DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-120

[redacted]
AM3 (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on March 23, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 5, 2019, 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 medically retired with a 50% disability rating for Major Depression on August 25, 1989, instead of being medically discharged with a 10% rating for Adjustment Disorder with Depressed Mood. The applicant alleged that he was never evaluated or diagnosed with an Adjustment Disorder by a representative of the Coast Guard, and two physicians who had evaluated him, treated him for recurrent Major Depression and prescribed antidepressants for him for almost a year before his discharge. He alleged that these physicians, who served on his Medical Board (MB), disagreed with the subsequent findings of the Central Physical Evaluation Board (CPEB) and that the CPEB had no other medical opinion that substantiated its determination that the applicant's disabling condition was an Adjustment Disorder. The applicant stated that he was also diagnosed with Major Depression by an examiner for the Veterans' Administration (VA) just a few months after his discharge.

The applicant argued that because he was "never lawfully diagnosed with 'Adjustment Disorder,' his [DD 214] is clearly in error and it would be grossly unjust for him to continue to suffer for the CPEB's groundless decision to improperly label him with a lesser psychiatric conditions so as to deprive him of the disability rating necessary to obtain a medical discharge [sic]." The applicant claimed that his medical discharge due to Adjustment Disorder appears to have been "part of an elaborate cost saving scheme by the various branches of the military which has resulted in the unconscionable denial of medical and other benefits to those who have loyally

served this Country." He also claimed that his erroneous discharge for Adjustment Disorder "has and continues to negatively impact his employment opportunities and deprive him of all of the benefits to which he is lawfully entitled"

The applicant alleged that he did not discover the error in his record until 2017, when he was "browsing the Internet and unexpectedly stumbled upon a news article reflecting the fact that various branches of the military, including the USCG, have been utilizing an 'Adjustment Disorder' diagnosis in connection with military discharges as a cost saving mechanism to either reduce or avoid the payment of disability payments upon discharge" for decades.

To support his allegations, the applicant submitted copies of some of his military and medical records, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard for four years as a seaman recruit on November 12, 1984, at age 19. He completed recruit training and advanced to seaman apprentice in January 1985. In January 1985, the applicant received orders to transfer to his home state, but the orders were canceled and from January 1985 to March 1987, he was assigned to an aviation training center in [redacted]. He advanced to seaman in November 1985.

On April 28, 1986, the applicant requested a transfer to his home state. His CO endorsed his request, but the applicant was not transferred.

In March 1987, the applicant extended his enlistment for fifteen months to be attend Aviation Structural Mechanic Class "A" School. After graduating from AM "A" School, the applicant advanced to AM3/E-4 and was transferred to the air station in [redacted], in August 1987.

On July 19, 1988, a doctor noted that the applicant had recently been discharged from a two-week stay in a hospital on [redacted],[1] where he had been diagnosed with depression and immaturity. The doctor stated that the applicant had stopped taking his medication, lithium, and denied feeling depressed. The doctor stated that the applicant "now wants to stay in the USCG 'very much'—a different impression compared [with] what he made [sic] the psychiatrist at [the hospital]." The doctor diagnosed the applicant with "emotional distress" and noted that he was fit for limited duty with close supervision and no aviation duties.

On July 26, 1988, the doctor reported that the applicant was taking lithium again and reported feeling much better. He wrote that the applicant's diagnosis was "emotional distress – depression" and that he had provided the applicant with information about "anger, depression, self-esteem – attitude."

[1] The medical records for this hospitalization are not in the record.

On August 2, 1988, the doctor noted that the applicant was feeling "well" but wanted to leave the Coast Guard "due to his circumstances." He stated that the applicant was fit for duty except aviation duty and that a Medical Board should be initiated.

On August 9, 1988, the applicant reported that he was no longer taking lithium and that he felt unable to concentrate and was worried about his future. The doctor advised him to take the lithium and again found him fit for duty except aviation duty.

