

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-193

**XXXXXXXXXXXXXX
XXXXXXXXXXXXXX**

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 June 21, 2010, 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 March 24, 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 received an administrative discharge under "other than honorable" (OTH) conditions on December 14, 2007, asked the Board to upgrade his OTH discharge to honorable.¹ The applicant stated that his discharge was unjust because of his "health, miscommunication, and violation of rights."

The applicant alleged that the Coast Guard wrongfully accused him of desertion. He stated that he was authorized leave from a Sector field office at the time his command claimed he had deserted. He argued that it was illogical for the Sector command to authorize leave for him if they thought he would not return. The applicant also alleged that at the time, he was disabled from [REDACTED]. He argued that he should have been evaluated by a medical board and noted that following his discharge, he received a 100% disability rating through Social Security. The applicant alleged that even though the Coast Guard knew he was severely disabled, he received an OTH discharge just a few days after his third car accident. He alleged that none of the car accidents were his fault. In support of these allegations, the applicant submitted the following documents:

¹ The 5 authorized types of discharge are Honorable, General Under Honorable Conditions, Under Other than Honorable Conditions, Bad Conduct, and Dishonorable. Bad conduct and dishonorable discharges are only awarded by court-martial. Personnel Manual, Article 12.B.2.c.

- A letter dated January 26, 2007, from the applicant's supervisor to his mother states that the applicant had been declared a deserter as of that date and suggested that she urge him to surrender to the nearest unit if she knew where he was.
- The last page of an investigation, which is summarized in the Summary of the Record below.
- Following an consultation with the applicant on May 3, 2007, a psychologist wrote that "[t]his patient suffers from chronic pain and was using alcohol to help deal with the constant and severe facial pain he has experienced since last November. He does not meet the diagnostic criteria for substance abuse or dependence and is recommended [to] return to duty without treatment [at SARP, a substance abuse rehabilitation program]. ... In my opinion, he needs to be seen by a pain specialist and also likely needs a Physical Evaluation Board as he does not appear to be fit for full duty."
- An unapproved leave request dated July 16, 2007, shows that the applicant asked to go on leave from July 22, 2007, to August 4, 2007.
- A letter from the Social Security Administration (SSA), dated March 18, 2010, notifies the applicant that the SSA had made a "fully favorable" decision on his application for supplemental security income. The SSA reported that the applicant had not engaged in substantial gainful activity since December 14, 2007 (his discharge date); that he suffered from the following severe impairments: major depressive disorder, trigeminal neuralgia, left shoulder bursitis, and hypertension; that the applicant's "substance use disorder(s) is not a contributing factor material to the determination of disability"; and that the applicant had been disabled since December 14, 2007.

SUMMARY OF THE RECORD

On August 21, 2006, at the age of 28, the applicant enlisted in the Coast Guard. He attended basic training and, following graduation on October 13, 2006, was granted two weeks of leave and then assigned to Station XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

The applicant reported to Station Xxxxxx on October 28, 2006. Before reporting, he called the station and asked for more leave to arrange for child care. This request was denied because he could not show that he had custody of his child. The next day he called and asked for more leave again, stating that he could not fly to [REDACTED] because of a sinus infection. This request was also denied.

The applicant was granted leave for six days from December 18 to 23, 2006, and he went home to Xxxxxx. On December 21, 2006, he checked himself into a hospital complaining of depression and suicidal thoughts. However, he told his command that he was undergoing eye surgery.

In the hospital, the applicant was diagnosed with "likely trigeminal neuralgia" resulting from a recent car accident, although MRI and CT scans did not show any injuries. The doctor

prescribed Prednisone and Tegretol for symptomatic relief. Upon his release from the hospital on December 24, 2006, the applicant was granted leave through January 25, 2007, because he was supposed to attend ten follow-up sessions at the hospital and the last such session was scheduled for January 24, 2007. However, the command learned that the applicant skipped many of the ten follow-up sessions.

On January 26, 2007, the applicant was declared a deserter after he refused to and failed to return to the station. His commanding officer (CO) noted in his report that during telephone calls, the applicant had repeatedly expressed his intention not to return to his unit. The applicant did not tell the command, as he later alleged, that he was bedridden or that a doctor had ordered him not to travel.

