

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-087

[REDACTED]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on January 29, 2021, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated August 4, 2023, 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, a former Fireman (FN/E-3), asked the Board to correct his record by changing his 2016 discharge to a military retirement and changing his narrative reason for separation from “Adjustment Disorder” to “Medically Retired.”

The applicant alleged that at the time of his separation he was suffering from service-connected Post Traumatic Stress Disorder (PTSD) which was diagnosed by the Department of Veterans Affairs (VA) after his separation. The applicant claimed that his PTSD was the result of discrimination and harassment sustained over an extended period of time based on his Latin American heritage and his alleged connection with Latin American drug smugglers. The applicant alleged that the injustice is rooted in an erroneous diagnosis of adjustment disorder, when in reality he endured daily and ongoing humiliating, discriminatory treatment from his peers and superiors based on his membership in a protected class. At the time, the applicant stated, he was performing sea duty and had no way of stopping the aggression he faced. The applicant claimed the aggressive treatment became so bad that he developed chronic mental health conditions, which caused his involuntary release from the Coast Guard, including the benefits that flow from service in the Coast Guard, through no fault of his own. The applicant alleged that the mental health conditions he developed while in the Coast Guard have persisted in his post-service life, hindering his social, professional and family life.

To support his application, the applicant submitted a copy of his Electronic Personnel Data Record (EPDR) and his Department of Veterans Affairs (VA) medical file. Those documents that are contained in the applicant's EPDR and are relevant to his claims are summarized in the Summary of the Record below. The applicant's medical file contained post-discharge medical evaluations from the Department of Veterans Affairs (VA) ranging from May 1, 2017, through December 19, 2017, wherein the applicant was diagnosed with service-connect PTSD. The VA records show that the applicant complained of depression due to the way he was treated while on active duty, in addition to the discrimination investigation he had pending against the Coast Guard. The applicant expressed sorrow and wanting to cry because he could not find an attorney who was willing to take his case. He further expressed depression because he had not yet told his family in his home country about the events that had transpired while he was in the Coast Guard or that he had been separated. The VA records consistently show that the applicant was not struggling with suicidal ideation but was ashamed of having psychological problems. The records also indicate that there were differing opinions between mental health providers. Several providers did not believe the applicant met the criteria for PTSD, while one believed he did and ultimately diagnosed the applicant with PTSD.

SUMMARY OF THE RECORD

The applicant enlisted into the United States Coast Guard on March 10, 2015, and completed basic training.

On May 28, 2015, the applicant reported to his first duty station, a cutter with a crew of about 100, as a non-rate with varying duties. On April 11, 2016, the applicant was sent from the cutter to a training center to attend Operations Specialist Class "A" School.

On April 22, 2016, in response to a complaint from the applicant, the Executive Officer (XO) of the cutter issued a memorandum, "Designation as Preliminary Investigating Officer," wherein he appointed a single Investigating Officer (IO) to conduct an independent investigation into all the circumstances surrounding the allegations of harassment and ethnic stereotyping experienced by the applicant while he was assigned to the cutter. The IO was directed to initiate the investigation on April 22, 2016, and complete it by May 2, 2016.

On May 12, 2016, he received a CG-3307 ("Page 7") wherein he was notified that he had been disenrolled from the "A" School due to "No Fault—Lack of Rating Progress."¹

On May 13, 2016, the applicant initiated contact with a servicing Civil Rights Service Provider (CRSP).²

¹ According to Article 1.C.4.b.2.a. of the Enlisted Assignments, Accessions and Advancements Manual, COMDTINST M1000.8A (October 2013), a "No Fault – Lack of Rating Progress" includes a failure to meet academic or physical fitness requirements, despite a member's best efforts to succeed, which is what happened in the applicant's case. He was unable to pass the requisite courses for his grade and was subsequently disenrolled.

