

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

BCMR Docket
No. 2002-055

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 February 22, 2001 upon the Board's receipt of the applicant's complete application for the correction of his military record.

This final decision, dated November 14, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Relief

The applicant enlisted in the Coast Guard on November 2, 1970. He was discharged honorably on September 7, 1972, as a conscientious objector.

Twenty-nine years after his discharge, he asked the BCMR to change the reason for his discharge from conscientious objector to physical disability due to psychosis. The applicant alleged that he suffered from psychosis while in the Coast Guard, and it was during a psychotic state in 1972 that he requested a conscientious objector discharge. Also he alleged that the mental status examination he underwent as part of the processing for a conscientious discharge was improperly done, that his medical records were falsified, and that he was misdiagnosed. He further alleged that information was withheld from him during the processing of his conscientious objector application. The applicant is seeking to improve his chances of obtaining full disability benefits from the Department of Veterans Affairs [DVA] with a correction to his Coast Guard record. In this regard the applicant stated the following:

While [I] was barred from [DVA] benefits from 1972 discharge for Conscientious Objector until 1993, when the [DVA] lifted that bar, [I] now seek to apply for benefits. [I] was well aware of the bar when in 1992 [I] applied for benefits . . . and was told that [I] could only receive limited medical benefits based upon financial status. In late 1999, the [DVA] psychiatrist referred [me] to apply for full medical and pension benefits. [I am] not seeking any monetary amount from the Coast Guard, only the

opportunity (based upon accurate service record) to proceed with [a DVA] claim for benefits.

The applicant was directed on the application form (DD Form 149) to state when he discovered the alleged error or injustice. He listed 1999 as the date of discovery. The application form further requires that if the date of discovery was more than three years prior to the date of application, the applicant must explain why the Board should find that it is in the interest of justice to consider the application. The applicant stated that he did not discover that he might be eligible for DVA benefits until November 1999. He stated that he was advised at that time by a psychiatrist to seek benefits from the DVA. The applicant further stated, citing Holmberg v. Armbrecht, 327 U.S. 392, 66 S. Cr. 582 (1946), that mere delay alone, no matter how long, is insufficient to constitute laches.

SUMMARY OF RECORD AND SUBMISSIONS

On January 12, 1972, the applicant asserted in a letter to his commanding officer that he was a conscientious objector. On March 8, 1972, he requested discharge from the Coast Guard as a conscientious objector. Before such a discharge can be granted, Coast Guard regulations require that a chaplain interview the member and offer an opinion as to the member's sincerity and depth of conviction. Also, the member is to be interviewed by a psychiatrist "who shall submit a written report . . . indicating the presence or absence of any psychiatric disorder which would warrant treatment or disposition through medical channels, or such character or personality disorder as to warrant recommendation for appropriate administrative action." See COMDTINST 1900.8. An investigating officer (IO) is appointed to investigate the member's conscientious objector claim. The IO conducts a hearing on the application and issues a report with conclusions and a recommended disposition based on all the evidence of record including the chaplain and psychiatric reports.

A chaplain and a psychiatrist saw the applicant on February 17, 1972 in furtherance of his conscientious objector application. The chaplain supported the applicant's application for discharge as a conscientious objector, finding that the applicant "was sincere in his feeling that he could no longer participate in the activities of the Coast Guard." The psychiatrist wrote the following about the applicant's mental status:

[The applicant] is a slender man of medium height who talks in a coherent logical manner with his attitudes overflowing with humanistic idealism . . . There is a paucity of pragmatic consideration in regard to personal security and gratifying relationships with people. He states he can only achieve a sense of accomplishment when he works as a volunteer. He evidently avoids emotional closeness and strong feelings of [an] aggressive or sexual nature. There is no indication of a thought or

affectual disturbance of psychotic proportion. This man has a mild personality disorder which permits him to withdraw in emotionally laden situations that he lacks confidence to handle. He is also in the midst of an adolescent identity crisis. His meek rebellion against his mother manifested in his resistance to follow her advice about college and a practical philosophy of life has now been displaced to the Coast Guard as shown by his resistance in accepting military attitudes. His decision to obtain [conscientious objector] status is not related to any mental illness *per se*, but is closely tied into a mild personality disorder and an adolescent adjustment reaction (an identity crisis). There is no essential need for psychotherapy. Though he would object and possibly become more overtly rebellious, he might benefit by continuing in the Coast Guard with a conscientious objector status involving no participation in "war" related activities.

On April 10, 1972, after a hearing and reviewing all the evidence of record, the IO recommended that the applicant's application for discharge as a conscientious objector be approved. (A civilian lawyer represented the applicant at the hearing.) On June 27, 1972, the Commandant ordered the applicant discharged under Article 12-B-6 (convenience of the government) of the Personnel Manual. He was discharged on September 7, 1972, after a physical examination that determined he was medically fit for discharge.