On February 5, 2007, the CO reported that the applicant had surrendered himself to his hometown police department on January 30, 2007, and that he had been returned to military control and escorted back to Station Xxxxxx on February 2, 2007. Upon the applicant's return, he was sent to the [REDACTED] for a medical examination by Dr. P and a psychiatric examination by Dr. T. The applicant told the psychiatrist that he wanted to be discharged. Dr. P found the applicant fit for full duty.

On February 23, 2007, the CO placed the applicant on probation and documented this action on a Page 7, which the applicant refused to sign in acknowledgement. The Page 7 states the following:

While on leave during the holiday season you took it upon yourself to seek medical treatment, exaggerating symptoms and statements to include suicidal comments in an effort to get discharged from the U.S. Coast Guard. These false pretenses continued until the end of January at which time you were ordered to return to this unit so you could be seen by military medical providers at the [REDACTED]. You disobeyed the order to return to United States Coast Guard Station Xxxxxx. A warrant for your arrest was issued to local law enforcement authorities for desertion in your home town of xxxxxxxxx, Xxxxxx. We were notified of your detainment and sent two law enforcement qualified petty officers to pick you up and escort you back to the area. Within a few days of your return to [REDACTED], you were seen by medical professionals at the [REDACTED] and were determined to be both physically and mentally sound.

I find your dishonesty, lack of devotion to duty and shipmates disturbing. You were one month overdue on your communications qualification. You have failed to qualify as a boat crewmember. You have disrespected a senior Petty Officer as documented on previous administrative remarks. Your inaptitude will no longer be tolerated. When an individual joins the military they do so with the understanding that they must fulfill their obligation to the service. You need to take stock in your actions on and off duty. You must become a productive member of the unit and United States Coast Guard, or you will be recommended for administrative discharge.

On March 22, 2007, a preliminary investigation officer (PIO) reported to the CO that in conducting his investigation, he had advised the applicant of the charges against him and of his Miranda/Tempia rights, but the applicant had refused to sign the form acknowledging the advice. Therefore, the PIO had been unable to question the applicant, who refused to submit a statement.

The PIO stated that his investigation had revealed that the applicant had falsified his SF-86 form, on which he certified that he had not been more than 180 days delinquent in paying a debt, when in fact he had "been delinquent on multiple debts for well over 180 days." Therefore, the PIO concluded that the applicant had violated Article 107 of the Uniform Code of Military Justice (UCMJ) by making a false official statement. In addition, the PIO concluded that the applicant had been absent without leave (AWOL) from January 26 to February 2, 2007, and refused to comply with an officer's request that he return to his assigned duty station, Station XXXXXX. The PIO noted that the applicant had had ample opportunity to satisfy the request to return to his duty station of his own free will but refused. Therefore, the PIO concluded that the applicant had violated Article 85 of the UCMJ by deserting. He recommended that the applicant be taken to mast for non-judicial punishment (NJP).

On March 29, 2007, the applicant was formally charged with desertion. The applicant consulted an attorney and refused to sign the charge sheet.

On May 3, 2007, the applicant saw a psychologist, who reported that the applicant was "suffering from what appears to be a debilitating chronic pain syndrome. In my opinion, he needs to be seen by a pain specialist and also likely needs a Physical Evaluation Board as he does not appear to be fit for full duty." The CO ordered the applicant to gather all of his medical records and submit them to the [REDACTED] in preparation for a physical examination.

In early May 2007, after the applicant complained to his congressman about the charges against him, his CO prepared a long statement concerning the applicant for the Coast Guard's congressional liaison.

On May 22, 2007, following a physical examination at the [REDACTED], Dr. P referred the applicant to the psychiatrist, Dr. T, "for c/o [complaints of] severe facial pain and hx [history] of SI [suicidal ideations]. Pt [patient] has admitted malingering in past and wants to be discharged from USCG. Pt with dramatic symptoms in past that have resolved during OP [out-patient] visit. Please eval for psychiatric diagnosis. ... Provisional diagnosis: facial pain ? malingering vs. conversion d/o [disorder]."

Also on May 22, 2007, the applicant was advised in writing on a Page 7 (form CG-3307) that he was 14 pounds overweight and had 2% excess body fat. The applicant was required to make a fitness plan and participate in mandatory fitness activities and regular weighings. He was advised that if he failed probation, he would be recommended for separation.

