

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-085

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 after receiving the applicant's completed application on January 31, 2011, and subsequently prepared the decision with the assistance of staff member D. Hale, as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 29, 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, who was discharged from the Coast Guard in 1993 for unsuitability, alleged that the "circumstances regarding my court-martial need to be examined and corrected. This court-martial was fraudulent, and a mismanagement and waste of programs and operations." He further alleged that his "honorable discharge is questionable due to circumstances surrounding my court martial."¹ The Board interprets the applicant's request as one for the removal of his summary court-martial conviction from his record and for an upgrade of his under honorable conditions discharge (commonly referred to as a general discharge).

The applicant stated that he discovered the alleged error in "2005-2010." Explaining his delay in filing his application, the applicant stated that "there is evidence of existing medical condition which is supported by medical records." In support of his application, he submitted a copy of his DD Form 214 and a Medical Verification Form dated May 30, 2006, indicating that he has work restrictions because of a back condition. He also submitted Medical Release/Physician's Statements dated December 29, 2007, July 18, 2008, October 16, 2009, and January 18, 2010, indicating continued work restrictions related to his back condition.

¹ The applicant did not receive an honorable discharge. The military record shows that he received an under honorable conditions discharge.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 19, 1993, and subsequently began recruit training at Cape May. According to his military record on August 6, 1993, he was convicted at a summary court-martial of violating Article 115 (malingering) of the Uniform Code of Military Justice (UCMJ). The record indicates that part of his sentence included 30 days of confinement.

On August 9, 1993, the applicant arrived at a brig to serve his confinement. On August 11, 1993, brig personnel referred the applicant to the clinic for an evaluation because his medical record indicated that he had engaged in suicidal ideation and in at least one failed suicide attempt. On August 16, 1993, the applicant was evaluated by a Navy physician, who explained the applicant's history as follows:

He was twice evaluated by psychiatry at Cape May. On each occasion, he was returned to duty (though once admitted for a short period for "acute emotion decompensation") with the [diagnosis] of adjustment disorder. [However, one of these evaluations indicted that he might be malingering]. His medical record indicates he experienced bouts of nausea, vomiting and other somatic manifestations of anxiety.

At one point, while at Cape May, he suddenly experienced a thought of killing himself. He apparently gestured suicide resulting in a very shallow laceration of one of his wrists. However, he immediately stopped himself thinking that he had a wife, that killing himself was wrong and that he had too much to return to at home. [In each evaluation, the applicant stated that he wanted out of the Coast Guard].

The physician diagnosed the applicant as having an adjustment disorder with mixed emotional features and as having "prominent Dependent, avoidant and Immature features." The doctor stated that the applicant was "fit for duty, but profoundly unsuitable for such. I give my strongest recommendation that he be administratively separated in the most expedient fashion possible, after release from the brig."

On August 19, 1993, the applicant was once again evaluated by the Navy physician, who once again recommended that the applicant be separated from the Coast Guard.

On August 25, 1993, the Coast Guard notified the applicant that he was going to be discharged for unsuitability because he had intentionally injured himself to avoid training, he attempted to manipulate the system by making false suicidal gestures; and he was convicted at summary court-martial for malingering. In addition the applicant's command also informed him that an RE board² was convened and unanimously found that it was in the best interest of the Service to discharge the applicant with a general discharge under honorable conditions and with

² There is no explanation for the term RE board. This Board assumes that it means a retention board was convened.

an RE-4 reenlistment code. The applicant was advised of his right to make a statement and of his right to consult an attorney. He signed the document, acknowledging that he did not desire to make a statement, did not desire to meet with the Commanding Officer, and did not desire to speak with an attorney.

On August 27, 1993, the applicant was discharged from the Coast Guard pursuant to Article 12.B.16. of the Coast Guard Personnel Manual. He received a discharge “under honorable conditions,” because of unsuitability, with a JMD³ separation code and an RE-4 (not eligible to reenlist) reenlistment code. He had served in the Coast Guard for 23 days.

On August 27, 1993, an entry entitled “SUBSTITUTION PHYSICAL EXAMINATION” was placed in the applicant’s medical record. It noted the purpose of the examination was the applicant’s discharge and that he was fit for duty. On the same page, the applicant signed a statement that was witnessed by a health services technician, which read “I deny any injury or illness at this present time.”

VIEWS OF THE COAST GUARD

On May 2, 2011, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief. In so doing, he adopted the facts and analysis provided in an enclosed memorandum prepared by the Coast Guard Personnel Service Center (PSC).

The PSC stated that the application is not timely and should be denied due to untimeliness. PSC noted that the only mention the applicant makes regarding the untimeliness of his application is that "there is evidence of existing medical condition which is supported by medical records."

PSC stated that in addition to untimeliness, the applicant's request should be denied because he was found guilty of malingering at summary court-martial and the circumstances leading to the charge are "completely substantiated and well documented".

PSC noted in his memorandum, however, that under current Coast Guard policy, the applicant would have received a separation code denoted by “FY” to signify an adjustment disorder as the reason for discharge. PSC recommended that the applicant's DD 214 be corrected to show a separation code of GFY (involuntary discharge due an adjustment disorder not amounting to a physical disability) and the narrative reason for separation should be “adjustment disorder.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 6, 2011, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. No response was received.

³ According to COMDTINST 1900.4C (March 12, 1990), the JMD indicates that the applicant was discharged because of unsuitability due to inaptitude.

