

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-113

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted 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 upon receiving the completed application on April 4, 2012, 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 January 18, 2013, 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 his record to show that he was separated due to a medical condition—epilepsy—pursuant to medical board processing under the Coast Guard's Physical Disability Evaluation System (PDES). The applicant's military record currently reflects a discharge due to "miscellaneous/general reasons" on September 27, 2010.

The applicant alleged that he was diagnosed with epilepsy in December 2009, and that it was this diagnosis that caused his discharge. Upon making the diagnosis, his physician, Dr. T, told him to get a second opinion and that if the diagnosis was confirmed, medical board processing for separation would be required. After the diagnosis was confirmed on February 23, 2010, Dr. T again told him that he would be evaluated by a medical board. In addition, Dr. T told him that he should not drive, which made it very difficult for the applicant to commute to work. He often had to walk to work and to medical appointments, and he would be charged leave when he was late to work because he could not get a ride and had to walk. His command told him to move to quarters on base, but he did not have the money to store his possessions or to move them to his family home in XXXXXXXX, so he stayed in his apartment.

The applicant alleged that in May 2010, when he refused to perform a task until a proper safety precaution was taken, he was told he would receive a Page 7 record entry about insubordination. A first class health services specialist (HS1) later told him that he would be punished at mast and receive a dishonorable discharge. The HS1 also repeatedly advised him to request a

hardship discharge and told him that it “would be the same thing as a medical discharge.” The HS1 told him that it would take a couple of years to be processed for a medical separation under the PDES, and it seemed like the HS1 did not want to go to the trouble.

The applicant alleged that he continued to have seizures, and the doctors told him it was unsafe for him to live alone. He was feeling a lot of stress and anxiety and was referred to a psychologist, who diagnosed him with post-traumatic stress disorder (PTSD). He did not feel calm enough to make a good decision but did submit a request for a hardship discharge. However, when he went to a Navy hospital to get a discharge physical, the doctor who examined him said he was crazy to request a hardship discharge and “started calling people.” Several other people also advised him not to do that. One of them took him to the office of the Sector Commander, who said that “he still had the paperwork for the mast [non-judicial punishment (NJP)] on his desk and if [the applicant] didn’t do the hardship [discharge] it would be processed. There was nothing I could do. I was forced to waive my rights to a medical board. I lost part of my G.I. bill and other benefits because of this and I didn’t even get a proper physical.”

In support of his allegations, the applicant submitted copies of his medical records, which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

On April 1, 2008, the applicant enlisted in the Coast Guard at age 21. During his pre-training and recruit training physical examinations, he denied any family history of epilepsy or seizures. He admitted that he had once been hit in the eye with a baseball, which broke his orbital bone and caused him to lose consciousness. Upon completing recruit training, he was assigned to an [REDACTED]

On August 14, 2008, the applicant underwent an MRI of the brain due to “head trauma, headaches, vision loss.” The report states that the results were normal.

On February 9, 2009, the applicant was counseled on a Page 7 for repeatedly being late to work. He was advised that future incidents would result in his placement on performance probation or an award of non-judicial punishment (NJP).

On March 30, 2009, the applicant was awarded NJP for insubordinate conduct after he repeatedly failed to follow directions regarding a safety issue and argued with a superior about it. He was awarded punishment of 7 days’ restriction with extra duties and 14 days’ arrest in quarters, which was suspended for 6 months on condition of good behavior.

On June 2, 2009, the applicant began seeking treatment for anxiety, nightmares, and difficulty sleeping, which he attributed to his [REDACTED]
[REDACTED] He was prescribed Xanax.

On June 3, 2009, the applicant was counseled on a Page 7 for unsafe operation of a Government vehicle. He had been stopped for speeding on base on June 1st, and on June 2nd he ran into a curb, damaging the tire rim, and got the “vehicle stuck while conducting tower climbing

training.” The command rescinded his driver and trailer qualifications and ordered him to retake an on-line defensive driving course, conduct motor vehicle safety training for the unit, re-qualify as a trailer operator, and park off-base until qualified.

