DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2015-007

FINAL DECISION ON RECONSIDERATION

This proceeding was conducted according to the provisions of section 10 U.S.C. § 1552, 14 U.S.C. § 425, and 33 C.F.R. § 52.67. The Chair docketed the case after receiving the completed application and records on January 9, 2015, and assigned it to staff member [redacted] to prepare the decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 6, 2015, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND: BCMR DOCKET NO. 2011-094

In BCMR Docket No. 2011-094, the applicant, who had been involuntarily honorably discharged on September 9, 2009, with 19 years, 7 months and 8 days of active duty service due to alcohol rehabilitation failure, alleged that his discharge was unjust because he suffered from and was being treated for severe depression at the time. The applicant also alleged that he suffered an injustice because it took the Coast Guard until July 31, 2009, to approve the findings and recommendations of the administrative separation board (ASB) that convened and concluded on April 28, 2008. The applicant noted that the Coast Guard made its determination to discharge him just about five months before he was eligible for a 20-year active duty retirement. The applicant alleged that he was not afforded proper due process and requested that the Board correct his record to show that he was retired from the Coast Guard. The Board granted alternative relief—amending the applicant's reason for discharge from "alcohol rehabilitation failure" to "condition, not a disability" for equitable reasons—as stated in the Final Decision for BCMR Docket No. 2011-094, dated December 8, 2011, which is incorporated by reference, and only new information submitted since the issuance of that decision will be summarized below.

SUMMARY OF APPLICANT'S REQUEST FOR RECONSIDERATION

In his request for reconsideration, the applicant asked the Board to reevaluate his retirement status. He argued that the Board should take into consideration a Department of Veterans' Affairs (DVA) decision (dated January 2012) awarding him 60% disability in addition

to his (previously mentioned) problems with depression and alcoholism. He argued that based on this new information, he should have received a medical disability retirement.

In support of his military disability claim, the applicant submitted a letter from the DVA reflecting a disability rating of 60% based on a finding of service-connected disability. The applicant received a 50% rating for his "major depressive disorder with alcohol dependence" and an additional 10% rating for hypertension. These ratings were effective as of March 21, 2011, about eighteen months after the applicant's discharge. The applicant did not provide any additional evidence regarding his medical conditions or alcoholism.[1]

VIEWS OF THE COAST GUARD

On June 16, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion that adopted the facts and analysis provided by the Commanding Officer of the Coast Guard Personnel Service Center (PSC) and recommended that the Board deny the requested relief.

PSC argued that the applicant's application was not timely and that the applicant did not provide a sufficient justification for the delay in filing his application. Therefore, the application should be given only a cursory review. Additionally, PSC argued that the applicant has submitted no new evidence to substantiate his request that his records should be corrected to reflect "retired" instead of "discharged." PSC noted that the BCMR previously considered the applicant's military and medical records and ultimately denied the applicant's request for retirement status.

With regard to the applicant's allegation that he was denied due process due to the prolonged separation process, PSC argued that the applicant received all the due process rights provided by Coast Guard regulations when he was administratively discharged. In accordance with Coast Guard policy, the applicant was entitled to a hearing before an Administrative Separation Board (ASB) with representation by counsel because he had more than eight years of service.[2] The ASB held the hearing; reviewed the applicant's military record; reviewed his service awards and work performance; and was aware of his ongoing treatment for depression. After completing a comprehensive review and taking into consideration the member's time in service, military service awards, work performance, ongoing treatment for depression, alcohol history and proximity to retirement eligibility, the ASB recommended separation.

With regard to the applicant's allegation that the Coast Guard committed an error or injustice in its decision to honorably discharge the applicant, the PSC argued that the applicant was discharged after his third alcohol incident and in accordance with COMDTINST M1000.6A, Article 20.B.2.i, which requires that enlisted members involved in a third alcohol incident be processed for separation. Additionally, PSC argued that there was no injustice in the applicant receiving an honorable discharge from the Coast Guard. PSC noted that the applicant had ample notice of the Coast Guard's policy on alcohol incidents and alcohol abuse and that applicant was

[1] Detailed information regarding the applicant's medical and alcohol history and treatments was reviewed by the Board for the prior BCMR decision, BCMR Docket No. 2011-094.