² Pursuant to Coast Guard Civil Rights Manual, COMDTINST M5350.4, before military members can initiate Equal Employment Opportunity Complaints, they must first attempt to resolve the matter with their Commanding Officer or Officer-in-Charge. They must also contact a CRSP within 45 days of the event giving rise to the complaint. If the contact is made on the 45th day, and the member has not attempted resolution, the member will be granted a 15-day period to attempt to resolve the matter.

Command Investigation into Allegations of Harassment and/or Ethnic Stereotyping

On May 17, 2016, the IO submitted his Investigative Report (IR) wherein he provided his “Findings of Fact,” “Opinions,” and “Recommendations” regarding the applicant’s allegations that he had been subjected to harassment and/or ethnic stereotyping. The IO interviewed multiple individuals implicated by the applicant in his complaint. On April 21, 2016, the applicant emailed the Command Master Chief (CMC) alleging that he had experienced harassment and/or ethnic stereotyping while he served aboard the cutter. Specifically, the applicant alleged the following:

- 1) His services as an interpreter were rarely used due to his national origin;
- 2) He was subjected to rumors that he was working with drug smugglers;
- 3) The cutter’s Chief Food Service Specialist (FSC) had angrily confronted him when he attempted to bring breakfast and coffee to the detainees;
- 4) The FSC had questioned him while he was adding ice to a cooler of water for the detainees. He was asked if the detainees should be given ice and water from the ice machine on the Mess Deck because it could break. He was later told not to add ice and to fill the cooler with tap water;
- 5) He had been yelled at for offering the detainees medical treatment while he was acting as an interpreter and only relaying the information that the detainees were complaining of stomach cramps, constipation, and rectal pain;
- 6) He was told one morning that “people” were saying he was using his cellphone to transmit the cutter’s position to drug runners because he had brought coffee to the detainees and [had] taken pictures of a migrant vessel; and
- 7) He was asked if he had immigrated illegally.

Those crewmembers interviewed by the IO stated that they had concerns about the applicant because he took pictures of a migrant vessel after the entire crew had been briefed that they were prohibited from taking pictures of Coast Guard operations. In addition, the applicant was becoming quite friendly with detainees, bringing them coffee and breakfast without first seeking permission to do so, for which the applicant was verbally counseled. A Health Services Specialist (HS1) stated that she remembered a situation when she was working with the applicant as a translator for the detainees. The HS1 told the IO that she had to confront the applicant about what she considered to be inappropriate actions. According to the HS1, the applicant failed to translate simple questions and instead had prolonged conversations with the detainees, making it difficult for her to trust the accuracy of the applicant’s translations. The HS1 stated that other Spanish speakers onboard were able to translate in a way that facilitated an accurate diagnosis of each detainee. A Machinery Technician (MK1) recalled a few occasions in the Engineering Control Center (ECC) when some crewmembers jokingly mentioned that the applicant was working with drug smugglers, but the MK1 said that he was confident he would have stopped the others from making the jokes if there had been a malicious intent. The same MK1 stated that he thought the crewmembers were making jokes that the applicant was working for drug smugglers

because the crew was currently patrolling off the coast of the applicant's home country. Another MK1 recalled a time when he had to go into the Combat Information Center (CIC) to get a radio, when an OS2 jokingly told him not to "give any information to the enemy or to the applicant." The applicant was not present at the time. During the course of the investigation, it was told to the IO that junior officers had expressed concern that the applicant was having difficulties because he was being harassed due to his race. However, those who were told of the concerns stated that the applicant was having difficulties due to his quality of work, not his race. An FS2 told the IO that he had heard crewmembers saying the applicant worked for drug smugglers and had relayed the information back to the applicant. The FS2 stated that at one point he told the applicant to be more careful because he did not want to see the applicant get into any more trouble.