On June 6, 2007, the applicant refused to accept mast. Therefore, the charges against him were preferred for a special court-martial.

On June 12, 2007, the applicant underwent a psychiatric evaluation. The applicant told the psychiatrist that in November 2006, [REDACTED], and he thereafter experienced left-side facial pain, which persisted. However, the results of MRI and CT scans had been normal. The applicant told the psychiatrist that he wanted to get out of the Coast Guard and that no one cared about him. He said he was able to sleep only about three hours each night and that prescriptions for Lunesta and Valium had not helped him to sleep. He said that he had considered suicide three times in November and December 2006 and had checked himself into a psychiatric hospital while on leave in Xxxxxx in December 2006 because he was alarmed by his suicidal thoughts. He denied current suicidal ideations or feelings of depression. The applicant reported having "occasional nightmares of the [REDACTED] but no other symptoms of post-traumatic stress disorder." The records of the hospitalization showed diagnoses of "rule out [i.e., possible] atypical depression with chronic pain and rule out somatization disorder, as well as alcohol abuse and occupational stress." The applicant claimed that he had stopped drinking alcohol on June 4, 2007. The applicant told the psychiatrist that he had been diagnosed with trigeminal neuralgia (facial pain) and had seen a pain specialist and been prescribed 16 different pain medications, including Tegretol, hydrocodone (Oxycontin), ibuprofen, Vicodin, Percocet, Valium, Ultram, Lortab, and Celebrex, none of which had helped. He had recently been taking duloxetine (Cymbalta) for his pain, but stopped on June 8, 2007, because he thought it was causing acne.

The psychiatrist reported that he did not think that the applicant met "the criteria for malingering, conversion disorder, a psychological pain disorder, or a factitious disorder. He has been prescribed multiple medications and yet his pain persists. He does not desire further pain medication. He was suicidal in December 2006 in the context of the pain, but he did not make an attempt and he instead checked himself into the hospital. His present suicide risk is low if he is discharged from the Coast Guard, but he will be at significant risk for suicide if he remains in the Coast Guard. ... His failure to adjust to the Coast Guard is most consistent with a personality disorder." The psychiatrist diagnosed the applicant with "Personality Disorder NOS (Not Otherwise Specified)." The psychiatrist noted that the psychologist had recommended a medical board for the applicant's chronic pain but recommended the following instead:

1. This member has a longstanding Personality Disorder that existed before he entered the Coast Guard and will not likely improve or remit with available military mental health treatment. The Personality Disorder renders him unsuitable for Coast Guard service in any capacity. I respectfully recommend that his Command initiate an expeditious administrative separation for Personality Disorder. If he is retained in the military, he will be significant ongoing risk for harming himself or for suicide.
2. Follow-up with me is not indicated nor desired by the member, but he is aware that he may contact me for follow-up if desired.
3. I recommended the use of Effexor or gabapentin for pain, but he declined. He is mentally competent to weigh the risks and benefits of taking or not taking pain medication. ...

On July 13, 2007, the applicant was advised that he had been charged with two counts of making a false official statement in addition to the charge of desertion. The new charges concerned (1) a form that he had signed upon enlistment certifying that he had no debts that were more than 90 days delinquent when in fact collection agencies were pursuing him for debts totaling many thousands of dollars and (2) a statement he made to a supervisor in 2006 to the effect that he was being discharged from the Coast Guard for medical reasons, which was false.

On July 23, 2007, the CO notified the applicant in writing that because he had failed to attain the weight or body fat standards during his weight probationary period, he would be discharged. He advised the applicant that he had a right to submit a statement on his own behalf. The applicant acknowledged this notification, indicated that he did not object to the proposed honorable discharge, and waived his right to submit a statement.

On July 23, 2007, the CO sent to the Personnel Command, by way of the Sector and District Commands, a recommendation that the applicant receive an honorable discharge for failing to comply with the Service's weight standards because he had failed weight probation. The CO noted that the applicant was also awaiting trial by special court-martial and that any "discharge would be held in abeyance until proceedings are concluded. Depending outcome of his court-martial a request for general discharge may be made."