[2] COMDTINST M1000.6A, Personnel Manual, Article 12.B.16.i.

advised after the second incident that he would be separated if he failed to comply with Coast Guard rules. PSC argued that the applicant's discharge was in furtherance of Coast Guard policy and, therefore, there was no injustice in the applicant's case.

Finally, PSC noted that the applicant's case addressed a "core value issue" for the Coast Guard. PSC explained that any determination by the Board that differed from the Coast Guard's recommendation would adversely impact the core values of the Coast Guard and would be subject to additional review.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 22, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Policy Regarding Separation for Unsuitability Due to Alcohol Abuse

Article 12.B.16.b. of COMDTINST M1000.6A , the "Personnel Manual" in effect during the applicant's discharge period, provides that discharges for unsuitability are intended to "free the Service of members considered unsuitable for further service" based on several reasons including alcohol abuse.

Article 12.B.16.i. states that a member with more than eight years military service under consideration for discharge for unsuitability is entitled to an Administrative Discharge Board (ADB).[3]

Article 20.A.2.d.1. of COMDTINST M1000.6A defines an "alcohol incident" as "any behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

Article 20.B.2.i. states that enlisted members involved in a third alcohol incident shall be processed for separation.

Article 20.B.2.k. states that members "refusing to undergo treatment a commanding officer and competent medical authority deem necessary, failing to complete this treatment, or violating an alcohol rehabilitation aftercare plan normally are processed for separation.

---

[3] COMDTINST M1910.2, "The Administrative Board Manual," describes the policies and procedures for conducting and processing administrative separation boards (ASBs) including administrative discharge boards (ADBs).

Article 20.B.2.l. states that "members diagnosed as alcohol dependent[4] must abstain from alcohol use to maintain sobriety. When commanding officers become aware that a recovering alcohol dependent member, after successful completion of an aftercare program, is again consuming alcohol, he or she will refer the member for alcohol screening to include consultation with a medical officer. An aftercare plan will be reinstituted in accordance with the Health Promotions Manual, COMDTINST M6200.1 (series)…the commanding officer, after reviewing information pertinent to the case, will recommend separation, retention or further treatment."

Law and Policy Regarding the Physical Disability Evaluation System (PDES)

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 schedule shall be discharged with severance pay.

Chapter 3.F.1.c. of the Coast Guard Medical Manual, COMDTINST M6000.1E, states the following:

> Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or reserves on extended active duty considered permanently unfit for duty shall be referred to a Medical Evaluation Board (MEB) for appropriate disposition.

Chapter 2.C.2. of the PDES Manual, COMDTINST M1850.2D, states the following:

> a. The sole standard 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. Each case is to be considered by relating the nature and degree of physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. In addition, before separation or permanent retirement may be ordered:
>
> (1) there must be findings that the disability
>
> (a) if of a permanent nature and stable; and
>
> (b) was not the result of intentional misconduct …
>
> b. 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. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retir-

[4] COMDTINST M1000.6A defines "alcohol dependence" as a chronic disease, sometimes referred to as alcoholism, characterized by repetitive, compulsive ingestion of alcohol which interferes with the user's health, safety, job performance, family life or other required social adaptation.

> ing or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply:
>
> (1) Continued performance of duty until a 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 member, because of disability, was physically unable to perform adequately in his or her assigned duties; 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 him or her unfit for further duty. …
>
> (2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.
>
> c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is presumed fit for duty even though medical evidence indicates he or she has impairments.

Policy Regarding Administrative Separation Board

Chapter 1.B.1. of COMDTINST M1910.2, the "Administrative Separation Board Manual," states (in relevant part) "Coast Guard discharge and retention decisions are driven by the needs of the Coast Guard overall, not by the needs of individual members or individual commands. Members do not have a right to remain on active duty in the Coast Guard, regardless of length of their service or the hardship their separation might cause."