On June 28, 2009, the applicant drove off the side of a highway and crashed into a tree. A paramedic reported that the applicant could not recall what had caused the accident and had an abrasion on his face, swelling around the eyes, and a sore neck. An emergency room report shows that the applicant complained of severe head pain and body aches. A CT scan of his brain showed “nor evidence for traumatic injury to the head,” and a CT scan of his back showed no injury. He was diagnosed with a concussion without loss of consciousness.

On June 29, 2009, the applicant reported to a clinic for a follow-up appointment. He told the doctor he had fallen asleep at the wheel and hit a tree. He complained of a headache and body aches and some dizziness upon waking that morning. The doctor diagnosed the applicant with a concussion without loss of consciousness.

On July 1, 2009, the applicant underwent a thorough medical examination to be “cleared from MVA” (motor vehicle accident). He complained of a headache, body aches, and stiff neck. The applicant asked for counseling because his little brother had recently died and he was “having issues sleeping” and wanted his prescription for a sleep aid refilled. The doctor found “no evidence of head injury.” The applicant was placed on “light duty” for 14 days, told not to run or jump or do anything physically stressful, and referred for counseling.

Following the accident, the applicant was counseled on a Page 7 for falling asleep at the wheel and not wearing a seatbelt. The Page 7 notes that not wearing a seatbelt was a violation of both local law and ALCOAST 433/09 Off-Duty Motor Vehicle General Order. The Page 7 states that the command would not award the applicant NJP for the violation because the police had issued him a ticket for the offense. The supervisor wrote that no line of duty determination was necessary because the accident did not render the applicant unable to perform his duties for more than 24 hours. However, he noted, “had your injuries been more severe, your negligence could have additionally caused the loss of future medical benefits to include medical bills and/or disability resulting from your accident, or even the loss of your [life insurance] benefits. One more poor decision could result in medical and financial consequences that would last the rest of your life.”

On July 8, 2009, the applicant, who had been undergoing endodontic dental treatment, sought medication for jaw pain, which he said had increased because of his accident. He reported that he had stopped taking Xanax, which had been “prescribed for grief” and was starting grief counseling the next day.

On October 1, 2009, the applicant was prescribed pain medication for back pain. He complained that he had suffered from sharp back pains since he had fallen off a ladder and landed on his back about three months earlier. (There is no medical record of this injury.)

On October 19, 2009, the applicant went to a hospital complaining of a headache and possible seizure. A CT scan of the applicant’s brain showed “no acute intracranial findings.” He

told the doctor he had no family history of seizures and was diagnosed with syncope (fainting) but advised to consult a neurologist.

On November 24, 2009, a neurologist, Dr. B, noted the applicant's description of his apparent loss of consciousness on June 28 and October 19, 2009. He also noted that the applicant had "a positive family history for epilepsy in an uncle, an aunt, and a brother ... who are all epileptic." The neurologist diagnosed the applicant with an epileptic disorder; started him on 750 milligrams (mg) of Keppra, an anti-seizure medication, daily; and ordered an EEG and MRI of his brain.

On December 3, 2009, the applicant's physician, Dr. T, noted the applicant's motor vehicle accident in June 2009 and provided more details of the second incident in October 2009. One of the applicant's coworkers reported hearing him making "sounds and shaking" in another room. The doctor noted that the applicant could not drive, perform boat or sea duty, operate heavy machinery, or perform duties of a sensitive nature. In addition, he noted that the applicant did not qualify for worldwide assignment.

On December 10, 2009, Dr. B noted that the applicant's two episodes of loss of consciousness had been followed by "diffuse soreness and achiness in his muscles" and that he "has a strong family history positive for epilepsy." However, the results of EEG and MRI tests were normal. The neurologist wrote that the applicant "is epileptic until proven otherwise" and could live a normal life except that he (1) could not work near open water, (2) should avoid heights, (3) should avoid working near dangerous moving machinery, and (4) should follow the State's driving limitations for people who have seizures. He noted that the applicant was tolerating the Keppra well but should be "transferred to a place where he will be close to his family in case he has more seizures." However, instead of being transferred to a unit near his home in XXXXXXXX, XXXXXXXX,¹ the applicant was transferred to the Sector office so that he would be closer to the military hospital where he was being treated.

