

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-052



FINAL DECISION ON RECONSIDERATION

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 case after receiving the completed application, including the applicant's military records on February 1, 2016, and prepared the draft decision as required by 33 C.F.R. § 52.61(c).


This final decision, dated April 21, 2017, 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 discharged for misconduct on August 1, 1967, asked the Board to correct his military records to show that he received a disability retirement from the Coast Guard, instead. Because the applicant previously requested the same relief in 1990, his application is a request for reconsideration. The applicant stated that he was injured while on active duty and had expected to be retired with a 50% disability rating, but the Physical Evaluation Board (PEB) that reviewed his condition before his discharge was "not thorough enough." The applicant claimed that he discovered the alleged error on May 6, 2015.

In support of his request, the applicant submitted a 2010 rating report from the Department of Veterans' Affairs (VA), which shows that he has a 60% disability rating for a left knee disability following arthroscopic surgery and a 30% rating for depression based on his left knee condition.

SUMMARY OF THE RECORD

The applicant first enlisted on active duty in the Coast Guard on October 31, 1955. He served as a  On July 25, 1957, while assigned to a cutter, the applicant was punished at mast for failing to obey an order and was awarded 20 hours of extra duty. On February 21, 1958, he was punished at mast for dereliction of duties. On March 18, 1958, he was punished at mast for willfully disobeying an officer and sentenced to two weeks of extra duty. On April 2, 1958, the applicant was punished at mast for being absent without leave

(AWOL) for more than a day and was sentenced to two weeks' restriction to base. On June 27, 1958, the applicant was punished at mast again for willfully disobeying an officer and was reduced in rate from [REDACTED] to seaman.

On March 29, 1959, the applicant was convicted by special court-martial after severely beating another member on December 31, 1958. In addition, he had twice gone AWOL and had disobeyed orders. He was originally sentenced to two months' confinement at hard labor and a bad conduct discharge, but the convening authority reduced his sentence to one month's confinement at hard labor, a second month of confinement without hard labor, and forfeiture of \$41.00.

On November 25, 1959, the applicant received an honorable discharge when his enlistment expired, and he was recommended for reenlistment.

The applicant reenlisted in the Coast Guard on September 6, 1960. On February 1, 1962, the applicant physically assaulted another member and broke the member's jaw. On March 16, 1962, he was convicted of assault by summary court-martial and confined at hard labor for 15 days.

In February 1966, the applicant underwent surgery on his left knee due to "laxity of the left tibial collateral ligament. A medical report dated February 15, 1966, states that the applicant had originally injured his knee in 1954 and had suffered a persistent ache and unsteadiness since enlisting. Following surgery, the applicant underwent physical therapy and remained on convalescent leave or limited duty. On October 25, 1966, a doctor reported that the applicant had a full range of motion in his left knee and only slight instability. The doctor noted, however, that the applicant could reinjure the knee if he performed sea duty.

On October 27, 1966, the applicant was arrested for battery by civil authorities, but the charges were dismissed on November 18, 1966.

On November 21, 1966, the applicant, who is right-handed, broke two bones in his right hand, which was put in a cast.

On December 1, 1966, a Medical Board reported to the applicant's command that the applicant was unfit for service due to the condition of his left knee: "patellar-femoral chondromalacia, slight to moderate, left medial collateral ligament instability, slight, left knee." The Medical Board recommended that the applicant be referred to a PEB for evaluation.

On December 3, 1966, while still on convalescent leave, the applicant was arrested by State authorities and charged with murder. The applicant's command reported to Headquarters that he had also recently been charged with assault with a deadly weapon against his spouse. The applicant was incarcerated in a municipal jail pending indictment and trial.

On December 9, 1966, the applicant's command forwarded the Medical Board report to the District Commander, noting that the applicant had been incarcerated by the State on a murder charge. No further action was taken on the Medical Board report.

On December 13, 1966, the applicant was indicted for murder. The records of the indictment show that a doctor and two women testified. On December 14, 1966, the applicant was placed in unauthorized absence status because of his civil confinement.

On February 15, 1967, the applicant was convicted of murder in the second degree by a jury in a State Superior Court and was incarcerated for an indeterminate period prior to sentencing.