Ultimately, the IO concluded that based off the definitions of "Prohibited Harassment" in the Civil Rights Manual³ and "Illegal Discrimination" in the Discipline and Conduct Manual,⁴ there was no evidence to support the allegations that any specific crewmember on board the applicant's cutter had subjected the applicant to prohibited harassment or illegal discrimination. The IO stated that the applicant's cutter held a Respect Stand Down for all crewmembers describing the definitions of prohibited harassment and illegal discrimination and that, while no one could remember exactly who had made them, the jokes being made about the applicant were clearly unprofessional. It was the IO's opinion that many of the actions complained about by the applicant were justified. For example, the IO stated, the applicant's non-use as an interpreter was not based on the applicant's race or a protected class but due to the applicant's poor performance. In addition, the IO stated that the confrontation with the FSC regarding the applicant bringing coffee and breakfast to the detainees did not constitute harassment or illegal discrimination because the FSC was merely ensuring that proper procedures were being followed regarding the treatment of detainees. In addition, the IO stated that the HS1's alleged yelling at the applicant while he was translating did not constitute prohibited harassment or illegal discrimination because the HS1 was addressing what she considered to be the applicant's inappropriate method of translating and made no explicit or implied reference to any protected status.

On May 17, 2016, the applicant was seen by a Coast Guard psychologist, Dr. N, with a

³ Article 2.C.1.a. of the Civil Rights Manual, COMDTINST M5350.4C (May 2017), defines "Prohibited Harassment" as conduct including, but not limited to, "unwelcome conduct, whether verbal, nonverbal, or physical conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, offensive, or hostile environment on the basis of an individual's protected status, which includes: race, color, religion, sex, national origin, age, disability, genetic information, sexual orientation, marital status, parental status, political affiliation, or any other basis protected by law. Among the types of unwelcome conduct prohibited by this policy are epithets, slurs, stereotyping, intimidating acts, and the circulation or posting of written or graphic materials that show hostility toward individuals because of their protected status. Acts of physical violence, and actual, implied, or veiled threats of violence, are forms of prohibited harassment. Any form or manner of threatening or provoking remarks or threatening gestures in the workplace is also prohibited."

⁴ Article 2.B.1.a. of the Discipline and Conduct Manual, COMDTINST M1600.2 (April 2017), defines "Illegal Discrimination" as, "any intentional action or omission that results in the adverse treatment of a person because of that person's race, color, religion, national origin, disability, handicap, age or gender, including sexual harassment or intentional actions or omissions in reprisal." Article 2.B.1.b. of COMDTINST M1600.2 states, "Disciplinary or administrative action shall be taken only where the discriminatory conduct is intentional. Although law and policy prohibit intentional and unintentional discrimination, only those persons who discriminate intentionally are included within the scope of this Section. If the discriminatory conduct is unintentional, disciplinary and administrative action is inappropriate and unjustified."

focus on psychological personality testing.

On May 31, 2016, Dr. N issued a “Review of Psychological Screening of [applicant],” wherein he provided the following conclusions:

Subjective: Appears anxious, highly sensitive, hyper-alert, and tensely guarded in person.

Objective: Has indicated to others and to me that he has thoughts of killing himself, but denies any immediate action-plans for self-harm. However, he has the potential to over-react negatively or negatively over-interpret minimal threatening clues, and thus continues in the long run as some risk for self-harm, including as a suicide risk.

Assessment: DSM-IV Axis I 309.24 Adjustment Disorder with Anxiety
 Axis II 301.28 Avoidant Personality Disorder

Plans: Maintain in-person contact on weekly or 2x a week basis. Although the suicide risk does not appear high now, if active suicidal thoughts continue to reoccur, consider reestablishing a basic safety pattern with coordination between clinic providers and base supervisors. If places for self-harm emerge, tighten the safety plan and/or consider psychiatric hospitalization. Consider referral for full clinical psychological evaluation and psychiatric consultation.

On June 1, 2016, the applicant contacted the Equal Employment Opportunity (EEO) Office to initiate a pre-complaint of discrimination.