On August 16, 1988, the applicant reported that he was unable to cope, was not taking the lithium, and wanted out of the Service as soon as possible. He could not "handle the stress of living here in [redacted]" The doctor stated that the applicant was calm and neither suicidal nor dangerous but in "moderately severe emotional distress" and unfit for duty. The applicant was referred to a psychiatrist, who diagnosed the applicant on August 17, 1988, with an "Adjustment reaction with depressed (at loss) and anxious mood." The psychiatrist prescribed Xanax and indicated that the applicant should be processed under "12-B-16," which is the article of the Coast Guard Personnel Manual that authorized administrative (as opposed to medical) discharges for members for unsuitability due to personality, behavior, and adjustment disorders.

On August 30, 1988, the applicant was transferred from Air Station [redacted] to the Support Center on [redacted]. His doctor reported the same day that the applicant said he felt good and wanted to be found fit for aviation duties and to complete his tour of duty. The doctor noted that the applicant was much improved but still not fit for aviation duties.

On August 31, September 9, September 14, and September 23, 1988, another doctor reported that the applicant was stable and doing well even though he was not taking lithium.

On September 28, 1988, the doctor noted that the applicant was anxious and prescribed Xanax. On September 30, the applicant was readmitted to the hospital on [redacted]. He stated that he was "upset over his current level in the Coast Guard" and felt that his job, which involved instructing maintenance men about painting windows and cleaning up the base, was meaningless. He reported insomnia, weight loss, and loss of sexual desire. The hospital report, which is signed by two physicians, noted the following regarding the applicant upon admission: "Mood mildly depressed. Affect appropriate. No evidence of a formal thought disorder. He denies suicidal and homicidal ideation. Memory is intact. Intelligence average. Judgment is poor. Impulse control is poor. Insight is fair." While in the hospital, the applicant was prescribed Halcion to help him sleep and Sinequan and Xanax for severe anxiety.

On October 27, 1988, the applicant was released from the hospital. A doctor had reported that the applicant's mood had become less depressed while he was hospitalized. His affect "became brighter" but he "remained somewhat withdrawn and self-isolative." Two doctors diagnosed the applicant with "Major Depression, recurrent without psychotic features (296.32)" on Axis I but also found that he "is clinically not depressed." They stated that it would be "in the best interest of the patient and the Coast Guard that patient be discharged from the Coast Guard on Medical grounds since it is evident that patient has had difficulty adjusting to the Coast Guard life."

Numerous medical notes from November 1988 through July 1989, state that the applicant was stable on medication but awaiting separation and concerned about the delay of his separation.

On March 8, 1989, a Medical Board of two physicians found that the applicant's primary diagnosis was "Major Depression, recurrent, without psychotic features (296.32)." But the Medical Board also found that the applicant was "Not Fit for Duty for reasons other than physical disability," instead of "Not Fit for Duty because of physical disability, refer to CPEB." The applicant signed an acknowledgement of the Medical Board's findings and recommendations on March 14, 1989, and indicated that he did not desire to submit a rebuttal statement.

On March 16, 1989, the applicant's commanding officer (CO) forwarded the Medical Board report to Headquarters. He noted that the applicant was primarily performing clerical duties and was "unable to fully perform the duties of his rate of AM." He stated that the applicant's prognosis was that he was not expected to be fit for full duty and that "daily antidepressant medication and weekly to monthly psychotherapy is recommended. Therefore, continuance on active duty is not in the best interest of the member or the Coast Guard."

On April 5, 1989, the Personnel Command convened a CPEB, which reviewed the applicant's military and medical records, found him unfit for duty, and recommended that he be medically separated with severance pay and a 10% disability rating for "Adjustment Disorder – with depressed mood – with emotional tension or other evidence of anxiety productive of mild social and industrial impairment" under code 9405 of the Veterans' Administration Schedule for Rating Disabilities (VASRD). The CPEB issued its report on May 16, 1989.

On May 16, 1989, the applicant's assigned attorney counseled him "regarding his acceptance or rejection of the Central Physical Evaluation Board's findings and recommended disposition."

On May 25, 1989, a physician at the hospital on [redacted] who had signed the IMB report dated March 8, 1989, sent the applicant's attorney a memorandum regarding the CPEB's findings and recommendation. The physician advised the attorney that the applicant had been treated by a doctor and psychiatrists at the hospital for Major Depression. He noted that his IMB report dated March 8, 1989, had shown a diagnosis of "Major Depression, recurrent without psychotic features and maintained on anti-depressant, Sinequan. In my opinion this is closest to VASRD #9209 Depression with melancholia."