On August 28, 2007, the Sector Commander forwarded the CO's discharge recommendation and recommended that it be approved as of December 15, 2007, to allow adequate time for the applicant's pending court-martial. He noted that the applicant had been placed on weight probation on May 22, 2007, and that the end date of the weight probationary period was August 28, 2007, but that the CO had properly initiated the applicant's discharge before the end of the probationary period because the applicant had gained another 15 pounds, instead of losing weight, and was 6% over the maximum body fat standard.

On September 4, 2007, the CO advised the applicant that he had initiated the applicant's administrative OTH discharge for misconduct based on the charges against him. The CO noted that the applicant had a right to an Administrative Separation Board (ASB) and that an OTH discharge could only be awarded if recommended by the ASB or if the applicant opted to waive his right to an ASB. He also advised the applicant that an OTH discharge would deprive him of many or all of his rights as a veteran and cause him to encounter substantial prejudice as a civilian.

On September 18, 2007, after consulting an attorney, the applicant signed an acknowledgement of the OTH discharge notification. He acknowledged that he had a right to an ASB and to be represented by counsel. He waived his right to an ASB and also waived his right to submit a statement on his own behalf.

On October 19, 2007, the CO sent the Personnel Command, by way of the Sector and District Commands, a recommendation that the applicant receive an OTH discharge for misconduct because he had committed a serious offense. The CO wrote the following:

2. [The applicant] departed to his home in Xxxxxx on regular leave on the 18th of December 2006. He was scheduled to return on 24 December 2006. When he did not return at the scheduled time, we initiated action to locate [him]. Through our efforts, we determined that [he] had checked himself into a behavioral medical treatment facility on the 21st of December 2006, and was discharged on the 26th of the same month. The medical staff of [REDACTED] became involved in the case and followed his treatment. On the 24th of January 200[7], [the applicant] was discharged from his outpatient program. His discharge paperwork was reviewed by medical staff at the [REDACTED], and it was recommended that [he] return to his unit to continue treatment in the local area. It was at this time [the applicant] was ordered by [LCDR T] (Supervisor, [REDACTED]) to return to his unit. He refused to return. Based on his admission that he would not be returning, we initiated DD Form 553 (Deserter/Absentee wanted by the Armed Forces). [The applicant] subsequently turned himself into the xxxxxxxxxxxx, xx police department and was turned over to Coast Guard escorts from Station Xxxxxx. He ultimately returned to the unit on the 2nd of February, 2007.

3. During the following weeks, the member's medical status was further evaluated by [REDACTED] medical staff. Additionally, the member was placed on report for violation of Article 85 – Desertion. It was our intention to ensure that the member continued to receive medical attention, as well as conduct an investigation into the events surrounding his alleged desertion. The recommendation of [Coast Guard Investigative Service (CGIS) officer's] investigation was to dispose of the matter through Captain's Mast. The member refused to sign the Acknowledgement of Rights – Acceptance of NJP. The matter was referred to District One legal to process a Special Court Martial. A Memorandum of Pretrial Agreement was drafted; however, the member refused to acknowledge or sign that document as well.

4. After conferring with District Legal Staff, we feel it is in the best interest of the Coast Guard to pursue a misconduct discharge of [the applicant] vice going through the Court-Martial process. I, as well as my staff, have spent numerous hours on the administration of this case, and feel everyone will be best served by [his] expeditious discharge.

On October 30, 2007, the Sector Commander forwarded the CO's recommendation and agreed that the applicant should receive an OTH discharge. He stated that during the applicant's short time in the Service he had made "several choices that reflect his inability [to] remain in the Coast Guard" and cited the applicant's "refusal to return to his assigned unit following an authorized trip home." The Sector commander reported that "[t]hroughout the trial by court martial, [the applicant] has continued his refusal to sign necessary documents (often at the last minute), and as a result has drawn out the processes to unnecessary lengths." The Sector commander also noted that the applicant was unable to maintain the Service's weight standards.

The District Commander also concurred with the recommendation for an OTH discharge. He stated that the investigation contained clear evidence that the applicant had committed the

offense of desertion. As the Officer Exercising General Court-Martial Jurisdiction over the applicant, the District Commander directed that the trial proceedings be held in abeyance pending the outcome of the CO's discharge request. He noted that the charges against the applicant were punishable by a punitive discharge at court-martial. He also noted that a separate discharge package was also being processed because of the applicant's failure to meet the Coast Guard's weight standards.