On June 9, 2016, CAPT C, the Commanding Officer of the applicant’s training center, issued a memorandum, “Duty Recommendation for FN [applicant],” wherein he noted that the applicant had been diagnosed with an Adjustment Disorder with Mixed Anxiety and Depressed Mood, and Personality Disorder – Avoidant. CAPT C stated that the applicant had completed counseling sessions and a mental health assessment and that his recurrent work and social problems were consistent with the Adjustment Disorder and Personality Disorder diagnoses. According to CAPT C, the applicant’s symptoms were not expected to improve quickly or easily without prolonged, intensive therapy. Accordingly, CAPT C stated that the applicant was not fit for full duty or worldwide deployment and that continued service might exacerbate the applicant’s condition. CAPT C recommended that the applicant be administratively separated by reason of unsuitability.

On June 13, 2016, the CO of the cutter, issued a memorandum, “Findings of the Harassment and Discriminations Onboard...,” wherein he wrote that, after reviewing the IO’s report and LTJG G’s memorandum on the applicant’s allegations of harassment and discrimination, he concurred with the IO’s assessment that there were no facts that supported the applicant’s allegations of harassment and discrimination. However, the CO stated that he did believe that there were occasions where inappropriate jokes were made regarding the applicant being a drug smuggler, though the CO did not believe that these jokes were related to the applicant’s nationality, ethnicity, or race, but based on the applicant having taken unauthorized photos during Coast Guard operations. The CO also believed that that the senior First and Second Class Petty Officers aboard the cutter could have done a better job addressing and stopping the inappropriate jokes being made about the applicant. The CO directed that all First and Second Class Petty Officers be counseled on their role within the command’s leadership and how critical they are in maintaining a positive command climate. The CO stated that unless additional evidence

and/or information was presented, he saw no reason to pursue the matter beyond the IO's stated recommendations.

On June 15, 2016, the applicant was involuntarily admitted to a hospital after he told police he wanted to cut his wrists and drive off a cliff. The medical notes from the applicant's treating physician are summarized as follows:

- Pt transferred from [redacted] Hosp on a 5150 for SI [suicidal ideation]. Pt told police he wanted to cut his wrists and drive off a cliff. Started to experience SI when he was told he would be deploying again. Recently returned from 10 mo. and said he was subject[ed] to verbal discrimination during this time (coworkers implied he was giving away information to drug smugglers); he and his partner divorced when he returned from his first deployment.

Pt reported that before was sent to [redacted] for school he was on a ship. Other sailors on the ship were telling him that he was a spy, drug smuggler, etc. because he was "being too nice" to some detainees on the ship. Made a report (that is still open) that he was discriminated against by unit. Liked people at school in [redacted], but said he failed his classes; thought he failed because he was depressed. Saw a psychiatrist on case who told him he had an avoidant personality disorder and there was no Tx the military could provide for him. Yesterday he found out he was going to be sent back to the unit in [redacted] and then out to sea, with the plan for him to transfer to another base. Felt depressed, hopeless and trapped that there was no way to [get] out of the deployment. Said he does not want to return to his unit and began to experience active thoughts of SI when he was told to leave last night.

CLINICAL NOTE

REASON FOR REFERRAL: The patient is a 32-year-old AD USCG male who was admitted on a 5150 for SI, with plan (jump off a cliff or cut wrists) and stated intent. He reports that he recently returned from a 10-month overseas deployment in which he experienced racial discrimination and harassment. He has reportedly filed a civil rights complaint due to this treatment and has recently been reassigned to return to the location in which he experienced this discrimination. He is also in the process of divorcing from his spouse and has had reported involvement with several new partners. He denies a past history of depression prior to the military. He continues to express suicidal ideation without intent or plan, and states that he has nothing to live for. He currently denies HI/AVH. This is this patient's first psychiatric hospitalization. This evaluation was requested for diagnostic clarification and treatment planning.

RELEVANT HISTORY: Please see patient's inpatient records for additional history.