On June 5, 1989, the applicant's attorney forwarded the physician's statement to the CPEB in a memorandum asking the CPEB to reconsider its determination and reserving the right to reject its findings and recommendation. He stated that the applicant wanted "to have his disability rating accurately reflect his medical diagnosis and severity and his physician reiterates that diagnosis." He stated that the applicant rejected the finding of "Adjustment Disorder with depressed mood – mild" under VASRD code 9405,

> because he does not have an adjustment disorder, but rather suffers from major depression, recurrent without psychotic features and should be so rated. … [The

> applicant's] doctor believes Major Depression with melancholia is the most appropriate rating and I have to agree with him. I further believe and request that a close reading of [the doctor's and applicant's statements and other evidence] will reveal that the 30 percent level of disability, and Temporary Retirement, is indicated here. … A reasonable doubt exists as to the appropriate level of disability in this case and it should be resolved in [the applicant's] favor. I thus request a finding of Unfit for Continued Duty at 30 percent under VA Code 9209, Major Depression, Definite.

The attorney also included with his memorandum to the CPEB two statements from the applicant dated May 24, 1989, rebutting the CPEB's findings and arguing that the CPEB had evaluated him on a less serious illness than the one he had been diagnosed with. The applicant noted that he had been in treatment with a psychiatrist for more than a year. He stated that he had been under a tremendous amount of stress due to the Coast Guard's "budget shortfalls," which had caused "cutbacks … in the form of personnel while the operational aspect grew. … I have attempted to grow and endure with the Coast Guard to the point of my mental attitude suffering. The pressures which are placed on superiors are ultimately felt by those of us in non-management positions to the point which I could no longer tolerate." He stated that the CPEB report had made him feel like the Service was trying to discard him "as a piece of old clothing" and that "[w]ith a minimum disability percentage of 30% [he] would be insured rehabilitation services through the Veterans Administration. And then have a reasonable chance for a career." He stated that his disability should not be rated below 30%.

On June 13, 1989, the members of the CPEB signed a statement noting that they had reconsidered their finding and recommendation in light of the applicant's attorney's submissions but had reached the same findings and recommendation.

Only June 21, 1989, the applicant's doctor noted that the applicant was "impatiently awaiting D/C [discharge]."

On June 22, 1989, the applicant's attorney again counseled him regarding the CPEB's findings and recommendation and his right to reject them and demand a hearing before a Formal Physical Evaluation Board (FPEB).

On June 30, 1989, the applicant signed the CPEB's report indicating that he accepted the CPEB's findings and recommended disposition and waived his right to a hearing before the FPEB.

On July 3, 1989, the Physical Review Council approved the CPEB's report and forwarded it for legal review. On July 19, 1989, a judge advocate signed the CPEB's report on behalf of the Chief Counsel and indicated that the proceedings were correct and that the findings and recommendation were supported by evidence. On July 21, 1989, a captain approved the CPEB's findings and recommendation on behalf of the Commandant.

On July 26, 1989, the Personnel Command issued orders for the applicant to be discharged within thirty days "by reason [of] physical disability which is of perm nature and considered to be ten percent disabling [in accordance with] current VA sched for rating disabilities."

On August 25, 1989, the applicant was medically discharged with disability severance pay in the amount of $10,413.00. His DD 214 shows that he was honorably discharged pursuant to Article 12-B-15 of the Personnel Manual then in effect[2] due to "Physical Disability Incident to Service," with a JFL separation code, which denotes an involuntary disability separation with disability severance pay. The applicant's psychiatric diagnoses are not shown on his DD 214.

Post-Discharge Evaluation

Upon his discharge, the applicant applied to the VA for benefits. The applicant submitted five pages of a six-page medical report dated September 28, 1989, from VA providers. (The fifth page is missing.) First, a social worker reported that the applicant had "a stable and supportive relationship" with his parents and was "getting along well" with his sister and her family. He "does not have a girlfriend but has male friends from high school. The veteran enjoys outdoor and water sports, swimming, boating, basketball, and softball."

