DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-095

XXXXXXXXXXXXXX
XXXXXXXXXXXXXX

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 application on upon receipt of a completed application on February 16, 2010, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 18, 2010, 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 asked the Board to correct the Report of Medical Examination (Standard Form 88 or Form 88) dated May 11, 1987 by removing a October 8, 1987, stamped entry, which stated that he was qualified for reenlistment/discharge. He alleged that an earlier September 29, 1987, stamped entry that stated he was not qualified for separation is the correct entry. The applicant alleged that he was never advised of the October 1987 entry because he was on terminal leave at that time. He asserted that if he had known of the October 1987 entry he might have reenlisted.

The applicant alleged that the audiometer testing results on the Form 88 were fraudulent because the doctor who performed his physical examination did not have testing equipment available at the time. He also complained that although he listed that he had "swollen or painful joints' and 'trick' or locked knee"' in the past on his Report of Medical History (Standard Form 93), the examining physician made no comment about the condition. He asserted that problems with his joints and knees disqualified him for separation.

The applicant alleged that he was treated at [redacted] while on active duty and that those records have been removed from his medical record. He asserted that the removal of the hospital records calls into question the accuracy of his medical record. His military record contains a message dated November 20, 1985 from his then-unit to Commandant requesting a

replacement for the applicant because he had undergone surgery at [redacted] due to a severe abdominal infection and abscess of the colon.

The applicant asked that an unsigned page 7 of his pre-discharge counseling, prepared in accordance with Article 12-B-4(D)(4) if the Personnel Manual then in effect, be removed from his record. The page 7 advised the applicant that to keep his then-current rank he was required to reenlist within 24 hours of discharge and that to remain in continuous service status he was required to reenlist within 3 months of separation. The page 7 also advised the applicant about the receipt of medical care for 90 days after discharge, about serving in the Reserve, and about outpatient dental and medical care through the Department of Veterans Affairs (DVA).

The applicant stated that he did not discover the alleged error until December 7, 2006 upon going to the Disabled American Veterans organization. He stated that it is in the interest of justice to consider his application even if untimely because he was never advised of his right to contest the alleged erroneous entries as evidence by the unsigned page 7.

The applicant concluded his statement with the following;

> [T]he above actions have caused the petitioner to suffer through physical pain and the frustration of having the [DVA], to whom he turned for assistance, claim that no records of any medical condition or treatment are present in the official records. . . . It is imperative that this Board give the petitioner the rights he is entitled to and was wrongly denied upon separation. In taking [this] recommended action the Board can correct a longstanding wrong, insure that official records are complete, accurate, and correct, and possibly help insure other service members actually get the counseling and examinations needed to provide medical care upon separation.

BACKGROUND

After serving in the Coast Guard Reserve, the applicant enlisted in the regular active duty Coast Guard on April 20, 1981. He underwent a reenlistment/discharge physical examination on May 11, 1987. The report noted that the applicant was overweight and suffered from hypertension and that he had a surgical scar as a result of his 1985 surgery. On the front of the Standard Form 88 (report of medical examination), there is a stamped notation dated September 29, 1987 and signed by a HS1 that the physical examination was reviewed and the examinee is considered to be disqualified for reenlistment due his blood pressure readings. However, a subsequent stamped notation dated October 8, 1987 and signed by the HS1 stated that the physical examination was reviewed and the examinee is considered to be qualified for reenlistment/discharge. The physician noted on the reverse of the Form 88, that the applicant had a repeat blood pressure reading on September 16, 1987. The physician also stated that the applicant was qualified for discharge.

On September 16, 1987, the applicant signed an entry terminating his health record. The entry stated that the applicant had been informed of the findings of the physical examination given to him on May 11, 1987 for discharge and agreed with the findings of the examining

physician and that he did not desire to make a statement in rebuttal. Right below the signed entry, the applicant was advised of the following:

> You have been examined and found physically fit for separation from active duty. Any defects noted during this examination are recorded in block #74 of the . . . medical examination (SF-88).
>
> The defects listed [on the medical forms] do not disqualify you from performance of your duties or entitle you to disability benefits from the Coast Guard. To receive a disability pension from the Coast Guard you must be found unfit to perform your duties before you are separated.
>
> After you are separated . . . any claims for disability benefits must be submitted to the Veterans Administration. It is suggested that you contact the VA Regional Office nearest your home as soon as practicable after your separation for certain benefits you may be entitled to.

Directly below the above entry the applicant signed an entry that stated the following: "I acknowledge receipt of a copy of my last physical examination (SF 88), my international certificate of immunization (PHS 731) and a copy of my chronological record of service (CG 4057)."