MEASURES ADMINISTERED: Minnesota Multiphasic Personality Inventory-2nd Edition (MMPI-2), Millon

Clinical Multiaxial Inventory-3rd Edition (MCMI-III).

TEST RESULTS: The patient produced a valid profile on the MMPI-2 with no obvious attempts to either conceal or magnify his current level of distress, although relatively few overall psychiatric symptoms were endorsed (L=61, F=51, K=47, F-K=-9, VRIN= 65, TRIN=57). The patient's MMPI-2 profile was notable for a spike on clinical scale 2 (T = 70), suggestive of moderate dysphoria with depressed affect. Individuals with this profile tend to have complaints pertaining to feeling unhappy, sad, and dissatisfied with themselves and life situations. They may have a difficult time finding pleasure in activities they once enjoyed, as well as lack motivation and initiative. Individuals with this profile may experience feelings of guilt and low self-esteem and tend to be passive and socially reserved. A moderate elevation on a scale 2 subscale was notable for difficulty experiencing positive emotion, poor morale and pessimism, complaints of mental inertia, and lack of energy for coping with difficulties. On the content scales, his profile also reflects mild depression and anxiety. While his overall profile is generally consistent his reported symptoms during clinical interview, his clinical presentation is suggestive of somewhat greater severity than is represented on this MMPI profile.

The MCMI-III was also valid, again with no overt attempts to either hide or otherwise exaggerate his current distress (X=44, Y=67, Z=54). The results were generally consistent with those found on the MMPI-2. He demonstrated elevations on the major depression scale, the anxiety scale and the compulsive scale. With regard to personality patterns, his profile configuration was moderately consistent with individuals who display a prudent, controlled and perfectionistic manner, and who demonstrate some restriction in their display of feelings. These individuals may also experience internal conflict between hostility towards others and fear of social disapproval. They may resolve ambivalence by suppressing feelings of resentment and placing high demands on themselves or others.

CONCLUSIONS: The results of the current evaluation were noteworthy for moderate symptoms of depression. While his overall profile was generally consistent with his reported symptoms during clinical interview, his clinical presentation was perhaps suggestive of somewhat greater severity than was represented in these assessment data. Given what looks to be mild compulsive personality traits, his current state of uncertainty with regard to his future in the military is likely contributing to ongoing mood difficulties. He reported significant hopelessness and distress related to his current difficulties, including the possibility of separating from the military and ongoing divorce.

Of note, we obtained his previous MCMI protocol from May 2016 which yielded a number of elevated personality scales (most notably, Avoidant) in the context of more significant overall distress. However, those findings were not replicated here and thus we do not have clear psychometric evidence for an ongoing diagnosis of Avoidant Personality Disorder. The current database appeared more supportive of depression and mild anxiety, in the context of an adjustment reaction.

DSM-V DIAGNOSES: Adjustment Disorder with Mixed Anxiety and Depressed Mood; Compulsive traits

RECOMMENDATIONS:

1. The patient should be monitored for thoughts of self-harm by his outpatient treatment providers. While he denied SI at the time of discharge, he may be prone to future thoughts of self-harm.
2. The patient is encouraged to follow his medication regimen as prescribed by his providers and continue outpatient psychiatric care following discharge.
3. Continued individual follow-up with mental health will be beneficial. More specifically, this can include increasing coping skills for improved decision making and behavioral activation.
4. Additionally, the patient is encouraged to engage in other activities that will serve to increase his social support network (e.g., social groups, church, volunteer work, etc.).

NOTE: This report was co-written with [redacted], VA Psychology Intern, working under my supervision. The patient was provided with feedback regarding the results.

On June 20, 2016, the applicant was notified that his CO had initiated administrative separation proceedings against him pursuant to Article 1.B.15.b.⁵ of the Military Separations

⁵ Article 1.B.15.b. of the Military Separations Manual, COMDTINST M1000.4, provides causes for discharge due to unsuitability. This article states, "The purpose of discharges for unsuitability is to free the Service of members considered unsuitable for further service because of:

...