The record indicated that approximately 12 years after his discharge from the Coast Guard, the applicant had an emergency psychological evaluation on January 4 and January 9, 1985. At that time the psychiatrist wrote that the applicant "appeared to be in a borderline psychotic state with paranoia in evidence." The applicant related the onset of his difficulties to a then-current work situation wherein he suffered a work-related back injury. The injury apparently caused him to lose some time from work and to be assigned to lighter duties when he could work. The applicant told the psychologist that upon his return to work his relationship with the employer became strained. He was subsequently fired. The psychologist noted the applicant's psychiatric evaluation during the processing of his conscientious objector application and offered the following impression and assessment of the applicant's current condition.

[The applicant] appears to be suffering from a major psychiatric disorder which appears clearly related to a job related injury and subsequently being fired. Because of the psychiatric disorder, the patient is clearly psychiatrically disabled to the point of hospitalization being considered and is being treated for his psychiatric disability with Haldol . . . [He] is suffering from severe adjustment disorder with atypical features . . . The adjustment disorder is of a borderline psychotic nature. In addition the applicant may have an underlying personality disorder which is

extremely difficult to evaluate at this time and will be left undiagnosed at this point. Additionally, he has shown evidence of alcohol, cocaine and cannabis abuse over the past several months; although this has diminished recently. It is my impression that the patient's severe psychiatric difficulties are accelerating and this acceleration is related to the sluggishness under which the legal system works in dealing with disability cases. . . . It is difficult to apportion past personality factors as well as current work situation in assessing his disability, but it is clear to me that being fired played a major role in his current situation. It is clear that there is not history of significant psychiatric treatment in the past and his need for increasing psychiatric and psychological care is a testament to the relationship between the injury and the subsequent firing in his current disability.

On May 1, 1985, the applicant filed a claim for disability compensation with the DVA for a back condition and a mental disorder. He had a psychiatric evaluation on July 31, 1985, but he submitted an incomplete report of this to the Board.

On September 24, 1985, the DVA granted the applicant a 50% non-service connected disability rating, which included 30% for an adjustment disorder with mixed emotional features. The non-service connected disability rating permitted the applicant to receive limited medical treatment from the DVA, but does not include compensation.

Around February 2000, the applicant reopened his DVA claim by asserting a disability due to post traumatic stress disorder resulting from a psychotic reaction to war drills while on a Coast Guard cutter in 1971 or 1972 and from witnessing the misfiring of a gun that hit a fellow sailor in the face.¹ It appears from the evidence of record that the DVA never ruled on the applicant's PTSD claim due to a lack of information from the applicant. The applicant stated that he is no longer claiming a disability due to PTSD.

On March 17, 2000, a psychiatrist evaluated the applicant to determine whether the applicant was mentally responsible for the commission of a felony and/or whether he was competent to stand trial for the alleged offense. That psychiatrist diagnosed the applicant as suffering from Bipolar II Disorder (Recurrent Major Depressive Episodes with Hypomanic Episodes, and Alcohol Abuse) and opined that the applicant "had an impaired and substantially lacking capacity to appreciate the wrongfulness of his conduct" at the time of the offense.

¹ There is nothing in the applicant's military record showing that he participated in war drills or that he witnessed a fellow sailor's injury from a misfired gun during one of these drills.

A psychiatric evaluation report dated April 27, 2000, states that the applicant was diagnosed as suffering from a schizo-affective disorder, alcohol abuse which is in remission, a history of fighting, a back condition, a serious mental illness, and a history of substance abuse, housing, employment and financial problems.

The applicant submitted a letter from his mother dated January 11, 2001. She wrote the following:

When the applicant came home in 1972 AWOL (absent without authority), I was very upset. I took him to see . . . the psychiatrist who had treated his father previously. I asked the doctor if it were possible [for the applicant] to develop the same mental illness as his father. [The psychiatrist] said it was not only possible, but probable. . . . This conference was the first time that there was any hint of mental illness for [the applicant].

The applicant submitted a psychological evaluation prepared for the probation division of a circuit court, dated February 19, 2002. This psychologist wrote that she was treating the applicant for an anxiety disorder. The report stated that some of the trauma features related to the applicant's PTSD were in large part due to "unfortunate events from the military." The report stated that anger is a major symptom of PTSD, for which the applicant was being treated.

The applicant submitted an undated statement from the psychiatrist who treated him in the 1990s. This psychiatrist wrote, "[the applicant] is a patient I have treated since 1993. [He] appears totally and permanently disabled at this time. I recommend he file for a NSC (non-service connected) pension and request [an examination] by a non-treating VA psychiatrist."

Views of the Coast Guard

On August 5, 2002, the Chief Counsel of the Coast Guard recommended that the applicant's request be denied. He asserted that "1) the applicant failed to submit a timely application and has not provided any basis or reason why it is in the interest of justice to excuse the delay, and; 2) even if the Board should find it appropriate to waive the statute of limitations, there is no merit to this case."