The applicant was discharged from the Coast Guard on October 17, 1987 with a RE-1 reenlistment code (eligible for reenlistment).

According to a rating decision from the DVA dated November 19, 2007, the applicant filed an original claim with the DVA on December 6, 2006, approximately 19 years after his discharge. The DVA denied his disability and compensation claims for low back injury, cervical injury, left knee injury, right knee injury, left foot stress fracture, bilateral hearing loss, tinnitus, varicose veins, not otherwise specified, diverticulitis, and stress induced traumatic anxiety neurosis. The DVA found that there was no service connection between these conditions and the applicant's military service.

VIEWS OF THE COAST GUARD

On June 3, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG noted that the applicant's application was untimely. He also based his recommendation in part on a memorandum on the case prepared by Commander, Personnel Service Center (PSC).

PSC stated that the applicant voluntarily separated from the service on October 17, 1987, his separation physical was completed in accordance with regulation, and there were no unfitting or disqualifying conditions noted. PSC noted that the applicant and the DVA had requested his hospital records from [redacted] but were told that the records had been destroyed by [redacted]

PSC stated that the applicant had applied for and was granted disability benefits from the Social Security Administration for injuries, illnesses or conditions that were incurred in his civilian workplace. PSC noted that the applicant also applied for and was denied DVA benefits because his conditions could not be connected to his service in the military. PSC asserted that the Coast Guard cannot connect any of the applicant's conditions or injuries with service in the military. PSC noted that the applicant's medical records show that he had a work-related injury to his right knee and left ankle in his civilian job when he slipped and fell on an icy ramp in January 2001. Another medical injury indicated that the applicant also fell in the 1990's when he slipped on oil when stepping out of a toll booth and injured his right knee, left foot, left ankle, hip, and lower back.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On July 7, 2010, the Board received the applicant's response to the views of the Coast Guard. He disagreed with them. He argued that it is in the interest of justice to waive the untimeliness because he was never counseled regarding his discharge rights and that he was unaware of the entries on the SF-88 because he had no reason to obtain or review his records before applying for DVA compensation in 2006.

With regard to the notation on the SF-88 dated September 29, 1987, stating that he was disqualified for reenlistment, he stated that it was not made on the date of the examination, which was May 11, 1987. He argued that because of this disqualification statement on the SF-88, the Commander, CG [redacted] rejected his intention to reenlist. After this rejection, he took terminal leave. He argued that at no time was he ever aware of the October 1987 notation that he was qualified for reenlistment. He stated that even if hearing tests are required only for enlistment as the Coast Guard suggested, the audiograms in his record are fraudulent and should not be there.

The applicant denied that he voluntarily separated from the Service but was told that he was ineligible for reenlistment per the September 29, 1987 entry. He also argued that the Coast Guard failed to maintain his medical record as evidenced by the alleged missing records from [redacted] He stated that the records of the doctor who performed his surgery were destroyed in 2002.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The application was not timely. The applicant had been discharged for approximately seventeen years before he filed this application with the Board. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.

3. However, the Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. Although the applicant alleged that he discovered the alleged error on December 7, 2006, he argued that it is in the interest of justice to waive the statute of limitations in his case because he was not aware of the October 1987 entry stating that he was qualified for reenlistment or discharge and because his records from [redacted] are not in his record and have been destroyed. However, the record indicates that on September 16, 1987, the applicant was on board the command because on that date he signed a document terminating his health record. In doing so, he acknowledged that he had a discharge physical examination, acknowledged that he agreed with it, and acknowledged that he did not desire to write a statement in rebuttal. He was also informed on the document terminating his health record that he had been found fit for separation and any defects listed on the SF-88 did not render him unfit to perform his duties. He was also told that after his separation any claims for disability benefits must be submitted to the DVA and that he should contact the DVA as soon as possible. The applicant also acknowledged on this document that he had received a copy of his last physical examination. Therefore, even if the two stamped entries were not on the SF-88 that the applicant received, the doctor's signature and affirmation on the page 2 of the document that the applicant was qualified for discharge were there. Additionally, the applicant signed his DD Form 214 showing that he was discharged due to expiration of enlistment (voluntary separation) with an RE-1 reenlistment code, allowing him to reenlist if he wanted to. With regard to the missing medical records, the record establishes that the applicant was told to go to the DVA immediately after discharge. If he had done so, his hospital records would now be in his record. In light of the evidence, the Board is satisfied that the applicant was on notice that he was found fit for discharge. If he disagreed with that assessment, he should have sought to correct it immediately and not wait 19 years to do so. Accordingly, the Board is not persuaded to excuse the untimeliness of the application in this case.