Chapter 1.G. states "The purpose and objectives of the administrative separations process are advanced by a timely disposition of the case. Every effort shall be made to adhere to the time goals prescribed. Failure to process an administrative separation within the prescribed time goals does not affect the validity of a separation decision."

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 over this matter under 10 U.S.C. § 1552.

2. An application for reconsideration by the Board must be filed within two years of after issuance of the final decision in accordance with 33 C.F.R. § 52.67(e). Because the Board issued the applicant's initial decision on December 8, 2011, his request for reconsideration, which was received on December 1, 2014, was not timely.

3. Pursuant to 33 C.F.R. § 52.67(e), the Board may excuse the untimeliness of an application for reconsideration if it is in the interest of justice to do so.[5] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[6] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."[7]

4. The applicant failed to justify his delay in applying for reconsideration. The record shows that he received the DVA's rating decision—the new evidence that is the basis for reconsideration pursuant to 33 C.F.R. § 52.67(a)—in January 2012, about one month after the Board issued the original decision. But he did not apply for reconsideration for almost three years after receiving that decision.

5. The Board's cursory review of the merits of this case shows in any case that the applicant's claim for a medical disability retirement cannot prevail. Under Article 2.C.2.b. of the PDES Manual, "the law that provides for disability retirement or separation 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 applicant was discharged because he had incurred three "alcohol incidents" and was recommended for separation by an ASB. Neither alcoholism nor alcohol abuse is on the list of medical conditions warranting PDES processing for a medical separation under Chapter 3.F. of the Coast Guard Medical Manual. Moreover, under Article 2.C.2.b., a member undergoing processing for an administrative discharge for a reason other than physical disability (such as three alcohol incidents) shall not undergo PDES processing unless the member is physically unable to perform his duties or suffers an acute, grave illness rendering the member unable to perform his duties. There is no evidence in the record that the applicant was physically unable to perform his duties or that he suffered an acute, grave illness rendering him unable to perform those duties while he was being processed for discharge. In fact, the applicant's CO requested that the applicant be retained on active duty based in part on his superior performance. In addition, under Article 2.C.2.c. of the PDES Manual, if a member who is being processed for separation or retirement for reasons other than physical disability adequately performs his duties, "the member is presumed fit for duty even though medical evidence indicates he or she has impairments."

6. Although the DVA has granted the applicant a 50% rating for "major depressive disorder with alcohol dependence" and an additional 10% rating for hypertension, DVA ratings are "not determinative of the same issues involved in military disability cases."[8] Moreover, the

---

[5] 10 U.S.C. § 1552(b).

[6] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

[7] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

[8] *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983); *see Kirwin v. United States*, 23 Cl. Ct. 497, 507 (1991) ("The VA rating [in 1986] is irrelevant to the question of plaintiff's fitness for duty at the time of his discharge in 1978. Indeed, the fact that the VA retroactively applied plaintiff's 100% temporary disability rating only to 1982, and not 1978, gives some indication that plaintiff was not suffering from PTSD at the time of his discharge."); *Dzialo v. United States*, 5 Cl. Ct. 554, 565 (1984) (holding that a VA disability rating "is in no way determinative on the issue of

DVA's decision shows that his 60% combined disability rating was made retroactively effective to March 2011, but the applicant was discharged about eighteen months earlier, in September 2009. Therefore, the DVA rating is not evidence that the applicant was unfit for military duty prior to his discharge.

7. Accordingly, because of a lack of a compelling excuse for the application's untimeliness and the lack of potential merit in the applicant's request for a disability retirement or discharge, the Board finds that it is not in the interest of justice to excuse the untimeliness or to waive the statute of limitations in this case. Therefore, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

---

plaintiff's eligibility for disability retirement pay. A long line of decisions have so held in similar circumstances, because the ratings of the VA and armed forces are made for different purposes.").

ORDER

The application of former [redacted], USCG, for correction of his military record is denied.

November 6, 2015

[redacted]