DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

[redacted]

BCMR Docket
No. 153-96

FINAL DECISION ON RECONSIDERATION

[redacted] Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on September 4, 1996, upon the Board's receipt of the applicant's application for correction.

The applicant's current application seeks the same relief that was denied to him by the Board in a previous decision, BCMR No. 71-90. The current application is therefore treated as a reconsideration of BCMR No. 71-90. It has been docketed as BCMR No. 153-96.

This final decision on reconsideration is dated October 10, 1997. It is signed by three duly appointed members who were designated to serve as the Board in this case.

Request for Relief

The applicant, a former seaman apprentice (SA; pay grade E-2), asked the Board to change the reason for his honorable discharge from unsuitability to physical disability. He was assigned a JMB (unsuitability-personality disorders) separation code. The applicant was discharged on November 8, 1989, after serving seven months and 25 days on active duty.

The Coast Guard recommended that the applicant's request be denied.

EXCERPTS FROM RECORD AND SUBMISSIONS

BCMR Docket No. 71-90 (Prior Case)

As stated above, the Board considered the request for relief in BCMR No. 71-90 and denied relief to the applicant. The Board found that the applicant had not established that the Coast Guard committed any error or injustice in discharging him by reason of unsuitability. A psychiatric diagnosis of "histrionic personality disorder" was the basis for the applicant's unsuitability discharge.

The psychiatrist wrote the following which is quoted in the final decision in BCMR No. 71-90:

> Final Diagnoses: (1) Histrionic personality disorder, severe, existed prior to enlistment.
>
> (2) Conversion disorder resolved . . . . The patient was interviewed together with his mother and adequate documentation was obtained to support the diagnosis of personality disorder. . . .
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> DISPOSITION: Return to duty. Fit for duty, but psychiatrically unsuitable for military service.
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> RECOMMENDATIONS: (1) It is strongly recommended that the member be administratively separated on the basis of a personality disorder of such severity as to render him incapable of further adequate service in the Coast Guard. . . [H]e is considered at continuing risk of self-harm or harm to others.

The applicant was afforded the right to make a statement prior to final action on his discharge. He made a statement and did not object to the discharge.

The final decision in BCMR N0. 71-90 is attached to this final d ision as "Attachment 1."

Current Case (Applicant's Second Req:est for Relief)

The applicant provided the Board with a copy of a letter that he sent to the Department of Veterans Affairs (DVA) in 1996. In that letter he stated that "it is an injustice to say that he was discharged for convenience of the government, when in reality he was medically discharged." The applicant stated that he had been granted a 10% service connected disability by the DVA.

The applicant also complained in this letter that he had been unable to have his military record corrected to remove the unsuitability discharge. He stated that he had been advised by a family friend who was a lawyer that an unsuitability discharge was only for those members who did not or could not complete basic training.

Evidence Obtained by the Board

Since the applicant stated that he had been granted a service-connected disability by the DVA, the Board obtained a copy of the applicant's DVA record. (This constitutes new evidence since it was not considered in the previous case.)

The applicant filed a claim with the DVA for disability compensation on January 4, 1990, approximately two months after his discharge from the Coast Guard. On June 28, 1990, the DVA determined that the applicant had a 10% service-connected disability for "post-concussion and myofascial syndrome" (described by the DVA

Schedule for rating Disabilities as migraine headaches due to brain trauma) dating from November 9, 1989. The DVA rating decision stated in relevant part:

> SMR [service medical record] show vet[eran] had no history of psychological or physical problems until 8/17/89, when he was hit in the left forehead by a fire hose nozzle. He was unconscious for 30 minutes and had loss of vision for about a week . . . . All . . . neurological tests failed to show pathology to account for complaints of recurrent headaches and passing out episodes.
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> Veteran first treated in service 3/28/89 for syncopal episode. He was found lying in street in front of gym. . . . Only muscle soreness was diagnosed. . . . He had fainting spells 6/27/89 while training for tournament on mess deck. . . . Besides treatment for recurrent headaches after 8/89 fire hose incident, he was . . . brought to [the] emergency room once in September and once in October for passing out episodes. Latest neurological evaluation prior to discharge for unsuitability indicated all neurological testing was negative to provide objective pathology to account for his subjective complaints of headaches and occasional syncope.
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> VAE [Veterans Affairs Examiner] . . . provided no definite pathology to account for veteran's complaint. EEG was normal. . . . He still gives history of headaches that began on left side of face, frontal region and radiate to right side of head. Diagnoses were past-concussion and myofascial pain syndrome. He had no complaints in this exam for right arm or jaw. He showed no signs of facial twitching or tremors in hand or feet.
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> The [DVA] Board appreciates the lack of definite objective pathology to account for veteran's complaints. However, such is often the case in this type of injury. Reasonable doubt is resolved in [the veteran's] favor in granting SC [service connection] for chronic headaches as residual of the head injury.

