authorized programs and circumstances.”

<sup>3</sup> Under M1900.4B, the manual for preparing DD 214s then in effect, the JDM separation code corresponds to an early discharge “under various authorized programs and circumstances” in accordance with Article 12-B-12(a)(6) of the Personnel Manual.

and concluded that the applicant's disability was neither incurred in nor aggravated by his military service.

PSC argued that a member "is not entitled to disability retirement if clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service." PSC argued that the evidence of record and particularly the FPEB's findings constitutes such clear and unmistakable evidence.

PSC argued that the applicant has not rebutted the presumption of regularity by showing any causal nexus between his military service and his learning disability. PSC stated that the psychiatrist's finding on May 17, 1982, that the applicant should be able to complete recruit training was "a far cry from being declared fit for duty." PSC noted that the applicant's learning disability was well documented throughout his career beginning with recruit training.

PSC noted that the applicant received all due process under the regulations as his case was evaluated by a medical board, CPEB, FPEB, Physical Review Council, and the Office of the Chief Counsel and that all made "consistent findings that his condition was neither caused nor aggravated by service." PSC concluded that the applicant has failed to prove by a preponderance of the evidence that his lack of a disability retirement from the Coast Guard is erroneous or unjust and his petition should be denied.

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

On August 6, 2012, the Board received the applicant's response to the views of the Coast Guard. He asked how he can be denied a disability retirement from the Coast Guard when so many records show that he was found to be 30% disabled. The applicant wrote that he would "get back with you later on the details," but no submitted no further information.<sup>4</sup>

#### **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.
2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years of the date the applicant discovers the alleged error or injustice. The applicant did not state when he discovered the error, but his records show that he knew in 1986 that he was being discharged because of a disability that the Coast Guard had found was not incurred in or aggravated by his military service. The applicant was represented by counsel at that time. Therefore, the Board finds that the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1986, and his application is untimely.

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<sup>4</sup> BCMR staff members have recently spoken by telephone to both the applicant and his representative about a related matter, and neither mentioned any intention to submit more evidence or arguments.

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 164-65; see *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. Regarding the reasons for the delay, the Board notes that the applicant did not explain his long delay in submitting his application, and the record shows that during the delay he was able to apply for DVA benefits and to appeal their denial. However, the record also shows that the applicant suffers from a significant learning disability that prevents him from retaining information. The Board finds that this disability provides sufficient explanation for the delay of his application.

5. Regarding the merits of the case, the Board finds that the applicant’s medical and military records amply support the Coast Guard’s determination that his learning disability was incurred before he enlisted and was not aggravated during his enlistment. The record clearly shows that the applicant incurred his head injury and learning disability in a motorcycle accident that occurred about seven years before he enlisted; that he could not hold a job before he enlisted and found some jobs too complicated; that he intentionally lied during his pre-enlistment physical examination to gain his enlistment; that his learning disability was apparent during recruit training and continued throughout his enlistment; and that there is no evidence that the applicant sustained any head injuries that might have aggravated his learning disability while he served on active duty. Because the applicant’s disability was incurred before he enlisted and was not aggravated while he served on active duty, there are no grounds for correcting his record to show entitlement to disabled retired pay because under 10 U.S.C. § 1201, only disabilities incurred or aggravated in the line of duty can be compensated with a disability retirement. Based on the record before it, the Board finds that the applicant’s claim cannot prevail on the merits.

6. Therefore, although the delay of the application may be attributable to the applicant’s disability, given the lack of evidence of any error or injustice on the part of the Coast Guard and the ample evidence supporting the Coast Guard’s determination, the Board will not waive the statute of limitations. The application should be denied.

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