5. Even though the Board is not persuaded to excuse the untimeliness of the application based on the applicant's reason for not filing his application within the time period allowed, the Board must still perform a cursory review of the merits in deciding whether to excuse the applicant's untimely filing. A review of the merits indicates that the applicant is not likely to prevail on his request for a change in the reason for his discharge, as discussed below.

6. The applicant alleged that he was not aware of the HS1 entry of September 29, 1987 stating that upon review of the physical examination the applicant was considered to be disqualified for reenlistment due to his blood pressure readings. Nor was he aware of the subsequent October 8, 1987 entry by the same HS1 who stated that upon review of the physical examination the applicant was qualified for reenlistment/ discharge. The first and second entries could both be accurate. However, more important than the two HS1 entries is the examining doctor's finding that the applicant was fit for discharge on the reverse of the SF-88.

Additionally, as stated in finding 4 above, the applicant signed entries on September 16, 1987 acknowledging receiving the physical examination for the purpose of discharge, that he was found fit for separation, that his obesity and hypertension did not interfere with his ability to perform his duties, and that after separation any claims for disability benefits must be made to the DVA. He also acknowledged receiving a copy of the SF-88 where the examining physician found that he was qualified for discharge. Therefore, the preponderance of the evidence is that the examining physician found the applicant fit for discharge, that the applicant was aware of it, and that he did not disagree with that finding.

7. The applicant has not shown by a preponderance of the evidence that the HS1's October 8, 1987 entry is inaccurate. It could have been made to correct the September 29, 1987 entry. In this regard, the Board notes that the HS1 stamped that he reviewed the physical examination and noted disqualification for reenlistment. However, it is the doctor's determination that is persuasive to the Board and he found the applicant fit for discharge. After 19 years the Board has no way of knowing if either of the entries is invalid or the reasoning behind them. However, the evidence shows that the examining physician found the applicant to be fit for discharge and the applicant acknowledged as much on the document closing out his health record. Therefore, the Board finds insufficient evidence to prove that the October 8, 1987 entry is erroneous.

8. The applicant argued that he was not aware of the October 1987 entry because he was on terminal leave. The applicant's military record contains a statement of intent which indicates that the applicant intended to take annual leave prior to reenlisting or separating. However, there is no documentation showing when the applicant actually began annual leave. It appears that if he took terminal leave, it did not begin until after September 16, 2007, the date he signed his DD 214 and document terminating his health record.

9. The applicant has offered no evidence except for his own allegation that the audiometer readings on the SF-88 are false. This is insufficient evidence to prove his claim. Further his claim that his knee problems disqualified him for separation lacks proof. He noted that he had problems with his knees and joints when he completed his medical history, but apparently the examining physician did not find his joints and knees to be problematic.

10. There is evidence in military record that the applicant's then-CO noted that the applicant had been hospitalized due to an abdominal infection. However, there are no records of the applicant's hospital stay in the record. The Board has no way of knowing if these records were ever in the military medical record, but if not, they should have been. However, the SF-88 notes that the applicant had a surgical scar from bowel surgery, which indicates that the examining physician was aware of the surgery, but he did not find that the applicant's surgery was disqualifying for separation. According to the Coast Guard and DVA, the applicant's hospital records were destroyed by [redacted] in 2008. However, if the applicant had not waited for 19 years to submit his application, the Board would likely have been able to obtain a copy. As the records related to the applicant's hospital stay have been destroyed, a Board order directing the Coast Guard to place them in the record would be futile.

11. The applicant's request to have an unsigned page 7 removed from the record is noted. However, since it is unsigned by both the applicant and the command, the Board fails to see how it is prejudicial to the applicant. The applicant claims that it proves that he did not receive the counseling to which he was entitled upon separation. Indeed Article 12-B-4.d. of the Personnel Manual requires counseling on the consequences of not reenlisting within 24 hours of discharge. The applicant's claim that he would have reenlisted if it had not been for the HS1's erroneous September 29, 1987 stamped entry on the SF-88, is not convincing. In this regard, how could he have known of the September 29, 1987 stamped entry if he was on terminal leave as he claimed. In addition, his DD 214 clearly shows that he was eligible to reenlist with an RE-1 reenlistment code. The other information on the page 7, such as having 90 days to file for dental care from the DVA, has nothing to do with the applicant's claim about being disqualified for separation. The page 7 would only have advised the applicant about the dangers of not reenlisting within 24 hours, about temporary health care, and about filing with the DVA within 90 days of discharge for dental care. The Board fails to see how not receiving this information has any bearing on the issue of the applicant's qualification for discharge or the loss of the [redacted]

12. Therefore, due to the passage of time, the lack of a persuasive reason for not filing his application in a timely manner, and the probable lack of success on the merits of his claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

13. Accordingly, the Board finds that the application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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