

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-030



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 upon receipt of the applicant's completed application on November 29, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated August 8, 2013, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED AND ALLEGATIONS

The applicant asked the Board to correct his record by amending his medical board report to include "the facts and disposition of [an] Admiral's Mast that was postponed [in his case] on March 26, 1990." He alleged that the comment "There is no known disciplinary action, investigation or processing for administrative discharge pending"¹ in the medical board is inaccurate. The applicant alleged that the no disciplinary action pending comment is inaccurate because on March 25, 1990, he requested and was authorized an admiral's mast that was scheduled for Monday March 26, 1990. He stated that he could not keep the appointment because his command had him involuntarily admitted to the Veterans Medical Center [REDACTED]. He alleged that the command's action resulted in his "inaccurate" termination from the Coast Guard Reserve.

The applicant stated that he wanted an accurate record of his medical board and discharge from the Coast Guard for the benefit of his family. He stated that he did not discover the alleged error until March 15, 2012. He explained that he is an alcoholic and did not become sober until about ten years ago.

¹ Paragraph 3.a. of Figure 3-1 of the Physical Disability Evaluation System (PDES) manual requires the medical board report to comment on whether any disciplinary action is pending against an evaluatee.

PHYSICAL DISABILITY EVALUATION SYSTEM (PDES)²

The applicant was a [REDACTED] in the Reserve when he was processed under the Physical Disability Evaluation System (PDES) to determine if he had a disabling condition that rendered him unfit for continued military duty.

The applicant underwent a medical board³ on April 8, 1990 and was diagnosed with “Bipolar Disorder, Manic with mood congruent delusions . . . DSM III-R 296.40.” The medical board determined that the applicant was not fit for duty as a result of the disability. The medical board referred the applicant’s case to the Central Physical Evaluation Board (CPEB)⁴ for processing. The medical board report discusses the bases for its findings and includes the comment that “[t]here is no known disciplinary action, investigation or processing for administrative discharge pending,” as required by regulation.

The medical board findings were referred to the applicant for rebuttal. On April 27, 1990, the applicant acknowledged receipt of the medical board and signed a statement that he did not desire to submit a rebuttal to the findings and recommendation of the medical board.

The CPEB report is not in the record, but the Formal Physical Evaluation Board (FPEB)⁵ is in the record. The FPEB held an oral hearing in the applicant’s case on July 23, 1991 to determine if the applicant was physically qualified for continued service in the Coast Guard. The applicant was represented at the FPEB by a military lawyer. The FPEB found that the applicant was not fit for duty by reason of physical disability due to bi-polar disorder. The FPEB rated his disability as 10% disabling under VA code 9206 (bi-polar disorder, manic). The FPEB recommended that the applicant be separated from the Coast Guard with severance pay.

On August 13, 1991, the applicant submitted a rebuttal to the FPEB challenging the finding that he was unfit for duty and asked that the finding be set aside. He asked that a finding of fit for duty be entered instead. On September 20, 1991, the FPEB responded to the applicant’s rebuttal and stated that the FPEB adhered to its original findings and recommendation.

² The PDES is a Coast Guard structure composed of administrative boards and reviewing and approving authorities whose common purpose is evaluating members for their physical ability to continue the required performance of their duties and the equitable application of the laws relating to separation or retirement of members because of physical disability. Article 2-A-37 of the PDES Manual (1988)

³ A medical board is a clinical body comprised of 2 or more medical officers who evaluate an individual’s condition in light of the requirements of military duty and provide a written professional opinion concerning the evaluatee’s physical and mental qualifications in relation to military service and makes certain recommendations regarding the evaluatee. The first such report in each evaluatee’s case is an IMB (initial medical board) and all subsequent reports are DMBs (disposition medical boards). Article 2-A-28 of the PDES Manual.

⁴ The CPEB is a permanently established administrative body convened to evaluate the physical fitness of active duty and reserve members to perform their assigned duties based upon the record.

⁵ The FPEB is a fact-finding body, which holds an administrative hearing to evaluate a member's fitness for duty and to make recommendations consistent with the findings. This hearing is not an adversarial proceeding, and the implication of litigation must be avoided. See Chapter 5.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

On October 2, 1991, the Physical Review Council (PRC)⁶ reviewed the case and concurred in the findings of the FPEB. On October 7, 1991, the Coast Guard Legal Division reviewed the proceedings and recommended findings of the physical evaluation board and found them to be in acceptable form and supported by a preponderance of the evidence.

