DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-165

[redacted]

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 case after receiving the completed application on August 15, 2013, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated April 25, 2014, 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,[1] who received an "ordinary discharge under honorable conditions" because of a pre-existing physical disability on May 18, 1943, asked the Board to upgrade his discharge to honorable and to increase the amount of time in service he is credited with so that he will qualify for veterans' benefits. He alleged that although the Coast Guard claimed that he had a pre-existing condition and discharged him because of it, he did not have the alleged condition before he enlisted in the Coast Guard Reserve. He stated that the Coast Guard would not have enlisted him had he already had a disqualifying condition. He enlisted for three years and intended to serve them, but something must have happened to him while he was in the service to cause the alleged convulsion that triggered his discharge. The applicant alleged that he discovered the error in his record in May 2013 after receiving copies of his military medical records. In support of these allegations, the applicant submitted copies of his records, which are included in the summary below.

SUMMARY OF THE RECORD

On February 10, 1943, at age 17, the applicant enlisted as an apprentice seaman (A.S.) in the Coast Guard Reserve after having certified that he had no draft status because he was not yet 18. He was found physically qualified for service although he told the doctor that he had had a

[1] The applicant was represented by his wife as he is in the memory care unit of an assisted living facility.

"nervous breakdown" in 1942, as well as the "usual childhood diseases," a tonsillectomy, and an adenoidectomy. He did not report having had any tongue-biting, convulsions, or epilepsy. The applicant reported for active duty on March 20, 1943, and was sent to the recruit training center at Manhattan Beach.

On April 22, 1943, while still in recruit training, the applicant was transferred to a Marine Hospital with a diagnosis of epilepsy and the following note from the doctor at the training center: "Patient had a convulsive seizure last nite. He has had seizures in the past." According to medical notes, after he was admitted to the hospital, the applicant told a doctor that there was no family history of epilepsy but that he had been having convulsions for the past two years at night in his sleep during which he would bite his tongue. He told them he had been taking medication and did not have convulsions unless he stopped taking his medication.

On May 14, 1943, a Board of Medical Survey convened and recommended that the applicant receive a medical discharge due to a diagnosis of epilepsy that was *not* an incident of service. The applicant was discharged from the hospital the next day and given leave until his discharge.

On May 18, 1943, the applicant received an ordinary discharge under honorable conditions (the equivalent of a general discharge) by reason of "physical disability which existed prior to enlistment." He had been on active duty for 1 month, 29 days and had received three 4.0 (out of 4.0) conduct marks and one 2.5 proficiency mark.

On April 17, 1944, the applicant was issued an "honorable service lapel button." The applicant acknowledged receipt of the button but on October 14, 1994, requested another because he had lost his button. He also requested a Coast Guard Emblem. On December 4, 1944, the applicant was advised that because he had been discharged "under honorable conditions," he was entitled to only one button and that he was not entitled to the emblem because he had received an ordinary discharge instead of an honorable discharge.

Correspondence in the applicant's record dated July 8, August 6, and September 10, 1946, shows that the Veterans' Administration (VA) sought the applicant's records to determine his eligibility for benefits. The applicant's record was forwarded to the VA on September 18, 1946, for adjudication.

VIEWS OF THE COAST GUARD

On February 24, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case based on a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that in 1943, there was no EEG test that would have shown whether the applicant suffered epilepsy when he enlisted in the Coast Guard on February 10, 1943, but epilepsy was a disqualifying condition, so the applicant would not have been enlisted if he had reported it. PSC stated that the detailed medical notes taken at the hospital about the applicant having convulsions only at night for the prior two years, biting his tongue, and having convulsions when not taking his medication "could only have been provided by the applicant." Because the applicant

admitted to having had convulsions for two years but had been on active duty for only a month when his condition was discovered, PSC stated that his condition was properly characterized as having pre-existed his military service. PSC noted that the applicant would have been discharged due to his pre-existing condition under today's standards as well.

PSC noted that under today's standards, a recruit discharged due to a pre-existing medical condition may receive an honorable discharge and recommended that the Board upgrade the applicant's discharge to honorable in accordance with the relief granted in a prior case, BCMR Docket No. 2006-132.[2] PSC argued, however, that there are no grounds for lengthening the applicant's period of service.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 4, 2014, the applicant responded to the views of the Coast Guard. The applicant repeated his argument that he would not have been found qualified for enlistment if he had had epilepsy before he enlisted. He noted that something might have happened to him during recruit training, and his commanding officer might have made the entries in his record to avoid responsibility for whatever had happened.

APPLICABLE REGULATIONS

Article 588 of the 1940 Regulations for the United States Coast Guard states that "[t]he Commandant, upon recommendation of a medical board of survey, may direct the discharge of an enlisted man for physical or mental disability. The character of the discharge to be issued shall depend upon whether or not the physical or mental disease was due to the man's own misconduct, and also upon the record of the man during his current enlistment. A man discharged by authority of his article shall be not recommended for reenlistment."

Article 584(4) of the 1940 Regulations for the United States Coast Guard provided that honorable discharges were awarded under any of five conditions: expiration of enlistment; convenience of the government; hardship; minority (age); and disability not the result of own misconduct. A discharge "under honorable conditions" could be awarded "for the same [five] reasons as an honorable discharge and issued to individuals whose conduct and performance of duty have been satisfactory but not sufficiently deserving or meritorious to warrant an honorable discharge."

Under the current Military Separations Manual, COMDTINST M1000.4, Article 1.B.14.c., "Discharging Recruits," provides that a member with fewer than 60 days of active duty may be discharged for a "physical disability not incurred in or aggravated by active military service; i.e., a pre-existing physical defect, under the conditions of Article 1.B.14.b. of this Manual." The recruit is discharged for an "erroneous enlistment" under Article 1.B.12.a. of the manual.