On February 23, 2010, another neurologist, Dr. S, provided a second opinion. She noted that according to the applicant, he had first experienced a loss of consciousness while driving at 65 to 70 miles per hour in June 2009 and may have hit his head when his truck hit a tree. His brother, who had nearly drowned at age 2 and suffered seizures thereafter, had died in May 2009 at age 17, and the applicant was "physically and mentally tired from dealing with his brother's illness." In October 2009, a coworker reported hearing the applicant "wrestling something" and making "weird noises" for about ten minutes in a locker room. When his chief found him in another building a while later, the applicant was confused for several minutes and had no memory of walking from the locker room to the other building. He felt like he had been "hit by a bus." Dr. S wrote that, according to the applicant, apart from his brother having seizures after nearly drowning, there was "no other family history of seizures." The neurologist concluded that the applicant had a "likely seizure disorder" but noted that his EEGs were normal.

¹ The applicant's family lived in xxxxxxxx. The Coast Guard has an [REDACTED] in xxxxxxxxxxxx, about 16 miles from xxxxxxxxxxxx. The [REDACTED] consists of boat crewmembers responsible for maintaining the [REDACTED] and mechanics who maintain the boats. The only non-water-related Coast Guard units in xxxxxxxx are in xxxxxxxxxxxx, which is 240 miles from xxxxxxxx. The closest military hospital is in xxxxxxxxxxxx, which is 80 miles from xxxxxxxxxxxx.

On March 16, 2010, the applicant was counseled on a Page 7 for being late to work and not calling in to explain his status. When the command called him an hour after the start of the work day, the applicant said he needed a ride to work. The Page 7 states that there “is no excuse for failing to contact the unit and ensure that your chain of command is aware of your situation. Any future incidents of this nature may result in disciplinary action.”

On April 15, 2010, the applicant’s physician, Dr. T, noted that the diagnosis of epilepsy had been confirmed and that if he had no seizures for a year while taking Keppra, no medical board would be required but that if he had “breakthrough seizures,” one would be required.

On April 29, 2010, the applicant’s supervisor sent him to the health clinic because the applicant had overslept and come to work late. The doctor reviewed his medications—Vicodin, Keppra, and Xanax—and discontinued the last. The applicant was sent back to the clinic later in the day for making a suicidal statement, “I’d rather be dead than listen to [a petty officer’s] shit!” He denied wanting to harm himself or anyone else.

On May 4, 2010, the neurologist, Dr. B, noted that the applicant was regularly taking Keppra but had recently woken up feeling very tired, confused, and “very sore with pain in his mouth as if he had been clenching his teeth.” The neurologist concluded that he had experienced a seizure and increased his dosage. In addition, he noted that he had written to the applicant’s command to recommend that the applicant be transferred to a unit closer to his family. The applicant’s dosage of Keppra was increased to 1,000 mg of Keppra per day.

On May 10, 2010, a psychiatrist noted that the applicant was suffering from an adjustment disorder with depressed mood due to grief and many stressors and would benefit from counseling. He prescribed Prozac.

On May 12, 2010, a psychologist reported that the applicant was suffering from PTSD due to the death of his brother in May 2009.

On May 19, 2010, the applicant told his physician, Dr. T, that he had suffered two nocturnal seizures within the past month despite being on anti-seizure medication. Dr. T noted that the applicant had also seen a psychologist due to multiple social and occupational stressors caused by his inability to drive. The applicant stated that he could not afford a taxi and that taking public transportation would be cumbersome because his commute would involve “multiple buses.” Dr. T recommended that the applicant be transferred to a unit near his family’s home. He also noted that because the applicant had suffered “breakthrough seizures” despite taking Keppra, evaluation by a medical evaluation board (MEB) was indicated.

On May 27, 2010, the applicant was placed on report for insubordination. The offense was confirmed by an investigation, and NJP was recommended.

On May 29, 2010, the applicant underwent more awake and asleep EEGs. Dr. B reported that the results were “within normal limits showing no current epileptogenic activities.”