On December 7, 2007, the Personnel Command ordered that the applicant receive an OTH discharge because of his involvement of a discreditable nature with civil or military authorities and receive a JKA separation code denoting separation for a "pattern of misconduct."

On December 22, 2007, the applicant was discharged. His DD 214 stated that he received an OTH discharge for "misconduct" pursuant to Article 12.B.18. of the Personnel Manual.

On September 22, 2008, the applicant asked the DRB to upgrade his OTH discharge to honorable. He stated that he had been given 12 days of liberty, came back on time, and never went AWOL or deserted. He alleged that he turned himself into police after hearing that his command had charged him with desertion. The applicant alleged that he was overweight because he could not exercise properly due to his illness. He stated that he was trying to get a medical board evaluation, but the doctors at the Academy told him that Physical Disability Evaluation System (PDES) processing takes 16 to 20 months and that during that time he would still have to work at the Station. The applicant told the DRB that he had been in [REDACTED]—the last one on December 3, 2007—while in the Coast Guard, which limited his ability to work. He alleged that his Navy attorney had told him he could not understand "why the Coast Guard is pressing the charges [be]cause you turned yourself in and told about the identity theft." The applicant stated that he had told Dr. P at the [REDACTED] that he wanted to be discharged because he had been diagnosed with trigeminal neuralgia (facial pain) by numerous neurologists. He stated that he agreed not to contest the OTH discharge so that he could go home and get proper medical care, knowing that he could later petition to have his discharge upgraded.

On April 15, 2009, the DRB convened and deliberated the applicant's request for an honorable discharge. The DRB reviewed the applicant's records and "found no basis whatsoever to recommend an upgrade in discharge." The DRB noted that the applicant's records revealed "a history of being uncooperative and deceitful," that he had been diagnosed with a personality disorder, and that he had "displayed a significant pattern of apathy and misconduct." The DRB also noted that the applicant had waived his right to an ASB and thereby had accepted his OTH. The DRB noted that although the applicant's DD 214 stated that he had been discharged for "misconduct," it should actually state "pattern of misconduct" since he was assigned the JKA separation code. This correction was approved by the Commandant on November 30, 2009, and the Coast Guard issued a DD 215 changing the applicant's narrative reason for separation from "misconduct" to "pattern of misconduct."

VIEWS OF THE COAST GUARD

On October 14, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC stated that after the applicant went AWOL and refused to return to his unit, he was declared a deserter. When his command attempted to punish him at mast for desertion and for making false official statements, the applicant refused NJP. Therefore, the command referred the charges for trial by special court-martial. When the legal office drafted a "Memorandum of Pretrial Agreement," the applicant refused to sign or acknowledge it. Therefore, the command decided to pursue an administrative discharge for misconduct, rather than a special court-martial, and the Sector Commander and District Commander supported this decision. Based on their recommendations, the PSC authorized the applicant's OTH discharge for misconduct.

The PSC noted that the Discharge Review Board (DRB) reviewed the case and unanimously found that the applicant's discharge was proper and equitable. The PSC concurred with the DRB and concluded that the applicant "has failed to substantiate any error or injustice with regards to [his] record."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 24, 2010, the Board received the applicant's response to the views of the Coast Guard. The applicant alleged that he had not deserted and had timely advised his command that he was bedridden and unable to travel back to the unit. However, his command "snapped," charged him with desertion, and issued a warrant for his arrest. A Navy lawyer assigned to advise him told him that it was his right not to sign anything at all, so he opted not to sign anything he did not believe was correct. In support of his allegations, the applicant submitted the following:

- A page of his CO's undated response to the congressional inquiry, on which the applicant indicated that he objected to the CO's claim that he had refused to answer CAPT T's questions honestly and had refused treatment.
- A note from a psychiatrist on the bottom half of a blank blue page bearing the date January 30 (year unreadable), states that the applicant "cannot travel at this time secondary to [unreadable]."
- A medical note dated May 14, 2007, states that the applicant should not perform strenuous workouts or work in hot or cold environments for 14 days.
- An undated test the applicant took to qualify for the watch at his unit shows that he scored 80% and passed the test.