The social worker also reported that the applicant had enlisted in the Coast Guard "expecting training and work in search and rescue [the applicant wrote on the report that this was wrong]. Instead he was an air frame mechanic. He was hospitalized in late 1988 and treated for depression, and says he had much anger and bitterness about not getting the assignment promised and other matters, then almost being 'tricked' into hospitalization in a closed psychiatric ward against his will." The social worker stated that the applicant wanted to "put that all behind" him, had enrolled in college with the goal of becoming a police officer, and was working at a hotel "with flexible duty hours to enable him to attend classes." She stated that he was "functioning adequately socially and vocationally, knows that if service connection status is established he can apply for VAVR benefits. No further social services are indicated at this time." On the same VA report, a psychiatrist wrote the following:

> [The applicant] was separated from the Coast Guard officially on 25 August 1989. He had been in the Coast Guard for approximately five years. He extended 15 months from his original enlistment in order to be able to attend the technical school he later chose (aviation structural mechanic school) in [redacted]. Up until then he had been doing routine menial ground maintenance and clean up duties for his entire enlistment. This is significant because he felt greatly disappointed at not being trained in any viable technical skill until he had to extend his enlistment in order to get it. Even so, he was disappointed with the technical school he attended.
>
> He has no psychiatric history predating his military service. According to the patient he first began showing signs of depression in December 1987. This was told to him by friends who knew him when he went home on Christmas leave.

[2] COMDTINST M1000.6A, Article 12-B-15, authorizes separations due to physical disability.

They told him, he states, "you weren't acting right, you weren't the same." He recalls becoming significantly depressed in the several months preceding his initial military psychiatric hospitalization, which occurred in June 1988. …

He was hospitalized in June 1988 unaware that he was being hospitalized. He states that he had been working as a night clerk, enabling him to attend classes during the day. On return from school one day in June his commander, Chief A.S.M. … [drove him to the hospital on [redacted]]. He was led into a locked ward and only then realized he was being hospitalized. … He was under 15-minute checks, likely for suicidal precautions, and it was explained to him at that time that he had been exhibiting a number of symptoms, apparently depressive ones, that made them fear for his suicide potential. He notes that he had never seriously thought about, talked about, planned, and has never tried to commit suicide. ("That's the farthest thing from my mind.")

On questioning, he does recall that prior to his hospitalization he recognizes now, and recognized at that time, that his work performance was poor, he had poor concentration, was blaming himself for being in the situation he was, that is, in an unproductive duty status in the Coast Guard, feeling hopeless, feeling he was keeping things 'bottled up' and not expressing his feelings, feeling disappointments, … noting that he had also been losing weight (35 to 40 pounds over several months), had lost his appetite, … feeling depressed ("I was depressed at rock bottom"), feeling anhedonic ("I couldn't find any enjoyment"), for example, of basketball as he had always enjoyed before, feeling a loss of interest in everything and not relating with his friends, feeling a lack of libido, which was a big change for him, feeling hopeless that his situation was inescapable, feeling worthless and 'useless' with increasingly poor personal hygiene, slowed down mentally and physically ("completely"). At that time he did not harbor any death wishes or suicidal ideation. At that time he did not have any delusions, hallucinations, or other signs of psychosis. He had never been that depressed before in his life. He also has no history of hypomanic or manic high.

He was hospitalized on three occasions[[3]] [on [redacted]], which comprised his entire psychiatric hospitalization history. His first hospitalization lasted three weeks … He felt the lithium did not help, and he discontinued it on hospital discharge. He felt just as depressed and anxious as when he went in, even though he was told by [the doctor] that he had "calmed down a lot." The patient noted a slight lessening perhaps of his symptoms and slight weight gain before discharge, but he continued to feel angry and resentful at his military predicament. He requested a transfer for a second opinion from a different psychiatrist and was sent to [redacted]. His symptoms remained and again worsened, and he was readmitted to the hospital from [redacted] due to feeling weak, tearful, losing weight, feeling tense, awakening every hour, and oversleeping. During his second hospitalization, he was treated by a Dr. … [who] started [the applicant]

[3] The record reflects two hospitalizations, rather than three, in June 1988 and September to October 1989.

on Sinequan. He noted that after four days his appetite returned and he ate voraciously. His sexual urges returned, he felt better, and was better able to concentrate. He was hospitalized two weeks at that time. He was again discharged to the same outpatient doctor, …, who continued him on Sinequan. However, he was again hospitalized within several weeks for the third time because of concern about again losing his appetite and worry that his symptoms would return in full. Again … the inpatient psychiatrist, adjusted his Sinequan dose and discharged him after several weeks, in October 1988.