On June 1, 2010, the applicant was counseled on a Page 7 about being late to work. His supervisor noted that the applicant's "inability to drive due to your current medical condition does not preclude you from securing reliable transportation to work each day. You are encouraged to consider moving on base as a means for mitigating your transportation situation. You are cautioned that any future incidents of this nature may result in disciplinary action."

On June 1, 2010, the applicant's psychologist wrote a letter to the command. He noted that the applicant was depressed and anxious and recommended that he be transferred to a unit close to his family so they could drive him to work and monitor him for seizures.

On July 14, 2010, the applicant's physician, Dr. T, noted that the applicant "does not desire a Med. Board. [He] wants to get out of the CG in an expeditious manner and go home to his family." The doctor noted that the applicant had been diagnosed with PTSD, wanted to waive his right to further medical board processing, and needed another psychiatric evaluation to see if he was mentally competent to waive his rights.

On July 26, 2010, the applicant signed a Certificate of Full and Fair Hearing, which was witnessed by a Navy JAG officer and a notary public of the State of XX. Each paragraph of the certificate is checked off. The certificate states the following:

I, [applicant's name], hereby certify it has been fully explained to me a medical board has found I am suffering from a physical disability, namely Post Traumatic Epilepsy.

I also acknowledge that I received a tentative diagnosis of Seizure Disorder and these conditions [sic] will not be evaluated by a medical board. By waiving my right to have these condition [sic] evaluated by a medical board, I understand that I will forego findings that may rate the disability under the Veterans Affairs Schedule for Rating Disabilities and entitled me to severance or retirement benefits. My diagnoses were the proximate result of performance of active duty and were incurred while I was entitled to basic pay from the United States Coast Guard.

I further certify it has been fully explained to me under 10 U.S.C. § 1214 and the regulations in Chapter 17, Personnel Manual, COMDTINST M1000.6 (series), I am entitled, as a matter of right, to a full, fair hearing before a physical evaluation board before my separation from the United States Coast Guard if I demand such hearing.

I further certify it has been fully explained to me that if I sign this statement, I may be separated from the United States Coast Guard in the near future without further hearing and without disability, retirement, or severance pay, and any compensation whatsoever; however, all payments ordinarily accruing to personnel discharged under honorable conditions are due and payable.

With full knowledge of the findings of the medical board convened in my case and of my rights in this matter, I hereby certify I do not demand a hearing before a physical evaluation board and request I be separated from the United States Coast Guard as soon as possible.

On August 6, 2010, the Sector Commander informed the applicant in a memorandum that he was initiating the applicant's honorable discharge because of the applicant's medical ineligibility for worldwide assignment and his waiver of a full and fair hearing. The Sector Commander stated that the applicant had a right to consult an attorney at Government expense, to object to the proposed discharge, and to submit a statement on his own behalf. The Sector Commander specifically encouraged the applicant to consult an attorney.

On August 9, 2010, the applicant acknowledged the Sector Commander's notification and acknowledged having consulted a Navy JAG officer. He submitted a statement requesting a discharge for the convenience of the Government. He noted that he had been diagnosed with epilepsy and could not drive for a year, live alone, or be around water, heights, or heavy machinery. He was having a hard time traveling to and from work, and four doctors had recommended that he be transferred closer to home, where his family could help him with transportation and watch him for future seizures.

On August 9, 2010, the Sector Commander submitted the discharge recommendation to the Coast Guard's Personnel Service Center (PSC) through the District Commander.

On August 10, 2010, the applicant signed a Page 7 stating that he desired to be discharged "despite the fact separation may prejudice any rights or benefits to which I may be entitled as a result of physical evaluation board hearings under 10 U.S.C. Chapter 61. I have been duly advised of my rights in this matter and request the Coast Guard to discharge me as soon as possible without further hearing and without disability, retirement, or severance pay and without any compensation whatsoever. I understand I am not required and am under no obligation to give this statement and I hereby certify I given this statement voluntarily."