3. Apathy, defective attitudes, adjustment disorders as listed in reference (d), Coast Guard Medical Manual, COMDTINST M6000.1 (series), Chapter 5, inability to expend effort constructively, or other observable defect for which a separation designator code (SPD code) exists that renders a member unsuitable for further military service.

Manual, COMDTINST M1000.4, due to a diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood, and a Personality Disorder – Avoidant. The CO stated that she based her recommendation on the mental health evaluation the applicant received on June 15, 2016. The applicant was informed that he had the right to submit a written statement within five working days. The applicant was further informed that he was eligible to be considered under the Commandant's Second Chance Program pursuant to Article 1.B.1.a.1.⁶ of COMDTINST M1000.4, and that because he had less than eight years of total military service, he was not entitled to an Administrative Separations Board (ASB).

On June 24, 2016, the applicant submitted a "First Endorsement" wherein he acknowledged receipt of his CO's June 20, 2016, memorandum and stated that he understood the contents within the memorandum. The applicant objected to his discharge and elected to provide a written statement and to be considered under the Commandant's Second Chance Program.

Also on June 24, 2016, the applicant filed a "Pre-Complaint Process Election Form," wherein he acknowledged his understanding of the process outlined in 29 C.F.R. § 1614.105⁷ and elected to have his disputes handled through traditional EEO counseling.

On July 12, 2016, the Coast Guard's EEO office issued the applicant a "Notice of Right to File Discrimination Complaint" and informed the applicant that the notice was the "final interview" in his case.

On July 13, 2016, the applicant's CO issued a memorandum, "Recommendation for Discharge ICO FN [applicant]," wherein he recommended that the applicant be separated pursuant to Article 1.B.15.b. of the Military Separations Manual, COMDTINST M1000.4. The CO further

⁶ Article 1.B.1.a.1. of the Military Separations Manual, COMDTINST M1000.4, states, "Commander, Coast Guard Personnel Service Center is the Discharge Authority in all cases of administrative separation except in those cases specified in Articles 1.B.7, 1.B.9, 1.B.11, 1.B.14, 1.B.15, and 1.B.19. of this Manual in which the district commander, logistics/service center commands, or commanding officer, as appropriate, may be the Discharge Authority. In an effort to retain good, solid first-term performers with potential, but who have made a youthful mistake that would otherwise result in their discharge, the Commandant has established a "Second Chance Program". The Second Chance Program authorizes the first Flag Officer/SES in the chain-of-command of the first-term performers to waive all policy discharge authorities (except as noted below) contained in Articles 1.B.9., 1.B.12., 1.B.15., and 1.B.17. of this Manual. This authority shall not be delegated. The first Flag Officer/SES with assistance from their units shall define the internal processes for forwarding waiver requests to them. The Second Chance Program specifically excludes all policy discharges contained in Article and 1.B.12 of this Manual or Chapter 3 of reference (h), Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).

⁷ 29 C.F.R. § 1614.105 lays out the "Pre-Complaint Process." It states, "(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

recommended that the applicant receive an Honorable discharge due to unsuitability for an Adjustment Disorder with Mixed Anxiety, Depressed Mood, and a Personality Disorder – Avoidant.

On July 18, 2016, the applicant filed a formal complaint of discrimination with the Coast Guard's EEO office, wherein he maintained his previous allegations that he had been harassed and discriminated against based on his ethnicity while serving aboard his first cutter.

On September 1, 2016, the applicant was Honorably discharged from the Coast Guard with a narrative reason for separation of "Adjustment Disorder," a separation code of "JFY," and a reenlistment code of RE-3.

On October 13, 2016, the Coast Guard's EEO office dismissed the applicant's complaint for failure to abide by the applicable filing deadlines outlined in 29 C.F.R § 1614.105(a)(1), which states that a "complainant must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action." The EEO office stated that the most recent alleged discriminatory action taken against the applicant had taken place on March 28, 2016, and the applicant did not contact a Counselor until May 13, 2016, one calendar day beyond the statutory period.