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[2] In BCMR Docket No. 2006-132, the applicant received an ordinary discharge due to a physical disability that he had incurred during approximately 15 months on active duty from April 21, 1942, to July 24, 1943. The Board found that an ordinary discharge was inappropriate for someone who was discharged due to disability and whose performance and conduct on active duty had been satisfactory, and upgraded the applicant's ordinary discharge to honorable.

Article 1.B.12.a.(5)(c) of the Military Separations Manual states that a discharge due to "erroneous enlistment" may be issued for a "member undergoing recruit training in an original enlistment, … who has fewer than 60 days' active service in the Coast Guard has a physical disability not incurred in or aggravated by a period of active military service; i.e., the defect existed before the member entered the Coast Guard."

Article 1.B.2.f. of the Military Separations Manual provides that members being discharged under Article 1.B.12. receive honorable discharges if they have shown "[p]roper military behavior and proficient performance of duty with due consideration for the member's age, length of service, grade, and general aptitude." Those discharged before June 30, 1983, must have earned "a minimum final average of 2.7 in proficiency and 3.0 in conduct" to receive an honorable discharge, but proficiency marks are disregarded for members undergoing recruit training.

Article 1.B.19. of the Military Separations Manual states that recruits may receive "uncharacterized discharges" if they "[e]xhibit minor pre-existing medical issues not of a disabling nature which do not meet the medical/physical procurement standards in place for entry into the Service" and that an "uncharacterized discharge is used for most recruit separations, except for disability, …" Under Article 1.B.17.b.(5)(b), members may receive general discharges for misconduct due to "fraudulent enlistment" if at the time of enlistment they knowingly fail to admit a medical condition that would have prevented their enlistment had they revealed the condition.

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[3] Military records and correspondence show that the applicant knew at least by October 1944 that he had received an ordinary discharge "under honorable conditions" due to pre-existing epilepsy and that he sought benefits from the VA in 1946. Therefore, although he claimed that he discovered the alleged error in his record in May 2013, the preponderance of the evidence shows that the applicant knew of the alleged error in his record approximately 70 years ago. Thus, his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[4] 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"[5] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the

[3] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[4] 10 U.S.C. § 1552(b).
[5] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

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."[6]

4. The BCMR has existed since 1946. The applicant provided no explanation for his very long delay in seeking correction of his military records. For reasons explained below, however, the Board will excuse the untimeliness of the application.

5. The applicant's claim that he was erroneously discharged for a pre-existing condition cannot prevail on the merits. His records shows that a doctor at the recruit training center, a doctor at the Marine Hospital, and a medical board all diagnosed the applicant with epilepsy and reported that it was a pre-existing condition because the applicant admitted that he had suffered convulsions in his sleep, biting his tongue, for two years before his condition was discovered during recruit training on April 22, 1943. The fact that the applicant did not admit to this condition during his pre-enlistment physical examination and that it was not detected during the examination does not prove that it was not a pre-existing condition. As the Coast Guard noted, there was no EEG test for epilepsy at the time. The doctors' reports of what the applicant told them about his past convulsions during sleep and their diagnosis of pre-existing epilepsy are presumptively correct,[7] and the applicant's allegations of error are insufficient to overcome this presumption. Therefore, there are no grounds for extending the applicant's time on active duty.

6. The Coast Guard recommended that the Board upgrade the applicant's discharge from ordinary to honorable as the Board did in another case, BCMR Docket No. 2006-132. Therefore, although the applicant's claims regarding his amount of time in service do not warrant excusing the untimeliness of his application, the Board will waive the statute of limitations to consider the merits of his request for an upgraded character of discharge. The record shows that the applicant received an ordinary discharge "under honorable conditions" because of his pre-existing epilepsy. Presumably, although he received perfect conduct marks, under Article 584(4) of the 1940 Regulations for the United States Coast Guard, his month of recruit training from March 20 to April 22, 1943, and time in the hospital and on leave from the latter date until his discharge on May 18, 1943, were considered insufficiently deserving or meritorious to warrant an honorable discharge.

7. With respect to upgrading discharges, the delegate of the Secretary informed the BCMR on July 7, 1976, that it "should not upgrade a discharge unless it is convinced, after having considered all the evidence … that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed." Under the current Military Separations Manual, the applicant could receive an honorable discharge, an uncharacterized discharge if his pre-existing medical condition were deemed minor, or a general discharge for fraudulent enlistment if he was found to have knowingly failed to disclose his diagnosis during his pre-enlistment physical examination.

8. The record shows that the applicant revealed a prior "nervous breakdown" during his pre-enlistment physical. After being enlisted, called to active duty, and trained at the recruit

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

[7] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

training center for a month, he suffered a convulsion and admitted to doctors that he had suffered convulsions for two years in his sleep but did not have them when taking medication. The applicant could have used his condition to avoid military service in World War II but tried to serve, instead. His marks indicate that he committed no misconduct while on active duty, and although willing to serve, he was unable to do so through no fault of his own. There is insufficient evidence to conclude that he intentionally committed fraud during his pre-enlistment physical by failing to mention his pre-existing condition. Based on this evidence, it appears to the Board that under today's standards, the applicant would likely receive an honorable discharge. Therefore, the Board finds that he has proved by a preponderance of the evidence that his ordinary discharge is unjust and should be upgraded to honorable.

9. Accordingly, partial relief should be granted by upgrading the applicant's discharge to honorable.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [redacted] USCGR, for correction of his military record is granted in part in that the Coast Guard shall upgrade his ordinary discharge to an honorable discharge and send him an honorable discharge certificate.

April 25, 2014

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