On August 10, 1990, the applicant filed a claim with the VA for increased disability compensation. On October 9, 1990, the DVA increased the applicant's disability rating to 30% because his symptoms had increased in frequency and duration.

Excerpt From the Applicant's Medical Record

The applicant received a discharge examination on November 1, 1989. On the Report of Medical History (Standard Form 93), which the applicant completed, he wrote "I am in poor health and taking medications. I have continuous headaches and a sore

arm (right). After a complete examination the doctor reported, on Standard Form 88 (Report of Medical Examination) that the applicant was "qualified for discharge." On November 3, 1989, the applicant agreed with the findings of the medical officer by signing the following statement: "I have been informed of the findings of the physical examination given to me on 11-2-89 for discharge and agree . . . with the findings of the examining physician and . . . do not desire to make a statement."

Views of the Coast Guard on the Applicant's Request for Reconsideration

The Coast Guard recommended that the applicant's request for relief be denied. The Service argued that the application did not meet the requirements for reconsideration nor has the applicant demonstrated that the Coast Guard committed an error or injustice.

With respect to reconsideration of the application, the Coast Guard asserted that the Board's regulations require that a request for reconsideration be made within two years of the issuance of a final decision, unless the Board finds that it would be in the interest of justice to consider the request despite the untimeliness. 33 CFR § 52.67. The Coast Guard argued that the current reconsideration application is untimely by approximately six years. The final decision in BCMR No. 71-90 was issued on 16 November 1990. The Coast Guard argued that excusing the untimeliness is not in the interest of justice since the applicant failed to give a reason for the delay in not filing his current application sooner.

The Coast Guard also argued that the current application failed to meet either of the following requirements on which reconsideration may be granted.

(1) An applicant presents evidence or information that was not previously considered by the Board that could result in a determination other than that originally made (evidence or information may only be considered if it could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence); or

(2) An applicant presents evidence or information that the Board, or the Secretary as the case may be, committed legal or factual error in the original determination that could have resulted in a determination other than that originally made.

In this regard, the Coast Guard argued that the applicant has not shown that the decision in BCMR No. 71-90 was incorrect in law or fact. The Service also asserted that the applicant has not presented any new evidence that could result in a different determination than that reached in BCMR No. 71-90. The Coast Guard recognized that the applicant has been granted a 30% service connected disability from the DVA. However, the Coast Guard argued that "even if the Board considered the DVA documents to be new evidence relevant to its decision under the reconsideration rule,

this information could have been presented to the Board prior to the determination in BCMR No. 71-90.

With respect to the merits of the case, the Coast Guard argued that the applicant has not proved that he had a physical dis- ·ility that rendered him unfit for duty at the time of his discharge in 1989. The Service stated that the applicant was properly discharged for unsuitability because of his diagnosed histrionic personality disorder in 1989. The Coast Guard stated that Personality disorders are not physical disabilities as that term is used in the Physical Disability Evaluation System (PDES). See COMDTINST M1850.2B, Physical Disability Evaluation System (PDES Manual).

The Coast Guard stated that it can find no evidence to support a claim that the applicant was unfit for duty because of a physical disability at the time of his discharge. The Service noted that the applicant agreed with the finding that he was fit for duty by signing a statement to that effect on November 3, 1989.

The Coast Guard further argued that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F. 2d 1034, 1037 (1992).

Moreover, the Coast Guard argued that DVA ratings are not determinative of the issues involved in military disability retirement cases. The DVA determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combinations of injuries. The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his rate and specialty because of a physical disability. Lord v. United States, 2 Ct. Cl. 749, 754 (1983).