He has had no mood disturbance since October 1988 and has remained taking Sinequan until approximately one month ago when it was tapered and discontinued with no ill effects, under the supervision of myself at the … Outpatient Clinic, where he was subsequently seen.

[page missing]

no history of alcohol or other drug abuse. Currently he is not depressed. However, this depression may not be a single episode but may turn out to be a recurrent depression. Only time will tell.

DIAGNOSES
Axis I: Major depression, single episode (cannot rule out recurrence), in remission.
Axis II: No diagnosis.

This patient is competent for VA purposes. He has been instructed to follow up at this clinic for any signs of recurrent depression.

VIEWS OF THE COAST GUARD

On September 11, 2015, a judge advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG stated that the applicant was untimely as the alleged error happened about thirty years ago and the applicant was clearly aware of the error in 1989 as shown by his rebuttal of the findings of the CPEB. The JAG stated that the applicant has not provided a reasonable explanation for or justified his lengthy delay in asserting his claim. The JAG also argued that the doctrine of laches should bar the claim because records and the Coast Guard members that could have provided further insights are no longer available.

The JAG argued that even if the Board waived the statute of limitations to consider the case on the merits, the applicant has not shown that an error or injustice occurred. The JAG noted that the applicant alleged, but failed to prove, any scheme to save costs by denying benefits to members.

The JAG stated that the medical records of the applicant's hospitalization in the fall of 1988 show that he was angry and bitter about his work assignments, which "led to feelings of hopelessness and worthlessness due to completing assignments he believed were meaningless, such as instructing maintenance men on how to paint windows or cleaning up around the base." The JAG noted that upon his discharge from the hospital, the applicant "was found not to be clinically depressed, but [to have] 'difficulty adjusting to Coast Guard life.'" The JAG stated that this finding supports a diagnosis of adjustment disorder.

The JAG stated that although depression and adjustment disorder are evaluated under different codes in the Veterans Affairs Schedule for Rating Disabilities (VASRD), both codes are "ultimately evaluated under the same criteria of symptoms, with the disability rating being based on the symptoms rather than the condition." Under either diagnosis, she stated, "to receive 30% disability, the applicant would have to show '[d]efinite impairment in the ability to establish or maintain effective or favorable relationship with people. The psychoneurotic symptoms result in such reduction in initiative, flexibility, efficiency and reliability levels as to produce definite industrial impairment.'"[4] She argued that there is "no indication or evidence that the applicant's mental disorder was so debilitating that it would affect his ability to maintain relationships with people," and the applicant instead claimed in his rebuttal to the CPEB's report that with vocational rehabilitation, "his condition could be 'curtailed before ever becoming a major issue in the future.'" Furthermore, that JAG noted that the psychiatrist who evaluated the applicant on behalf of the VA in September 1989 noted that he had not suffered from a mood disturbance since October 1988 and had not suffered any ill effects when he discontinued his medication in August 1989. Therefore, the JAG argued, "[e]ven if there was some question as to whether the applicant's condition should have been categorized as Depression or Adjustment Disorder, there is no evidence that his condition was so disabling as to warrant a rating greater than 10%."

In accordance with 10 U.S.C. § 1552(g), the JAG also submitted a new opinion from a psychiatrist, who wrote the following:

> This opinion is based on review of the record provided and not on an interview with the member. The records provided did appear incomplete (however this was nearly 30 years ago) and my opinion may change if further information is provided. Additionally, since this took place in 1988/89, I used criteria from DSM III used then as well as the current DSM [Diagnostic and Statistical Manual of Mental Disorders 5].
>
> With regards to if PDES [the Coast Guard's Physical Disability Evaluation System] made an error in diagnosing this member with an adjustment disorder vs Major depressive disorder – It is difficult to tell from the records provided. In Aug 88, the member was diagnosed with an "Adjustment Reaction" after having emotional difficulties. In Oct 88 he was hospitalized for approx. 4 weeks and given the diagnosis of Major Depression, recurrent without psychotic features. However, the written description of his symptoms meet criteria for a) feeling depressed and b) 2 other symptoms (possibly 3 if count decreased sexual desire as

[4] 53 Federal Register 1441-01, Corrections to Veterans Administration, 38 C.F.R. Part 4, dated 19 January 1988.