On March 15, 1967, the applicant's commanding officer (CO) notified him that he was going to recommend that the applicant receive an undesirable discharge based on his conviction by civil authorities and that the applicant had a right to counsel, to an Administrative Discharge Board (ADB), and to submit statements on his own behalf. On March 22, 1967, the applicant acknowledged the notification and requested an ADB.

On April 27, 1967, the Coast Guard convened the ADB to make a recommendation regarding the applicant's retention or discharge to the Commandant. The ADB recommended that in light of the seriousness of the applicant's crime, his processing for a medical separation should be canceled, and he should receive an undesirable discharge.

In a statement for the ADB dated April 27, 1967, the applicant alleged that, after he told a man in a bar who was speaking offensively to a woman to leave her alone, the man left the bar but later approached the applicant from behind as he was getting into his car and began hitting him over the head. The applicant stated that he could not defend himself because of his cast, but he had a pistol in the console between the front seats and reached for it to scare his attacker off. When he pointed it at his attacker, the man backed off, but when the applicant turned to get into his car, the man began hitting him again. When the applicant turned back, the gun went off. He stated that his attorney told him that his conviction should have been for manslaughter, instead of murder, as it had occurred in the heat of passion. The applicant stated that there were no witnesses and that the man had a history of violence and picking fights but that this information was not admitted into evidence by the judge. The applicant noted that at the time of the incident, he had undergone a Medical Board and was found unfit for duty. The applicant asked the ADB to consider his years of good service and recommend that he receive a general discharge instead of an undesirable discharge.

On May 16, 1967, the applicant's attorney added letters of appreciation and other documents to the ADB proceedings under review. He maintained that the applicant's case should be considered by a PEB, instead of an ADB, based on the finding of the Medical Board. He noted that if the applicant received an undesirable discharge, he would be denied medical treatment by the VA and asked for a general discharge for the applicant.

On July 12, 1967, the ADB's recommendation for an undesirable discharge was approved by the final reviewing authority. On July 20, 1967, the Commandant issued orders for the applicant to receive the undesirable discharge for misconduct due to his conviction by civil authorities for a serious offense pursuant to Article 12-B-13 of the Personnel Manual then in effect.

On August 1, 1967, the applicant received an undesirable discharge for misconduct due to his conviction by civil authorities pursuant to Article 12-B-13 of the Personnel Manual then in effect.

On September 4, 1968, the applicant was allowed to withdraw his plea of not guilty to murder in the second degree in order to plead guilty to voluntary manslaughter. On appeal, the court found that the judge had instructed the jury about first and second degree murder, voluntary manslaughter, and justifiable homicide, but had not properly instructed the jury regarding involuntary manslaughter.

After pleading guilty to voluntary manslaughter, the applicant applied to the DRB, requesting an honorable discharge and claiming that he should be retired by reason of physical disability. On December 1, 1970, the Coast Guard Discharge Review Board (DRB) upgraded the applicant's discharge to a general discharge under honorable conditions based on findings that pursuant to Article 12-B-13 of the Personnel Manual, the Coast Guard could have delayed determining the character of the applicant's discharge while his conviction was appealed but had not done so. The DRB noted that the applicant was being processed for a medical separation when he was administratively discharged for misconduct. The DRB stated that because the applicant might have received a general discharge had the determination of his character of discharge been delayed pursuant to Article 12-B-13, his discharge should be upgraded to general under honorable conditions. This recommendation was approved by Commandant, and the applicant received a new DD 214.

In 1990, the applicant applied to the BCMR and requested a medical retirement. The Board did not discuss the merits of the applicant's request but denied the case based on the untimeliness because the applicant had waited about twenty years after receiving the decision of the DRB to apply to the BCMR.

VIEWS OF THE COAST GUARD

On July 7, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board deny relief in this case. The JAG stated that the applicant's request is untimely because the applicant clearly knew at the time of his discharge, as well as when he applied to the DRB in 1967 and the BCMR in 1990, that he had not received a medical retirement from the Coast Guard. The JAG stated that even if the applicant's request was not time-barred, his case would fail as both the DRB and the BCMR have found that the applicant was properly discharged for misconduct based on his criminal conviction by civil authorities. The JAG concluded that the claim is time-barred and that the applicant has not shown that his lack of a medical retirement is erroneous or unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

In a letter dated August 26, 2016, the applicant responded to the views of the Coast Guard. The applicant stated that May 6, 2015, is the date a Veterans Service Officer informed him that there was a possibility that his discharge could have been a medical retirement.