The District Commander forwarded the separation package to PSC and recommended approval. He noted that the applicant had been counseled "and understands his rights with regards to a Physical Disability Evaluation Board. [He] desires to be discharged and use the VA to pursue any disability evaluation."

On August 18, 2010, the applicant's doctor reported that the applicant "has waived his right to an MEB, has done the Page 7 and his Admin[istrative] Sep[aration] package has been forwarded up the chain. [Patient] has not gone to military psych for the second opinion to judge if mentally competent to waive his right given his psych [diagnosis] of adjustment disorder. [Patient] has been doing well on the meds and has had no [seizures] since last visit with me." The doctor noted that the applicant was taking 500 mg of Keppra per day and "need[ed] to see military psych as prev[iously] recommended." The doctor noted that he had scheduled the applicant for a psychiatric examination the following week. The report of the psychiatric examination is not in the record.

An MRI of the applicant's brain on September 2, 2010, showed "normal intracranial anatomy."

On September 14, 2010, the applicant underwent a pre-separation physical examination by a new doctor, Dr. M. His medication list shows that he was taking Prozac, Keppra, and Klonopin (another anti-seizure medication). The applicant told the doctor about his truck wreck and a 16-foot fall that had caused several medical problems. When the doctor asked the applicant if he had been evaluated for a traumatic brain injury (TBI), the applicant said he had not. The doctor recommended that the applicant be processed through a medical board to address "possible TBI as a [unreadable] of fall from significant height, seizures, and PTSD."

Also on September 14, 2010, the neurologist, Dr. B, wrote that the applicant had “a case of generalized seizures” and although he “claims that he still has seizures while taking Keppra 500 mg two tablets b.i.d. but his EEG has shown no epileptogenic activity. Now he claims to have a chronic pain syndrome in his mouth, neck and lower back and he requested narcotics. I am beginning to suspect drug seeking behavior or manipulation.”

On September 27, 2010, the applicant was honorably discharged for “miscellaneous/general reasons.”

VIEWS OF THE COAST GUARD

On October 16, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG stated that the applicant was evaluated by an MEB that determined he suffered from post-traumatic epilepsy, which rendered him ineligible for worldwide assignment. Based on that determination, the applicant was processed for an honorable discharge, not a hardship discharge. Before he was separated, however, the applicant was also tentatively diagnosed with a general seizure disorder—a diagnosis that the MEB had not specifically addressed. The applicant waived his right to have the MEB repeated for the seizure disorder diagnosis “in order to speed up his separation from the Service.”

The JAG noted that the applicant has alleged that he was coerced to sign this waiver with threats of non-judicial punishment (NJP) and dishonorable discharge but that he submitted no evidence of the alleged threats. He pointed out that the applicant’s signature on the Certificate of Full and Fair Hearing, waiving his right to an MEB for the seizure disorder diagnosis, was witnessed by a Navy JAG and that there is no evidence of any coercion in the record. Therefore, the JAG concluded that there is insufficient evidence to overcome the presumption of regularity accorded the applicant’s military records and the actions of the military and medical personnel who handled his case.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC stated that the applicant was diagnosed with post-traumatic epilepsy while on active duty. An MEB evaluated his fitness for duty, and the results and his entitlement to a Physical Evaluation Board (PEB) under the PDES were explained to the applicant. The applicant was also tentatively diagnosed with a general seizure disorder, which had not been evaluated by the MEB. “Both conditions were the proximate result of service in the Coast Guard.” However, the applicant waived his right to an MEB for the latter condition and requested an expeditious discharge even though he was advised that he would not receive any disability, retirement, or severance pay or any compensation whatsoever. Therefore, the applicant was honorably discharged for miscellaneous/general reasons. PSC recommended that the applicant’s request be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 5, 2012, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response has been received.

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 application was timely filed within three years of the applicant's separation.