> a criteria). Even if the decreased sexual desire is included in the criteria, this does not meet the criteria for a Major Depressive Episode (in either DSM III or DSM 5). Additionally, much was written about his displeasure with the Coast Guard and stressors of living the [sic] [redacted] which support the diagnosis of Adjustment disorder. I understand that another medical provider wrote a letter supporting the diagnosis of Major Depression, but unfortunately, no supporting documentation for his decision making was provided.
>
> Throughout the documentation, there was a theme of feeling depressed. However, feeling depressed and meeting criteria for a major depressive episode is a separate matter.
>
> According to the documentation provided, the first time he met criteria for a Major Depressive Episode/Disorder would have been during a Sept 1989 assessment, which is after the Medical Board was finalized in June 1989.
>
> In the end, at the time of the medical board, I do not believe the Coast Guard made an error with the diagnosis of Adjustment Disorder."

The JAG concluded that the evidence does not show that an error or injustice occurred in this case: "There is no evidence that the applicant's condition at the time he was discharged warranted a higher disability rating. The applicant's medical history also supports a diagnosis of Adjustment Disorder." The JAG also pointed out that after consulting counsel, the applicant ultimately accepted the CPEB's findings and recommendation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was granted extensions and submitted his response to the advisory opinion on September 21, 2018. The applicant argued that his application is timely because in 2017 he read an article, which he attached, claiming that the Coast Guard and other military services "had been engaged in the grossly unjust practice of utilizing adjustment and personality disorder ratings to deny veterans some of the lawful benefits to which they are entitled." The article led him to others with "statistics reflecting gross misuse of adjustment and personality disorder diagnoses as a cost saving mechanism." He stated that at the time of his discharge, he did feel that the CPEB's rating was "incorrect and extremely unfair," but he "had absolutely no reason to believe that the Coast Guard, after [his] dedicated service, would betray [him] by engaging in what [he believes] to be fraudulent and/or extremely unjust practice of utilizing an improper adjustment or personality disorder rating to deprive [him] … of much needed benefits and services."

The applicant also argued that the Coast Guard's reliance on doctrine of laches must fail because the Coast Guard's conduct in this regard and "further concealment of said conduct … was the cause of any delay with respect to the petition" and because "the record is completely devoid of any failed attempts to obtain documents and/or interview witnesses that resulted in actual prejudice," citing *Cornetta v. United States*, 851 F.2d 1372, 1377-78 (Fed. Cir. 1981).

Regarding the merits of the case, the applicant stated that the record shows that three different physicians diagnosed him with Major Depression, recurrent, and under DSM 5, a diagnosis of Adjustment Disorder "cannot be made if any other disorder, such as major depression, can be made." Therefore, he argued, the Adjustment Disorder diagnosis "was inaccurate, unjust and improper." He also claimed that the basis for the alleged Adjustment Disorder—his frustration with the Coast Guard because of "his newly assigned tasks or a transfer to [redacted]"—did not begin until after he was tricked into being hospitalized in June 1988 by his Command Enlisted Advisor. He stated that it was being tricked into going to a psychiatric hospital in June 1988 that cause him to be frustrated with the Coast Guard. But an Adjustment Disorder diagnosis under DSM 5 requires "an identifiable triggering event that precedes the symptoms by at least three months." Therefore, he argued, "Without an identifiable stressor that preceded the symptoms by at least three months, adjustment disorder want not an available diagnosis."

The applicant stated that before his hospitalization in June 1988, his "behavior and performance were not indicative of an adjustment disorder diagnosis." He stated that he had received the "unique opportunity" of attending AM "A" School and was "relatively pleased with his progress in the Coast Guard, received multiple awards throughout his term and was never reported for any disciplinary or behavioral issues."

