DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2013-004

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. The Chair docketed the case after receiving the applicant's completed application on October 9, 20012, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 12, 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, who was honorably discharged from the Coast Guard in 1982, asked the Board to correct his military record to show that he was medically separated due to a physical disability. He alleged that while reviewing his medical records in 2010 he learned that he was recovering from a "viral syndrome" when he was hurriedly discharged and so may have been denied a lawful entitlement. He argued that the fact that the doctor noted that he was recovering from the virus does not mean that he ever recovered and that the claim that he was recovering was mere speculation. He alleged that the viral syndrome was traumatizing and devastating, particularly to his immune system, may be related to his later diagnosis of HIV/AIDs. He alleged that since his discharge, he has been repeatedly stricken with strange ailments for which his doctors have found no cause. The applicant alleged that Coast Guard doctors hid from him the seriousness of his condition. In support of these allegations, he submitted copies of his medical records, which are included in the summary below. The applicant alleged that he did not discover this error in his record until January 5, 2011.

SUMMARY OF THE APPLICANT'S MEDICAL AND MILITARY RECORDS

The applicant served on active duty in the Coast Guard from July 3, 1978, to February 28, 1982. While in the Coast Guard, the applicant was repeatedly counseled about his poor performance and awarded non-judicial punishment (NJP) for minor infractions. He advanced to [redacted] but was reduced in rate to [redacted] at mast. His Coast Guard medical records show that he was occasionally treated for minor medical problems. On November 13,

1981, he was treated in a hospital emergency room for a laceration on his left temple. He told the doctors that he had been hit in the face with a brick the night before but had not lost consciousness or felt dizzy.

On November 23, 1981, the applicant underwent a pre-separation physical examination. On his medical history, he reported that he was in good health and not taking any medications. The doctor noted that blood test results showed that he was recovering from a "viral syndrome," which was not considered a disability (NCD). The applicant was found to be physically qualified for separation. On December 2, 1981, the applicant signed a form agreeing with the doctors' findings and declining to rebut them.

On January 13, 1982, the applicant's commanding officer advised him in writing that he would be separated because his low performance marks met the criteria for separation due to a reduction in force (RIF) announced in ALDIST 438/81. The applicant acknowledged the notification and asked to be discharged as soon as possible.

On February 28, 1982, the applicant was honorably discharged for the convenience of the Government due to a general demobilization and RIF with reenlistment code RE-1, denoting his eligibility to reenlist.

From April 24, 1985, to March 3, 1988, the applicant served on active duty in the Army. Although fit for duty upon enlistment, his Army medical records show treatment for various medical conditions. While in the Army, he was screened and found not to have HIV. He received a general discharge due to unsatisfactory performance after having been diagnosed with a mixed personality disorder with histrionic and antisocial features.

On November 16, 1992, the applicant underwent neuropsychological testing "to help ascertain an amnestic syndrome" because he came to the hospital complaining of hearing voices telling him to kill himself. He had been drunk and smoking marijuana and cocaine. The doctor noted that the applicant had been diagnosed with a personality disorder, a "15-year history of polysubstance dependence (cocaine, cannabis, opiates, alcohol—primarily alcohol)," and arthritis. The applicant told the doctor that he had suffered two significant head injuries in his life, one as a child and another when someone hit him in the head with a brick when he was in the Coast Guard. The testing showed that the applicant suffers from a "mild to moderate organically-based cognitive impairment." The doctor noted that it might be related to his head injuries or to his long-term polysubstance abuse.

In 2009 and 2011, the applicant applied to the Department of Veterans' Affairs (DVA) for benefits due to post traumatic stress disorder (PTSD). He alleged that he was traumatized as a soldier in the Army when he was diagnosed with a mental illness, harassed, and awarded non-judicial punishment (NJP). He also alleged that the "viral syndrome" he was recovering from in 1982 was related to his current diagnosis with HIV/AIDS. The DVA has denied his claims.

VIEWS OF THE COAST GUARD

On April 19, 2013, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the applicant's request for its lack of merit.

The JAG argued that the application was timely filed because the applicant did not discover the diagnosis of "viral syndrome" until he reviewed his medical records in 2010. The JAG alleged, however, that the evidence of record shows that the applicant was separated because of an authorized RIF due to budget constraints in 1982. The separation was conducted in accordance with policy and the applicant underwent a pre-separation physical examination, which showed that he was medically qualified for separation. The JAG stated that the report of the examination shows that the applicant's blood test indicated he was recovering from a virus when he was discharged, but there is no evidence that he has continued to suffer from the virus or related problems resulting from the virus since 1982, as the applicant alleged. The JAG also noted that the Army HIV test in 1987 proves that the applicant did not get HIV while in the Coast Guard. The JAG concluded that the applicant has failed to prove by a preponderance of the evidence that he should have received a medical separation with a disability rating. He noted that there is no evidence that the "viral syndrome" prevented the applicant from performing his military duties in 1982.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 16, 2013, the BCMR mailed a copy of the views of the Coast Guard to the applicant at the address he provided on his application. The package was returned by the Post Office with a note indicating that the applicant no longer lives at that address. No further information has been received from the applicant. Under 33 C.F.R. § 52.21(d), it is an applicant's responsibility to provide the BCMR with his correct mailing address and to inform the BCMR in writing of any subsequent change of address until the Board's decision is issued.

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.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[1]

3. An application to the Board must be filed within three years of the day the applicant discovers the alleged error in his record.[2] The applicant alleged that his record is erroneous because he had a "viral syndrome" when he underwent his pre-separation physical and so should

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[1] *See Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

[2] 10 U.S.C. § 1552(b).

have received a medical separation and disability rating. The applicant alleged that he discovered this error in his record on January 5, 2011,[3] and the JAG stated that his application is therefore timely. The record shows, however, that on December 2, 1981, the applicant was advised of the results of his November 23rd pre-separation physical examination, which included the finding that he had a "viral syndrome," and agreed with them, and that on January 13, 1982, he was notified that he was being discharged due to a RIF (not a medical disability) and agreed with the proposed discharge. While the applicant has (not surprisingly) forgotten what the doctor told him in the intervening thirty years, the preponderance of the evidence shows that "the essential facts which gave rise to the application were known to [the] applicant long before the asserted date of discovery. Knowledge of those facts constituted the date of discovery."[4] Therefore, the application is untimely.

4. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that to determine 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."[5] The court further instructed that "the 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]

5. The applicant failed to justify his delay with any explanation of why he could not have submitted his application to the Board within three years of his discharge.

6. The Board's review of the merits of this case indicates that the applicant's request for a disability rating and medical separation lacks merit. Disability ratings and pay may be authorized when a member has been rendered "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability."[7] The record shows that at the time of and subsequent to his discharge from the Coast Guard, the applicant was fit for duty because he later served on active duty in the U.S. Army. The HIV test he passed in 1987 proves that he did not contract that virus while he served in the Coast Guard. The record contains no evidence that substantiates the applicant's allegations of error in his Coast Guard military record, which is presumptively correct.[8] Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

7. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

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[3] The Board notes that the applicant alleged that he reviewed his medical records in 2010 but alleged that he discovered the error in his record on January 5, 2011.

[4] Barney vs. United States, 57 Fed. Cl. 76, 78 (2003) (upholding decision of Air Force BCMR).

[5] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

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

[7] 10 U.S.C. § 1201.

[8] 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.").

ORDER

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

[redacted]