The applicant argued that under the current Physical Disability Evaluation System (PDES) Manual, Chapter 2.C.11. states that disability statutes do not prevent disciplinary or administrative discharges for misconduct:

- a. If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored. ...
- b. If the court martial or administrative process does not result in the execution of a punitive or administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official record.

The applicant argued that his PDES processing was closed only because of the execution of a punitive discharge and that since his discharge has been "overturned" and upgraded to general, under honorable conditions, "[t]his changes the entire record retroactively and should allow the Coast Guard to use the completed but 'not forwarded' [Medical Board report] to assess/evaluate [the applicant] for a medical retirement or medical discharge as if it had been Honorable at the time." The applicant argued that nothing in the law or manuals prevents the Coast Guard from continuing his PDES processing since his discharge was upgraded.

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. Under 10 U.S.C. § 1552(a)(3)(D), "Any request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination." Although the applicant submitted a copy of a 2010 VA disability rating decision, which was not in the record before the Board in 1990, the applicant's disability rating in 2010—more than forty years after his discharge—is not evidence that supports his claim that his administrative discharge for misconduct in 1967 due to his conviction for voluntary manslaughter was erroneous or unjust.¹
3. When the BCMR denied the applicant's request in 1990, however, it did so based purely on the application's untimeliness without considering whether there was any merit to his

¹ 10 U.S.C. § 1552(a)(3)(D) ("Any request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination.")

claim. Therefore, in accordance with *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the Board should reconsider the case by considering any justification for his delay and conducting a cursory review of the merits.²

4. The Board notes that the applicant claimed that he did not discover the error in his record until 2015. However, the record clearly shows that the applicant and his counsel were informed at the time of his separation in 1967 that he was receiving an administrative discharge for misconduct. Moreover, the applicant challenged his administrative discharge for misconduct and lack of a medical retirement before the DRB in 1968 and to the BCMR in 1990.

5. The applicant provided no justification for his long delay in applying to the Board in 1990 or in seeking reconsideration of his 1990 application.

6. The Board's cursory review of the case shows that it lacks potential merit. The record shows that the applicant received due process during his discharge proceedings in that he was notified of the reasons for his discharge, provided an opportunity to make a statement, and afforded an ADB based on his years of service. Although a Medical Board had recommended that the applicant be referred to a PEB two days before his arrest, his medical processing was suspended when the Coast Guard began processing him for an administrative discharge due to misconduct. The Coast Guard's suspension of his medical processing is presumptively correct³ and remains correct under the current policy in Chapter 2.C.11. of the PDES Manual, which was cited by the applicant.

7. Although the applicant argued that his processing for a medical retirement should be revived because the DRB upgraded his undesirable discharge to a general discharge after his conviction was changed from second degree murder to voluntary manslaughter, the Board disagrees. The applicant was administratively discharged for misconduct due to his conviction for a serious offense by civil authorities pursuant to Article 12-B-13 of the Personnel Manual then in effect. Article 12-B-13 authorizes such discharges when the crime the member is convicted of is one for which the maximum penalty under the Uniform Code of Military Justice (UCMJ) is confinement for more than one year or death. Under the Article 119 of the UCMJ and the Manual for Courts-Martial then in effect, the maximum punishment for voluntary manslaughter exceeded a year.⁴ Therefore, the applicant's administrative discharge due to his conviction for a serious offense by civil authorities remained correct pursuant to Article 12-B-13 of the Personnel Manual even after his conviction was changed to voluntary manslaughter. The Board finds that the applicant would have been discharged for misconduct, instead of a physical disability, even if he had originally been convicted of voluntary manslaughter, instead of second degree murder.

² In *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review." The court noted 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."

³ 33 C.F.R. § 52.24(b).

⁴ *United States v. Harrison*, 1967 WL 4194, 37 C.M.R. 104, 16 USCMA 484 (CMA 1967) (noting that the member had pleaded guilty to voluntary manslaughter and was sentenced to a dishonorable discharge and confinement for eight years at hard labor).

8. The Board's review reveals no new evidence supporting the applicant's claim of error and injustice, no justification for his long delay, and no potential merit in his claims. Therefore, his request for relief should be denied.

(ORDER AND SIGNATURES APPEAR ON PAGE)

ORDER

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

April 21, 2017