The applicant also stated that the medical records he submitted "contain multiple references to feelings of worthlessness, depressed mood, drastic weight loss, insomnia, fatigue, lack of pleasure, [and] self-isolation," and so clearly support the diagnosis of Major Depression made by all but one of his doctors. In addition, he stated, the severity and duration of his symptoms were "by no means indicative of an adjustment disorder that normally resolves within six months" and very rarely requires separation from the Service. Given his CO's and doctor's statements that he would never be fit for duty and "[i]n light of the multiple diagnoses of major depression, recurrent, by psychiatrists retained and trusted by the Coast Guard to treat and diagnose [him], the fact that the CPEB did not interview [him], and the absence of an identifiable triggering event, the adjustment disorder and the corresponding 10% rating was and continues to be a gross injustice." He also alleged that he has "consistently received treatment for depression since [his] discharge in 1989," including both psychotherapy and antidepressants.

The applicant alleged that the "current protocol and protections available to Coast Guard members with respect to adjustment disorder discharges would likely have prevented the gross injustice" that he suffered, citing the current Military Separations Manual. He cited separation policies authorizing administrative discharges for diagnosed Adjustment Disorders, which require the member to be notified of the pending discharge and a psychiatric report.

APPLICABLE REGULATIONS

Medical Manual

The Medical Manual in effect in 1989, COMDTINST M6000.1A, governed the disposition of members rendered unfit for duty because of medical conditions. Chapter 3.F. lists medical conditions that "are normally disqualifying" for retention and require the command to convene a Medical Board. Chapter 3.A.16. refers the reader to Chapter 5.B. for mental health

diagnoses. According to Chapter 5.B., Major Depression is normally a disqualifying diagnosis resulting in a medical separation, while Adjustment Disorders, such as inability to adapt to military life or to separation from family, are "generally treatable and not usually grounds for separation" but may result in an administrative separation pursuant to Article 12-B-16 of the Personnel Manual if they persist.

PDES Manual

The PDES Manual in effect in 1989, COMDTINST M18050.2B, provided the procedures for separating members due to medical disabilities. Under Chapter 3.F., a Medical Board of at least two medical officers or clinical psychologists is convened to examine the member's health, make diagnoses, and provide a medical opinion about the member's fitness for duty and recommendations for future action. Chapter 3.I. states that the member's CO ensures that the member is counseled about the Medical Board report and afforded an opportunity to comment on the report and forwards the report to Headquarters with any comments and a statement about the member's ability to perform the duties of his rating. Upon receiving the report, Headquarters convenes a CPEB to review the case.

Under Chapter 4 of the PDES Manual, a CPEB consists of at least one military officer and one medical officer who conduct a review of the member's records and make findings about, *inter alia,* whether the member is fit for duty and, if not, which medical conditions are causing the unfitness; whether the unfitting medical condition was incurred or aggravated in the line of duty; the percentage by which the member is permanently disabled by the condition according to the VASRD; and whether and how the member should be medically separated. Chapter 4.A.13. states that the member is assigned legal counsel to represent and advise the member regarding the CPEB report and the right to reject the findings and recommendations of the CPEB and demand a full and fair hearing before an FPEB in accordance with Chapter 5. Chapter 4.A.14. allows the member to submit a written rebuttal to the CPEB for reconsideration. Chapter 4.C. states that if the member waives the right to an FPEB and accepts the findings and recommendation of the CPEB, the report is forwarded for review by the Physical Review Council, after which it undergoes legal review before final action is taken by the Final Approving Authority.

Chapter 5 of the PDES Manual provides the procedures for an FPEB. Chapter 5.A.6. states that the member has the right to attend the hearing and be represented by counsel, to present documentary evidence, witnesses, medical witnesses, and oral testimony, and to cross-examine the authors of reports in person or by telephone. The member may submit a rebuttal to the FPEB for reconsideration, and then the proceedings are forwarded for review by the Physical Review Council, legal review, and final action.

