

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-093

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on March 9, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated December 7, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND

On October 22, 1998, the Board denied a request from the applicant in BCMR No. 1997-189 to correct his military record to show that he was retired instead of discharged. The final decision in BCMR No. 1997-189 described the applicant's situation as follows:

On May 23, 1992, the applicant was convicted by a general court-martial of 13 violations under the . . . the Uniform Code of Military Justice (UCMJ). . . . The court-martial sentenced him for his crimes to six months confinement at hard labor, to a reduction to pay grade E-1, and to a bad conduct discharge (BCD). On September 21, 1992, the convening authority approved the sentence. On August 9, 1993, the applicant's conviction was upheld on every charge and specification by the Coast Guard Court of Criminal Appeals (CGCCA) . . . [but] the CGCCA ordered a rehearing on the sentence . . . on the ground that one of the three attorneys the Coast Guard had provided to represent the applicant at the court-martial was assigned to duty aboard a ship during the time of the sentencing.

On December 19, 1995, the applicant signed a request of an "other than honorable" (OTH) discharge. That request stated that "I understand that such a discharge may deprive me of virtually all veterans' benefits based upon my current period of active duty . . . This request is voluntarily submitted free from any duress or promise of any kind."

On December 29, 1995, the Officer Exercising General Court-Martial Jurisdiction (OECGMJ) . . . canceled the referral for a rehearing on resentencing on the ground that resentencing had been delayed for over two years, a delay that made conducting a rehearing impracticable. The OECGMJ granted a sentence of “no punishment” and the applicant was discharged on December 31, 1995 under other than honorable conditions.

The Board found, in BCMR No. 1997-189, that the Coast Guard did not commit an error or injustice by discharging the applicant without retirement on December 31, 1995.

APPLICANT’S CURRENT REQUEST AND ALLEGATIONS

In his current application, the applicant asked the Board to correct his record to show that he has an honorable discharge instead of a discharge under other than honorable (OTH) conditions. He alleged that he was eligible for an honorable discharge six months after being discharged with an OTH in 1994, but he never completed the paper work. The applicant did not list a date on which he discovered the alleged error, but stated that it is in the interest to waive the untimeliness of his application because he was eligible for an honorable discharge six months after being discharged with an OTH.

VIEWS OF THE COAST GUARD

On July 27, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG noted that the application was untimely and that the applicant failed to show why it is in the interest of justice to excuse the delay. In this regard, the JAG argued that the application was submitted 14 years beyond the statute of limitations, that the applicant did not state a reason for the delay, and that the applicant was not likely to prevail on the merits because he submitted no evidence to support his claim that he was eligible for an honorable discharge.

The JAG attached comments from the Commander, Personnel Service Center (PSC) and asked that they be accepted as a part of the advisory opinion. In addition to noting the application’s untimeliness, PSC stated that the applicant did not provide any evidence supporting his argument. PSC stated that Coast Guard policy does not contain any provisions which would allow upgrading a member’s character of discharge without the demonstration of an error or injustice. PSC stated that the Coast Guard is presumptively correct and the applicant has failed to substantiate any error or injustice with regard to his discharge.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 21, 2012, the Board received the applicant’s response to the views of the Coast Guard. The applicant disagreed that his application should be denied due to untimeliness because he was diagnosed with and suffered from the symptoms of post-traumatic stress disorder (PTSD). He also stated that at the time he signed the request of an OTH, he was under the

influence of narcotic drugs prescribed to him for injuries sustained in a motor accident.¹ He argued that it is in the interest of justice to waive the untimeliness because he served on active duty for 21 years, 7 months, and 10 days and his service was excellent. He submitted several commendatory administrative remarks pages (page 7s) of his service. He stated that since his discharge he has continued with physical therapy and treatment for PTSD, but he is no longer addicted to prescription drugs. He stated that he has been married for 14 years and has not been in any trouble with the law.