APPLICABLE REGULATIONS

Article 12.B.16.b. of the Personnel Manual lists inaptitude as a basis for an unsuitability discharge. Under Article 12.B.16.d., prior to recommending a member for an unsuitability discharge, the CO is required to notify the member of the proposed discharge; afford him the opportunity to submit a statement on his own behalf; and, if a General discharge is contemplated, allow him to consult with an attorney. (In Change 39 to the Personnel Manual (2005) adjustment disorder was added to this provision as a basis for an unsuitability discharge.)

Article 12.B.16.e. of the Personnel Manual permits commanding officers of training centers to discharge enlisted members because of unsuitability solely due to inaptitude without a medical board if they had less than 4 four months' active service and were "deemed unfit for further retention." Subsection 2 of this provision provides the following guidance for a general discharge:

Issuing a general discharge is warranted if there is evidence of misbehavior, bad faith, or failure to make a proportionate effort having due regard for his or her rate and capabilities. Commanding officers shall summarize the basis on which awarding a general discharge on an administrative remarks, [page 7] in the member's PDR. The entry should reflect a record of disciplinary infractions in training, culpable failure to conform to minimum standards for recruit or Reserve training, or poor attitude.

ALCOAST 252/09 issued on April 29, 2009, states that the Department of Defense has created new separation codes (the FY series) to address the situation in which a member is unsuitable for military service because of a diagnosed adjustment disorder that does not constitute a physical disability but that prevents the member from adapting to military life. The ALCOAST directed that the Coast Guard began using the FY SPD codes for members discharged because of adjustment disorders. For enlisted personnel, the re-entry code assigned can be either RE-3G or RE-4. CG PSC (epm-1) will review the separation packages and make the determination for which re-entry code should be applied.

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(a).
2. The application was not timely. Under 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant stated that he discovered the alleged error between 2005 and 2010. However, he was aware that he had received a discharge under honorable conditions when he received and signed his DD 214 on August 27, 1993, and he was also aware at that time that he had been convicted at a summary court-martial. Therefore, any allegations of error with regard to his summary court-martial or his discharge should have been submitted to the Board within three years after his

1993 discharge. The post-discharge medical documents show that the applicant has a back condition, but they do not explain why he could not have filed his application sooner.

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, 165.

4. Based upon a cursory review of the merits, the Board finds that the applicant is not likely to prevail. In this regard, the applicant alleged that his court-martial was fraudulent and abusive, but he provided no evidence to support his contention. More importantly, the Board does not have authority to remove a court-martial from a military record. *See* 10 U.S.C. § 1552(f). The applicant also failed to present any evidence to prove that his under honorable conditions discharge is erroneous. In addition, in discharging the applicant, his command informed him of the reasons for his discharge and provided him with an opportunity to submit a statement, consult with the CO, and consult with an attorney. The applicant signed a statement waiving his rights in this regard. The applicant’s allegations, without supporting evidence, are insufficient to prove an error or injustice with respect to his summary court-martial conviction or his discharge. Therefore, it is not in the interest of justice to waive the untimeliness with regard to these issues.

5. Although PSC recommended changing the applicant’s narrative reason for discharge and SPD code to adjustment disorder to reflect current policy, the Board will not direct this correction for the reasons that follow. The narrative reason for separation and the separation code assigned to the applicant on his DD 214 indicate that he was discharge by reason of unsuitability due to inaptitude. Adjustment disorder as a basis for separation was not added to the Personnel Manual until 2005 and to the Separation Program Designator (SPD) Handbook in 2009. Although the Navy physician who evaluated the applicant in 1993 diagnosed the applicant with an adjustment disorder and recommended his separation from the Coast Guard, the applicant’s command did not list the psychological evaluation as a basis or reason for their decision to separate the applicant. Instead, the command focused on the applicant’s summary court-martial conviction for malingering and his propensity to manipulate the system by engaging in false suicidal attempts and gestures. Therefore, the Board is persuaded that the command’s decision to discharge him due to inaptitude was a proper basis for separation.

6. Additionally, there is the question of whether changing the narrative reason for separation from unsuitability, with a JMB (inaptitude) separation code to “adjustment disorder” as the narrative reason for separation with the corresponding GFY (involuntary discharge due to adjustment disorder) separation code, as suggested by PSC, would make the applicant’s record appear worse. In this regard, inaptitude is defined as “unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn.” Article 12.B.16. of the Personnel Manual.” Change 39 to the Personnel Manual issued in 2005 specifically added adjustment disorder as a basis for an unsuitability discharge and defined it, along with apathy and defective attitudes as “the inability to expend effort constructively, or other observable defect for which a

separation designator code (SPD code) exists that renders a member unsuitable for further military service.” Medically, an adjustment disorder is a psychological response to an identifiable stressor that results in the development of emotional or behavioral symptoms, which may be temporary and disappear when the stressors disappear. *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (2000) (p. 679). The Board believes that a discharge by reason of “adjustment disorder” could be considered more prejudicial than a discharge by reason of unsuitability with a separation code indicating inaptitude. In addition, the applicant did not ask for a change in his separation code; nor did he endorse such a change by responding to the advisory opinion. Therefore, the Board will not direct a change to the applicant’s narrative reason for separation or his separation code. However, the Board will grant further consideration on the issue of changing the narrative reason and separation code to reflect a discharge because of an adjustment disorder, if the applicant requests such further consideration within 180 days from the date of this decision.

7. Accordingly, the application should be denied because it was untimely with regard to the applicant’s allegations about his summary court-martial and his under honorable conditions discharge.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXX, USCG, for correction of his military record is denied. However, the Board shall grant further consideration on the issue of changing the narrative reason and separation code on his DD 214 to reflect a discharge by reason of adjustment disorder if he submits a request for such further consideration within 180 days from the date of this decision.