APPLICABLE REGULATIONS

Article 12.B.18.b. of the Personnel Manual in effect in 2007 stated that Commander, Personnel Command could discharge a member for misconduct under certain circumstances, including the following:

2. Pattern of Misconduct. Members may be separated when they have:
 - a. two or more non-judicial punishments, courts-martial, or civilian convictions or a combination thereof within a 2-year period;
 - b. three or more unauthorized absences, each is at least three or more days, within a 2-year period;
 - c. six or more unauthorized absences and the total amount is at least six days, within a 2-year period;
 - d. a pattern of failure to contribute adequate support to dependents (see Art. 8.M);
 - e. a pattern of failure to pay just debts; [or]
 - f. a pattern of shirking[.]

3. Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

- a. Members may be separated based on commission of a serious military or civilian offense when:

- (1) The specific circumstances of the offense warrant separation; and
- (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

Article 12.B.18.d. states that “Commanding officers shall process all cases in which they contemplate a discharge under other than honorable conditions for misconduct as Article 12.B.32 prescribes.” Article 12.B.32.a. states that a member whose CO has recommended an OTH discharge has a right to consult an attorney and to appear before an ASB represented by an attorney unless the member requests an OTH in lieu of trial by court-martial or waives his right to an ASB in writing.

The Separation Program Designator (SPD) Handbook provides the codes entered on discharge forms, DD 214s, depending upon the reasons for a member’s discharge. It lists the following codes for misconduct discharges under Article 12.B.18. of the Personnel Manual:

Code	Narrative Reason for Separation	Explanation
GKA	Pattern of Misconduct	Involuntary discharge approved by recommendation of a board resulting from a pattern of misconduct of a discreditable nature with civil or military authorities.
HKA	Pattern of Misconduct	Involuntary discharge directed in lieu of further processing or convening of a board (board waiver) resulting from a pattern of misconduct of a discreditable nature with civil or military authorities.
JKA	Pattern of Misconduct	Involuntary discharge directed by established directive (no board entitlement) resulting from a pattern of misconduct of a discreditable nature with civil or military authorities
HKM	Misconduct	Involuntary discharge directed in lieu of further processing or convening of a board (board waiver) when a member engages in acts of misconduct not otherwise listed.
HKN	Misconduct	Involuntary discharge directed in lieu of further processing or convening of a board (board waiver) when member has established a pattern of misconduct consisting solely of minor disciplinary infractions.
HKQ	Misconduct	Involuntary discharge directed in lieu of further processing or convening of a board (board waiver) when a member has committed a serious military or civilian offense.

Chapter 2.C.11. of the Physical Disability Evaluation System (PDES) Manual states the following regarding members undergoing concurrent disciplinary action and medical board evaluation:

- a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINST M1000.6 (series). If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by Commander, Coast Guard Personnel Command.
- b. If the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official medical record.

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. The Board finds that the applicant has exhausted his administrative remedies by applying to the DRB, and his application is timely.²

2. The applicant alleged that his OTH discharge is erroneous and unjust because of his medical problems, miscommunications, and violations of his rights. He alleged that he never deserted, as his CO alleged. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁴

3. Article 85 of the UCMJ states that a member is guilty of desertion when he "without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently."⁵ The preponderance of the evidence in the record before the Board shows that in January 2007, the applicant failed to return to his unit at the end of his leave and repeatedly stated that he was not going to return to his unit. There is no evidence supporting the applicant's claim that he was granted leave from January 26, 2007, until his return to military control on February 2, 2007. Nor is there credible evidence that the applicant was under orders not to travel. In fact, the applicant was repeatedly ordered to return to his unit and unreasonably refused to do so. Therefore, the Board finds that the applicant's chain of command did not err in finding that he had deserted or in charging him with desertion.

4. The applicant alleged that his OTH discharge was unjust because of his medical problems. He claimed that he was disabled by debilitating trigeminal neuralgia, and a psychologist who interviewed him on May 3, 2007, clearly believed his claim. However, a psychiatrist concluded that the applicant had a personality disorder⁶ and recommended an administrative discharge. The record further shows that although the applicant was diagnosed with trigeminal neuralgia while serving on active duty, he failed to attend all of his follow-up outpatient appointments after he was released from a hospital, refused treatment and prescriptions for pain medications offered by Service physicians, and stopped taking one pain medication just because he

² 33 C.F.R. §§ 52.13 and 52.22.

³ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ 10 U.S.C. § 885 (2008); MANUAL FOR COURTS-MARTIAL UNITED STATES, IV-9 (2008 ed.)

⁶ Under Chapter 5.B. of the Medical Manual, personality disorders do not constitute physical disabilities and result in administrative discharges from the Service for unsuitability instead of medical discharges or retirements.

thought it was causing acne. The record shows that the applicant's CO believed that the applicant exaggerated his complaints of pain because he wanted to be discharged from the Service, and the applicant's conduct strongly supports the CO's belief.

5. Moreover, under Chapter 2.C.11. of the PDES Manual, members who are, like the applicant, being discharged for misconduct either administratively or by court-martial because of an offense that could, under the UCMJ, result in a punitive discharge are not entitled to disability evaluation and separation under the PDES. The record shows that the applicant was charged with desertion, in violation of Article 85 of the UCMJ, and with making false official statements, in violation of Article 107 of the UCMJ. The maximum possible punishment under the UCMJ for either offense includes a punitive discharge.⁷ Therefore, because the applicant was being discharged for offenses that could have resulted in his punitive discharge by court-martial, he would not have been entitled to disability evaluation and separation under the PDES even if he had been found unfit for duty, which he was not.

6. The applicant alleged that his rights were violated pursuant to his discharge. However, the record shows that the applicant received all due process in accordance with Article 12.B.18. of the Personnel Manual. Under that article, he was entitled to and received notification of the proposed OTH discharge, an opportunity to consult an attorney, an opportunity to submit a written statement objecting to the discharge, and an opportunity to appear before an ASB with an attorney. The record shows that he was properly notified of the proposed OTH discharge and consulted an attorney but on September 18, 2007, opted to waive his right to appear before an ASB as well as his right to submit a written statement objecting to the discharge. The applicant has not proved by a preponderance of the evidence that he was denied any rights with regard to his OTH discharge.

7. The CO recommended that the applicant be discharged for misconduct under Article 12.B.18. of the Personnel Manual. The CO specifically noted that the applicant had committed a serious offense, which is one of the reasons for a misconduct discharge listed in Article 12.B.18., and detailed the circumstances of his desertion. However, discharge authority under Article 12.B.18. rests with Commander, Personnel Command, who issued orders for the applicant to be discharged for a "pattern of misconduct," which is another of the authorized reasons for a discharge for misconduct listed in Article 12.B.18. The record contains evidence that the applicant did evince a pattern of misconduct while in the Service. In addition to the charges of desertion and making two false official statements, there is evidence that he lied to his command about why he did not want to report for duty in October 2006 and about why he was hospitalized in December 2006. There is also evidence that he skipped medical appointments, malingered, disobeyed direct orders to return to his duty station, failed to complete work in order to qualify for important duties, and showed disrespect to a senior petty officer. Although the applicant did not go AWOL more than once or accept NJP when it was offered, the Board finds that there is sufficient evidence that the applicant repeatedly shirked his duties to support the Personnel Command's decision to discharge him for a "pattern of misconduct" under Article 12.B.18.

⁷ 10 U.S.C. §§ 885 and 907 (2008); MANUAL FOR COURTS-MARTIAL UNITED STATES, IV-9 AND IV-47 (2008 ed.).

8. Although the applicant has not proved by a preponderance of the evidence that his OTH discharge is erroneous or unjust,⁸ it was documented erroneously on his DD 214. Under the SPD Handbook, the JKA separation code, which the applicant received, applies to members who are not entitled to appear before a board before being involuntarily discharged due to a pattern of misconduct. The applicant was entitled to a board, an ASB, and expressly waived that right. Therefore, his DD 214 should bear the separation code HKA, which is for members being discharged for a pattern of misconduct who have waived their right to a board.

9. Accordingly, the applicant's request should be denied because he has failed to prove by a preponderance of the evidence that his OTH discharge is erroneous or unjust, but his DD 214 should be corrected to show the HKA separation code, instead of JKA.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁸ For the purposes of the BCMRs, “[i]njustice’, when not also ‘error’, is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a “case-by-case basis.” Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

ORDER

The application of former SA xxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied except that block 26 of his DD 214 shall be corrected to show the HKA separation code, instead of JKA.