On October 7, 1991, the Acting Chief, Office of Personnel and Training approved the findings and recommendation of the physical evaluation board and ordered the applicant to be discharged from the Coast Guard due to a physical disability with severance pay.

VIEWS OF THE COAST GUARD

On May 3, 2013, 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 application was not timely. The JAG stated that an application must be filed with the Board within three years of the date the applicant discovered or reasonably should have discovered the alleged error or injustice. In this case, the JAG stated that the medical board report was prepared in April 1990 and the applicant acknowledged it on April 27, 1990. Therefore, the JAG argued that the applicant likely discovered or reasonably should have discovered the alleged error when he reviewed the medical board report in April 1990. The JAG stated that if the medical board contained an error, the applicant had an opportunity to identify the error in a rebuttal. Instead, the applicant waived his right to submit a rebuttal to the medical board report. The applicant did not submit an application to the Board on this particular point until November 6, 2012, approximately 22 years after acknowledging the medical board report.

The JAG argued that it is not in the interest of justice to excuse the applicant's untimeliness because the applicant did not state a persuasive reason for not filing a timely application. In addition, the JAG stated that based on a cursory review of the merits, the applicant is not likely to prevail on his claim to have certain language added to the medical board report. The JAG asserted that even if the Board were to excuse the applicant's untimeliness, the application should be denied because there is no evidence in the record that at the applicant had disciplinary action pending at the time the medical board was considering his case. Further, the JAG stated that the applicant did not provide any evidence to support his claim that he had an admiral mast scheduled prior to the convening of the medical board. The JAG recommended that the application be denied.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On May 29, 2013, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that his goal in submitting his application is to have the bi-polar diagnosis removed from his records. He stated that the diagnosis has had a negative impact on his life and has prevented him from obtaining significant employment. Also, the diagnosis has

⁶ The Physical Review Council is a three member review body responsible for ensuring that physical disability cases are accorded fair and uniform consideration under applicable laws, policies, and directions. Article 6-A-1. of the PDES Manual. Subsection 6-A-3 states, in pertinent part, that the President of the PRC reviews the records and recommended findings of all CPEBs that have been accepted by the evaluatees.

caused major disruptions in his personal life. He stated that he wants to ensure that his children and grandchildren are not burdened by the bipolar label of their father and grandfather.

The applicant disagreed with the JAG's conclusion that his application was not timely. He stated that he was an alcoholic at the time of his discharge and continued in that condition for years after his discharge. He also stated that mixing alcohol with his bi-polar medication had a negative effect on his life. He indicated that he has been sober and off psychiatric medication for ten years. He suggested that at some point during his period of sobriety, he realized that an error had been made in his medical board.

With regard to the JAG's comment that there is no evidence in the military record of a pending admiral's mast for the applicant at the time of the medical board, the applicant stated that he is withdrawing his request to have the facts and disposition of the admiral's mast included in the medical board report. He stated that he understands that as a discharged member he cannot be recalled to active duty for an admiral's mast and that the two-year statute of limitations for imposing non-judicial punishment has expired.

In his reply to the advisory opinion, the applicant requested new relief. In this regard, he asked the Board to order the Coast Guard to convene a new medical board based on medical evaluations that occurred in 2008 and 2012 to determine whether the bi-polar diagnosis should be removed from his record. An April 9, 2008 psychiatric evaluation noted that Dr. W diagnosed the applicant with (provisional) bi-polar disorder not otherwise specified (NOS). The report noted that the applicant did not display any signs of a mental disorder at the time of that evaluation. Although the psychiatrist did not recommend medication for the applicant at that time, Dr. W stated that the applicant would require psychiatric medication in the future. The psychiatrist stated that the applicant should continue mental health treatment because he would benefit from the counseling provided.

Dr. N evaluated the applicant on June 12, 2012, which he wrote was a follow up to his August 1996 evaluation. According to Dr. N., the evaluation occurred as a result of a letter the applicant wrote to the President requesting assistance in having the bi-polar diagnosis removed from his medical. Dr. N wrote that that he agreed that the applicant was not bi-polar that day but that he needed to control his actions with his racing thoughts just like he controls his drinking. Dr. N stated that the plan was the applicant to stay off meds and to return to the doctor for follow-up evaluations.

The applicant submitted excerpts from an internet article on bi-polar disorder produced by Right Diagnosis. According to the applicant the article states the symptoms of bi-polar disorder are similar to many other conditions and that bi-polar misdiagnoses occur. The applicant stated that he believes that he was suffering from "adult situational reaction" while in the Coast Guard.