Pursuant to 33 C.F.R. 52.22, this application should have been filed within three years of the date the alleged error or injustice was, or should have been, discovered. He stated that the applicant did not provide a reason for not filing his application within three years from the date of his discharge, approximately 29 years ago. The Chief Counsel argued that such an explanation is necessary in order for the Board to determine whether it is in the interest of justice to waive the statute of limitations in this case. The Chief Counsel stated that in accordance with Dickson v. Secretary of Defense,

68 F. 3rd 1396 (D.C. Cir. 1995) he performed a cursory review of the merits in this case to determine whether it was in the interest of justice to waive the statute of limitations.

The Chief Counsel stated that based on his cursory review, the Commandant's decision to discharge applicant from the service was thoroughly justified based on the record. He stated that there is no evidence in the record that the applicant suffered from, nor complained of, any sort of physical or mental disability during his entire enlistment. Nor, according to the Chief Counsel, is there any evidence that the applicant was denied any due process in connection with his discharge as a conscientious objector.

The Chief Counsel stated that the evidence in the record strongly indicates that the applicant's psychiatric problems began in the 1980s, nearly ten years after his discharge from the Coast Guard. He further stated that other than the applicant's blanket assertion, there is no evidence to suggest that the "war drills" performed on board a Coast Guard cutter in 1972 were the basis for the applicant's alleged PTSD or other psychiatric disorders.

PHYSICAL DISABILITY EVALUATION SYSTEM

Chapter 2-A-36 of COMDTINST M1850.2B (Physical Disability Evaluation System Manual) defines a physical disability in the following manner:

Any manifest or latent physical impairment or impairments due to disease, injury or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a service member unfit for continued duty. The term "physical disability" includes mental disease but not such inherent defects as behavior disorders, personality disorders, and primary mental deficiency.

Chapter 2-A-44 of this provision defines unfit for continued duty in the following manner:

The 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. The status of unfitness applies to individuals unable to perform specialized duty such as duty involving flying or diving only if the performance of the specialized duty is a requirement of the member's enlisted rating.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. The application was not timely.
2. To be timely, an application for correction of a military record must be submitted within three years of when the alleged error or injustice was or should have been discovered. See 33 CFR 52.22. The applicant was discharged from the Coast Guard approximately twenty-nine years ago. He should have discovered the alleged error at that time, although he claimed that he did not discover it until November 1999. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See Dickson v. Secretary of Defense, 68 F. 3rd 1396 (D.D.C. 1995).
3. The applicant stated that he did not file his application sooner because he was not aware that he might be eligible for DVA benefits until November 1999. The Board is not persuaded by this argument and notes that in 1985, the DVA denied the applicant's claim for a service connected disability, while finding him 50% disabled due to non-service connected disabilities. This finding entitled him to limited medical care but not compensation. This finding of a non-service connected disability and the denial of disability compensation by the DVA in 1985 should have put the applicant on notice at that time that he needed to challenge the reason for his discharge if he thought it to be erroneous.
4. Additionally, after a review of the merits, the Board finds the applicant is not likely to succeed on the merits of his claim that he should have been discharged from the Coast Guard due to a psychotic mental disability. The psychiatrist who evaluated the applicant during the conscientious objector proceedings stated that there was no "indication of a thought or affectual disturbance of psychotic proportion." The psychiatrist did state that the applicant suffered from a mild personality disorder and that he was in the midst of an adolescent identity crisis. Personality disorders are not considered to be physical disabilities under the PDES.
5. In addition, on September 5, 1972 the applicant underwent a separation physical and was fit for separation. There is no medical evidence in the applicant's military record or in the evidence he submitted showing that he suffered from or was treated for a psychiatric condition until 1984 or 85, approximately 12 years after his discharge from the Coast Guard.

6. Although the psychiatric and psychological reports submitted by the applicant, beginning in 1985, indicate that he currently suffers from a mental illness, none of these evaluations, except for one, claimed that the applicant's mental illness was in any way related to his time spent on active duty. For instance, the 1985 medical report stated that the applicant's psychiatric disorder appeared to be related to a civilian job injury and subsequent firing. In this regard that psychologist wrote "[i]t is clear that there is no history of significant psychiatric and psychological treatment in the past and [the applicant's] need for increasing psychiatric and psychological care is a testament to the relationship between the [current work] injury and the subsequent firing in his current disability." The 2002 psychological evaluation report was the only one connecting the applicant's military experience to alleged PTSD. Such evidence is not persuasive in light of the other evidence to the contrary and in light of the fact it was prepared approximately 30 years after his discharge and was based on his assertions which are not supported by the record.

7. Moreover, in 1985 the DVA found that the applicant suffered from a mental illness, but determined that it was not service connected. The applicant has presented no evidence, except for his own allegations of error, to support his contention that he suffered from "psychosis" or even PTSD while on active duty from November 1970 to September 7, 1972.

8. The Board finds that it is not in the interest of justice to waive the statute of limitations in this case due to the passage of time (approximately 29 years), the lack of any compelling reason for not filing his application for correction sooner, and the probable lack of success on the merits in this case.

9. All of the applicant's allegations, whether or not addressed within the Findings and Conclusions, have been considered by the Board and found to be without merit.

10. Accordingly, the applicant's request should be denied.

ORDER

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

