

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-130

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

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. It was docketed on June 2, 2004, upon the BCMR's receipt of the applicant's request for correction.


This final decision, dated February 24, 2005, 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, a seaman second class (SN2) who served on active duty in the Coast Guard Reserve during World War II, asked the Board to upgrade the character of his ordinary discharge (under honorable conditions) to honorable.

The applicant alleged that he was diagnosed with a disabling medical condition while in the Coast Guard and was subsequently determined to be medically unfit for duty. Although he received an ordinary discharge under honorable conditions, he argued that in the interest of justice, his discharge should be upgraded to honorable.

SUMMARY OF THE APPLICANT'S RECORD

On September 10, 1942, the applicant enlisted in the Coast Guard Reserve and was called to active duty shortly thereafter. On March 30, 1943, the Board of Medical Survey at the U.S. Marine Hospital in  issued a report to the District Coast Guard Medical Officer stating that the applicant had been diagnosed with

Psychoneurosis¹ Anxiety Hysteria and recommended that the applicant be discharged from the Coast Guard as medically unfit. The report indicated that the disabling condition existed prior to enlistment and was not the result of the applicant's own misconduct nor was it incurred in the line of duty. The report, written by the doctor who evaluated the applicant, included the following comments:

Patient stated that following an automobile accident in 1940 he has had pain and soreness of muscles to the right lumbar spine and soreness and pains in the entire right arm with weakness on that side. This trouble has not been constant but it definitely has been aggravated by service in the Coast Guard. Physical examination revealed nothing more than tenderness, and fist percussion over muscles to right of lumbar spine, [and] various types of physiotherapy associated with vitamin therapy [have] brought no results. X-rays of all affected areas were negative. This man's mental attitude is very poor and the weakness of the right arm is partially hysterical in its manifestations.

The applicant was discharged on April 9, 1943, and his Certificate of Discharge indicates that he was discharged "by reason of physical disability with ordinary discharge." The applicant earned a perfect conduct rating for the 8 months he was in the Coast Guard.

VIEWS OF THE COAST GUARD

On August 19, 2004, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board grant the applicant's request.

Although the applicant filed his application to the BCMR nearly 62 years after he was discharged, neither JAG nor CGPC addressed the timeliness issue in their response to the applicant's application.

CGPC stated that according to the Equity Standard of Review under 33 C.F.R. § 51.7 (the Discharge Review Board's regulation), a discharge is presumed to be equitable, absent sufficient evidence to establish that the policies under which the appellant was discharged materially differ from current policies, and there is substantial doubt that the applicant would have received the same discharge if current policies had been available to the applicant at the time of his discharge.

However, CGPC stated that under the Coast Guard's current separation policies, it is highly unlikely that a member discharged for a physical disability, absent other

¹ Psychoneurosis: A mental or personality disturbance not attributable to any known neurological or organic dysfunction.

evidence of misconduct, would receive an Ordinary discharge (discharge under honorable conditions). Therefore, CGPC stated that it would be in the interest of justice to upgrade the applicant's discharge.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The applicant responded on September 2, 2004, and stated that he agreed with the Coast Guard's recommendation.

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. An application to the Board must be filed within 3 years after the applicant discovered or should have discovered the alleged error in his record. 10 U.S.C. § 1552. The applicant signed and received his discharge documents indicating that his discharge was characterized as "under honorable conditions" in 1943, and has not provided any explanation why he waited so long to submit his application to the BCMR. Thus, the Board finds that the applicant knew or should have known the character of his discharge in 1943, when he received his Certificate of Discharge. Thus, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552, the Board may waive the 3-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reason for the delay and conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). Although the applicant has not explained his delay, a cursory review of the merits of this case indicates that CGPC has determined that the applicant's character of discharge was unjust. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

4. The characterization of the applicant's discharge was appropriate under the Coast Guard policy in effect in 1943. However, the Board notes that both JAG and CGPC stated that the applicant would have received an honorable discharge under current Coast Guard policy. CGPC has routinely stated that under the current Coast Guard separation policies, a member discharged due to physical disability that existed prior to enlistment would not receive a discharge under honorable conditions, unless he

had been involved in some misconduct. The Board notes that the applicant's condition existed prior to enlistment and he was not involved in any misconduct during his enlistment. Therefore, the applicant's service record meets the criteria for an honorable discharge under current standards. The Board concludes that it is in the interest of justice to upgrade the applicant's discharge.

5. Accordingly, relief should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former seaman second class XXXXXXXXXXXXXXXXXXXXXXXX,
USCGR, for the correction of his military record is granted.

His records shall be corrected to show that he received an honorable discharge
from the Coast Guard Reserve.