The Coast Guard argued that the DVA does not provide evidence that the applicant's inability to continue with his military duties in 1989 resulted from a physical disability rather than a personality disorder. The Coast Guard stated that while the DVA report noted that the applicant was hit on the head with a fire hose nozzle, it also noted that after his entry on to active duty in March, 1989, he was treated for repeated muscle strain, fevers and headaches, and fainting prior to the nozzle incident. The Service stated that the DVA admitted that it lacked objective pathology to account for the applicant's complaints and therefore granted him a 10% disability compensation rating. The Coast Guard :gued however, that none of this evidence suggested that the Coast Guard erred in determining that the applicant was fit for continued duty, though psychiatrically unsuitable due to a personality disorder.

Applicant's Response to the Views of the Coast Guard

On August 13, 1997, the BCMR mailed a copy of the Coast Guard views to the applicant and advised him that he could submit a response. He did not respond.

APPLICABLE REGULATION

The Board's rule on reconsideration at 33 CFR § 52.67 states in pertinent part that reconsideration of an application shall occur if the applicant meets the following requirements.

> A(1) An applicant presents evidence or information that was not previously considered by the Board that could result in a determination other than that originally made. Evidence or information may only be considered if it could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence; or
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> (2) An applicant presents evidence or information that the Board, or the Secretary as the case may be, committed legal or factual error in the original determination that could have resulted in a determination other than that originally made.
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> (b) The Chairman shall docket a request for reconsideration of a final decision if it meets the [above] requirements . . .
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> (e) An applicant's request for reconsideration must be filed within two years after the issuance of a final decision, except as otherwise required by law. If the Chairman dockets an applicant's request for reconsideration, the two-year requirement may be waived if the Board finds that it would be in the interest of justice to consider the request despite its untimeliness.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code.

2. This current application constitutes a request for reconsideration, since the Board denied relief to the applicant on this issue in BCMR No. 71-90.

3. The BCMR was not aware that this application constituted a request for reconsideration since the applicant did not mention that it was a request for reconsideration of BCMR No. 71-90. Thus, the Chairman did not review this application to determine if it met the requirements for reconsideration, pursuant to § 52.67 (b) of the Board's rules prior to docketing.

4. The Board finds that this current application does not meet the requirements for reconsideration as defined in 33 CFR § 52.67. The applicant has not demonstrated that the Board committed a factual or legal error in the final decision in BCMR No. 71-90. Moreover, the applicant has not presented new evidence that would lead the Board to make a different determination than that originally made in BCMR No. 71-90.

5. To establish that he should have been discharged by reason of physical disability, the applicant must show that at the time of his discharge he was unfit to perform his military duty. Chapter 2-A-47 of the Physical Disability Evaluation System Manual (COMDTINST M1850.2B) defines unfit as "[t]he status of an individual member who is physically and/or mentally unable to perform the duties of office, grade, rank, or rating because of physical disability incurred while entitled to basic pay."

6. The current application did contain some new evidence. It consists of documents from the DVA, including a document showing that the DVA granted the applicant a 10% (later increased to 30%) disability rating for myofascial pain syndrome. However, this evidence is insufficient to establish that the applicant had this condition at the time of his discharge. The DVA admits that there is no evidence of "objective pathology," in the applicant's case, to support awarding him a disability rating. Even if the applicant had myofasical pain syndrome at the time of discharge, the evidence from the DVA does not establish that this condition caused him to be unable to perform duty as a seaman apprentice.

7. The applicant's medical record reveals that prior to his discharge, he had a thorough medical examination and was found fit for discharge. The applicant agreed that he was fit for discharge and did not object to the discharge in his statement statement. Earlier, the applicant was found to have a personality disorder, which cannot be the basis for a disability discharge. See Chapter 2-A-7, COMDTINST M1850.2B.

8. Moreover, the Court of Federal Claims has stated that "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The Veterans Administration determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. . . . The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. . . . Accordingly, Veterans' Administration ratings are not determinative of issues involved in military disability retirement cases." Lord v. United States, 2 Cl. Ct. 749, 754 (1983). As stated above, there is no evidence in the record that the applicant was not able to perform his duty because of a physical disability incurred while on active duty.

9. For the reasons stated above, the Board finds that the current application does not meet the requirements for reconsideration and it should be denied.

ORDER

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

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