The applicant submitted an undated medical report that shows he was diagnosed with “right sciatic nerve injury partial with reflex sympathetic dystrophy.” The report indicates that the applicant was involved in a car accident in October 1993 and subsequently underwent a fusion of the right SI joint. In January 1995, he underwent surgery for removal of the screws. According to the medical report, the doctor recommended a course of treatment that included supervised chemicals Sympathectomy with Phenoxybenzamine. The doctor stated “over the long haul [the applicant’s] prognosis is good but will take many years.”

The applicant submitted a document entitled “The date 2 July 1990, the place U.S. Coast Guard Training Center Cap May New Jersey.” The documents appears to be the written statement of the applicant pertaining to the death of a sea cadet on which he participated in the unsuccessful attempt to save the sea cadet’s life. The last entry on the three-page document states, “I am presently being evaluated by Dr. [S] to [rule out] PTSD.”

The applicant submitted a letter from his detailed appellate defense counsel explaining that a decision on whether the applicant would be eligible for veterans’ benefits was up to the Department of Veterans Affairs. The letter explained that avoiding a BCD and the applicant’s other prior honorable discharges would improve his chances of obtaining veterans’ benefits.

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 section 1552 of title 10 of the United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered the alleged error or injustice. *See* 33 CFR 52.22. The applicant should have discovered the alleged error as early as December 31, 1995, the date of his OTH discharge and no later than October 22, 1998, the date the Board rendered a final decision in BCMR No. 1997-189. In the findings and conclusions of that case, the Board notes the fact that the applicant had received an OTH in 1995.

¹ BCMR No. 2012-093 states that the applicant was involved in a car accident while in an appellate leave status.

3. The applicant's argument that the untimeliness should be excused because he suffers from PTSD and that at the time he requested the OTH discharge he was under prescribed narcotics for treatment of injuries he suffered in motor vehicle accident is not supported by the record. The medical evidence offered by the applicant states that PTSD should be ruled out and not that he actually had or has PTSD. In addition there is no corroboration for the applicant's claim that he was addicted to and under the influence of prescription drugs when he requested the OTH. The Board notes that less than three years after his discharge, the applicant was fully capable of filing a claim with the BCMR in 1997 to challenge the fact that he was not receiving retired pay. If he was capable of challenging the fact that he was not retired, he was also capable of challenging the fact that he had received an OTH. Therefore, the applicant's arguments for excusing his untimeliness are not persuasive to the Board.

4. Although the application is untimely, the Board must still perform at least a cursory review of the merits to determine whether it is the interest of justice to waive the statute of limitations. 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.

5. A cursory examination of the merits indicates that the applicant is not likely to prevail because he has presented no regulation and the Board is aware of none that states that an OTH discharge will be upgraded after a six-month period. Nor has the applicant presented any evidence that anyone in authority told him that his OTH would be upgraded after a six-month period. While the applicant's record of trial and the documentation of the OTH request and approval are not in the military record, the Board presumes that the OTH request was submitted and approved in accordance with the Personnel Manual. Under Article 12.B.21 of the Personnel Manual then in effect, an enlisted member could request an OTH in lieu of "UCMJ actions if punishment for alleged misconduct could result in a punitive discharge at any time after court-martial charges have been preferred against him or her." This section further requires that a member who indicates a desire to submit a request for an OTH discharge for the good of the Service will be assigned a lawyer counsel. The applicant has not produced any evidence to suggest that the Coast Guard failed to comply with the Personnel Manual in granting his request for an OTH.

6. The applicant submitted documents showing that he performed some excellent service while in the Coast Guard. However, Article 12.B.2.f.3. allows the Coast Guard to discharge a member with an OTH for misconduct or in lieu of trial by court-martial for the good of the Service. According to the final decision in BCMR No. 1997-189, the applicant was discharged with an OTH at his request to avoid a possible BCD at a resentencing for his court-martial convictions.

7. The application should be denied because it is untimely and it is not in the interest of justice to excuse the untimeliness.

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXX, for correction of his military record is denied.

Donna M. Bivona

Andrew D. Cannady

Francis H. Esposito