2. The applicant alleged that he was unjustly coerced to accept an administrative discharge and should have been medically separated under the PDES. 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.² 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."³

3. The applicant's military and medical records show that while on active duty, he was properly informed of his medical diagnoses and his rights to processing under the PDES for disability severance or retired pay but formally waived those rights because he wanted to be expeditiously discharged so that he could return to his family in XXXXXXXX, XX. The records further show that he was encouraged by his military doctors to stay in the Coast Guard long enough to complete PDES processing and that his Sector Commander encouraged him to consult an attorney so that he would understand what he was giving up by waiving his rights. The record shows that the applicant did consult an attorney but nevertheless opted to waive his rights under the PDES so that he could be expeditiously discharged.

4. The applicant alleged that he was coerced to waive his rights under the PDES and accept the administrative discharge, but he submitted no evidence to support this claim. He alleged that he was threatened with NJP for insubordination and a dishonorable discharge, but dishonorable discharges can only be issued by a court-martial.⁴ The applicant had already received NJP for insubordination on March 30, 2009, and so he cannot have been unfamiliar with the limits of NJP for such an offense, which does not include any type of discharge. The record supports the applicant's claim that a charge of insubordination was pending against him at the time of his separation. However, the fact that if he had remained on active duty, he might have received some NJP from the Sector Commander—or even be tried by court-martial—does not prove that his waiver of his rights under the PDES was coerced. In *Wright v. United States*,

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ Coast Guard Personnel Manual, Article 12.B.2 f.5.

2008 U.S. Claims LEXIS 96 *1 (April 7, 2008), the U.S. Court of Federal Claims stated that “a decision to retire is not rendered involuntary merely because the servicemember is faced with an undesirable choice.” And in *Christie v. United States*, 207 Ct. Cl. 333, 337-8 (1975), the court held the following:

This court has enunciated a principle, now firmly established, for determining whether a resignation is voluntarily tendered. The element of voluntariness is vitiated only when the resignation is submitted under duress brought on by Government action. ... The tripart test for such duress is: “(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the results of coercive acts of the opposite party.” [Citations and indentation omitted.] ... Duress is not measured by the employee’s subjective evaluation of a situation. Rather, the test is an objective one. ...

The record before the Board shows that the applicant was encouraged to and could have remained in the Service for PDES processing to determine his entitlement to disability severance or retirement pay, but he chose not to. The evidence of record does not support his claim that he waived his right to PDES processing under duress or coercion.

5. The record shows that the applicant strongly desired to return to his family home in XXXXXXXX, XXXXXXXX, instead of working at the Sector office long enough for his PDES processing to be completed. He complained that his commute by bus was too burdensome because he could not drive, and it was unsafe for him to live alone. His doctors supported his request to transfer to the unit closest to his family home. However, the record shows that the applicant was offered housing in the Sector barracks so that he would not need to commute or live alone, but he chose not to move into the barracks because he did not want to store or get rid of some of his apartment furnishings. Moreover, the applicant was not allowed to work near the water; the closest unit to his family home was an [REDACTED] and there was no non-water-related Coast Guard unit within 200 miles of his family home in XXXXXXXX. The closest military hospital to XXXXXXXX was 80 miles away. In light of these facts, the Board finds that the Coast Guard committed no error or injustice in refusing to transfer the applicant to a unit that would allow him to live with his family in XXXXXXXX.

6. The record shows that the applicant’s physician, Dr. T, thought that he should have a mental competency test to determine whether he was mentally competent to waive his rights under the PDES, and the doctor who completed his pre-separation physical examination in September 2010 thought that he should be tested to see if he was mentally incompetent due to a TBI. Dr. T scheduled an appointment with a psychiatrist in August 2010 to determine his mental competency, but there is no report of that psychiatric examination in the record before the Board. If the applicant was mentally incompetent to make decisions in 2010, then the waiver of his rights under the PDES was invalid. However, the record shows that he was under psychiatric care at the time of his discharge and had been for some time, but no doctor had diagnosed him as mentally incompetent. The fact that the applicant was discharged after presumably undergoing the competency examination scheduled by Dr. T strongly suggests that he was not mentally incompetent.⁵ In the absence of any evidence that the applicant was mentally incompetent to

⁵ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

waive his right to PDES processing in 2010, the Board finds insufficient grounds to set aside his waiver or administrative discharge or to correct his discharge to reflect a medical disability separation.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