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. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his military record.[5] The applicant was medically discharged in 1989 and the evidence shows that he knew at the time that he was being medically discharged with disability severance pay and a 10% disability rating pursuant to the CPEB's finding that he was unfit for duty due to an Adjustment Disorder. This medical discharge for Adjustment Disorder and 10% disability rating are the allegedly erroneous and unjust records that he wants the Board to correct. The evidence also shows that the applicant believed in 1989 that the CPEB's findings and recommendations were erroneous and unjust and that he should have received a higher disability rating for Major Depression with melancholia. The fact that the applicant still believes that his medical discharge for Adjustment Disorder and 10% disability rating were erroneous and unjust and has recently read articles that support his belief does not persuade the Board that he only recently discovered the alleged error or injustice in his record. The Board finds that the applicant's request was not timely filed within three years of his discovery of the alleged error and injustice.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[6] In *Allen v. Card*, 799 F. Supp. 158 (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"[7] to determine whether the interest of justice supports a waiver of the statute of limitations. 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."[8] With respect to these issues, the Board finds as follows:

a. Length and Reasons for Delay: The applicant waited almost thirty years to challenge his 1989 medical discharge for Adjustment Disorder with a 10% disability rating and disability severance pay even though the record shows that he believed strongly at the time that it was erroneous and unjust. In addition, he has provided no justification for his long delay.

b. Potential Merits of the Claim: The applicant's claim lacks potential merit. Although he claimed that he was never diagnosed with an Adjustment Disorder, on August 17, 1988, he was diagnosed with an Adjustment Reaction, which is what Adjustment Disorders used to be called.[9] Although he claimed that under the DSM 5, he should not have been diagnosed with both an Adjustment Disorder and Major Depression, the DSM 5 was not published until

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[5] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

[6] 10 U.S.C. § 1552(b).

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

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

[9] International Classification of Diseases (ICD-9); Paulina Zelviene and Evaldas Kazlauskas, "Adjustment Disorder: Current Perspectives," NEUROPSYCHIATRIC DISEASE AND TREATMENT, vol. 14 (2018), pp. 375-381, available through the National Institutes of Health, U.S. National Library of Medicine, at https://www ncbi.nlm.nih.gov/pmc/articles/PMC5790100/.

2013 and does not prohibit these "comorbid" diagnoses.[10] Although he alleged there was no timely stressor for an Adjustment Disorder diagnosis, the date of the onset of his symptoms is unknown and the record shows that he moved from [redacted] to the air station in [redacted] in August 1987; was told when visiting old friends in December 1987 that he was "not the same" and "not acting right"; and later identified living in [redacted] as a significant stressor. Although the applicant claimed that he should have received a 50% disability rating for Major Depression with melancholia under VASRD code 9209, his Medical Board diagnosed him with Major Depression without psychotic features and found that he was "Not Fit for Duty for reasons other than physical disability," (emphasis added) as his Major Depression was in remission[11] and remained in remission until after he was discharged on August 25, 1989, whereas his Adjustment Disorder continued. Moreover, the applicant received all due process under the PDES, and on June 30, 1989, voluntarily waived the right to an FPEB and accepted the findings and recommendation of the CPEB that he be medically discharged with a 10% disability rating for an Adjustment Disorder.

5. Because the applicant has not justified his very long delay in challenging his medical discharge and his claims lack potential merit, the Board will not excuse the untimeliness of his application or waive the statute of limitations.[12] The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[10] The DSM 5 states that "[i]f an individual has symptoms that meet criteria for a major depressive disorder in response to a stressor, the diagnosis of an adjustment disorder is not applicable. The symptom profile of major depressive disorder differentiates it from adjustment disorders"; but it also states that "[a]djustment disorders can accompany most mental disorders and any medical disorder. Adjustment disorders can be diagnosed in addition to another mental disorder only if the latter does not explain the particular symptoms that occur in reaction to the stressor. For example, … an individual may have a depressive or bipolar disorder and an adjustment disorder as long as the criteria for both are met." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5th Edition (American Psychiatric Assoc. 2013), pp. 288-89.

[11] Under the 1989 VASRD, the disability rating for Major Depression with melancholia (code 9209) in remission was zero percent. 38 C.F.R. § 4.132.

[12] *Allen v. Card*, 799 F. Supp. at 164.

ORDER

The application of former AM3 [redacted], USCG, for correction of his military record is denied.

April 5, 2019

[redacted]