The applicant stated that he made mistakes and exercised poor judgment many years ago, but that is not a reason "to hang [him] for life with a bi-polar rope." He asked that his record be corrected to remove the bi-polar disorder diagnosis, if a new medical board finds that the diagnosis is erroneous.

PREVIOUS BCMR DECISION (DOCKET NO. 46-92)

On November 26, 1991, the applicant submitted an application to the Board asking that his record be corrected to show that he was fit for duty, even though a physic evaluation board found unfit for duty due to bi-polar disorder.

On January 14, 1993, the BCMR denied the applicant's request for a correction of his record to show that he was fit for duty. The Board stated that the applicant did not prove that the Coast Guard committed an error or created an injustice when it found that he had bi-polar disorder, a physical disability that rendered him unfit for duty.

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 applicant withdrew his request to have "the facts and disposition of the admiral's mast [that was] postponed on March 26, 1990" added to his medical board. Section 52.27 of the C.F.R. permits the withdrawal of an application prior to the issuance of a final decision. Therefore, the applicant's withdrawal of this request renders it moot.

3. However, in his reply to the views of the Coast Guard, the applicant made a new request. He asked the Board to direct the Coast Guard to convene a new medical board to determine whether the Coast Guard's 1990 bipolar diagnosis was correct,⁷ and if incorrect to remove it from his record.

4. With regard to the applicant's request for a new medical board to consider whether the bi-polar diagnosis should be removed from his record, the application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. The applicant stated that he discovered the alleged error on March 15, 2012. However, the applicant was aware that the medical board and all subsequent physical evaluation boards agreed that he suffered from bi-polar disorder that rendered him unfit for duty as of the date of his discharge from the Coast Guard on November 6, 1991. The Board also notes that he challenged the finding that he was unfit for continued duty due to bi-polar disorder in BCMR No. 46-92.

⁷ This appears to be a different request than that made in Docket No. 46-92. In that case, the applicant asked to have the BCMR find that he was fit for duty despite the bi-polar diagnosis. In this case, he is asking to have the bi-polar diagnosis removed from his record as if it never existed.

5. The applicant argued that he could not have discovered the alleged error sooner than March 15, 2012 because he was suffering from alcoholism and the negative physical effects of mixing alcohol with his bi-polar medication until approximately 10 years ago when he became sober. He did not provide a specific date during the previous 10 years on which he discovered the error. However, the Board notes that he was able to file an earlier application with the Board on November 26, 1991 challenging the PDES finding that he was unfit for continued duty and challenging the accuracy of an officer evaluation report, even though he alleged he was suffering from alcoholism at that time. There is nothing in the final decision in BCMR No. 46-92 to indicate that that Board had any concern about the applicant's ability to present his case due to alcoholism. Therefore, this Board is not persuaded to excuse the applicant's untimeliness due to his alleged alcoholism. In this regard, the applicant presented no evidence corroborating the impact his alcoholism had on his judgment and competency, except for his statements.

6. 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." The court further stated 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." Id. at 164, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

7. With respect to the merits, the Board finds that the applicant is not likely to prevail. The applicant was discharged in 1991 due to bi-polar disorder, a physical disability that rendered him unfit for continued military service. He was processed under the PDES to determine whether his disability was unfitting for duty and to what extent the disability interfered with his ability to perform the duties of his rank or grade. The applicant was granted an oral hearing before the FPEB where he was represented by counsel. The FPEB determined that he was unfit for continued duty due to the bi-polar disorder disability. The FBEP decision was reviewed and approved the Coast Guard legal division and the Commandant. The applicant was discharged due to a physical disability with a 10% disability rating and severance pay.

8. The applicant's 2008 and 2012 psychiatric evaluations do not prove that the Coast Guard's 1991 determination was incorrect. Nor do they prove that the applicant no longer has this disabling condition. The most that the two evaluations show is that the applicant is not currently on any psychiatric medication. Neither psychiatrist stated that the applicant never suffered from a bi-polar disorder, nor did either state that he is cured of that condition. The evidence submitted by the applicant is insufficient to show that the Coast Guard committed an error in 1991 by diagnosing the applicant with bi-polar disorder.

9. The Board notes the applicant's concern that his children and grandchildren will be negatively impacted by his bi-polar diagnosis. However, his DD 214 and DD 215 do not specifically identify the physical disability that led to his discharge. The separation authority for his discharge, Article 12-B-15 of the Personnel Manual is stated on the DDs 214 and 215. This provision means that a member was separated from the Coast Guard due to a physical disability, but does not require naming of the disability.

10. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case and it should be denied because it is untimely.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