On December 13, 2016, the applicant applied to the Coast Guard's Office of Civil Rights and Civil Liberties (CRCL) for reconsideration of the Coast Guard's dismissal of his complaint.

On April 4, 2017, CRCL notified the applicant that because it found that the Coast Guard's decision to dismiss his case was not supported by substantial evidence, his appeal was approved and that his original allegations, as presented in his original application, would be considered.

On October 19, 2017, after having received the entirety of the Coast Guard's Investigative File, the applicant submitted an eight page addendum wherein he contested the statements of those interviewed and provided his account of events, as previously stated in his complaint.

Coast Guard EEO Final Agency Decision

On November 20, 2017, the Coast Guard's EEO office issued its "Final Agency Decision" wherein it addressed the applicant's allegations of harassment and discrimination. Specifically, the Coast Guard addressed the applicant's claims that he was harassed based on his race and national origin by several crewmembers aboard his cutter. The Coast Guard decision noted that the applicant did not report the alleged harassment while aboard the cutter, but after he reported to "A" School in June 2016. The relevant portions of this report are summarized as follows:

HOSTILE WORK ENVIRONMENT

Harassment claims involve one or both of the following categories: (1) harassment by a supervisor that results in a tangible employment action, and (2) harassment which creates a hostile work environment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also* Equal Employment Opportunity Commission *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*. In a case where a complainant proves a supervisor subjects the complainant to unlawful discriminatory harassment which results in a tangible employment action, the

employer will be found liable since no affirmative defense is available to the employer. *Id.*

In order to prevail on a claim of a hostile work environment, a complainant must prove the workplace was permeated with discriminatory behavior sufficiently severe or pervasive to create a discriminatorily hostile or abusive work environment - one that a reasonable person would find hostile or abusive in addition to the victim's own subjective perception. *Harris v. Forklift Sys. Inc.*, 510 C.S. 17 (1993); *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986). To establish a claim of hostile environment, a complainant must prove the following elements: (1) the complainant is a member of a protected group; (2) the complainant was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the unwelcome conduct was based upon the complainant's protected class; (4) the unwelcome conduct affected a term or condition of the complainant's employment, or had the effect of unreasonably interfering with the work environment, or creating an intimidating, hostile or offensive work environment; and (5) there is a basis for imputing liability to the employer. See *McCleod v. Soc. Sec. Admin.*, EEOC Appeal No. 01963810 (Aug. 5, 1999) (citing *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982)).

In cases involving supervisory harassment i.e. where the individual accused of harassment has the authority to take tangible employment actions (such as hire, fire, reassign or discipline) see *Vance v. Ball State Univ.*, 570 U.S. (June 24, 2013), where no tangible employment action is taken, the employer may prove an affirmative defense comprised of two elements: (1) that the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. See *Ellerth*, 524 U.S. 742; see *Faragher*, 24 U.S. 775; see also Equal Employment Opportunity Commission *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*. In cases involving harassment by a coworker or non-employee where no tangible action is taken, the employer will be found liable if the complainant proves the employer knew or should have known of the conduct, unless the employer can prove that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d); see Equal Employment Opportunity Commission *Policy Guidance on Current Issues of Sexual Harassment: see also Owens v. Dep 't of Transp.*, EEOC Request No. 05940824 (Sept. 5, 1996).

ANALYSIS

Complainant failed to demonstrate that the alleged examples of unwelcome conduct constituted an unlawfully hostile work environment. Complainant failed to produce preponderant evidence either that the examples involved or were based on his protected class status, that any examples satisfying these proof requirements rose to a level of severity or pervasiveness that a reasonable person would find discriminatorily hostile or abusive when the examples are considered as a whole, or that the actions at issue were motivated by discriminatory intent.

Complainant presented as evidence of discrimination only his own uncorroborated subjective testimony reflecting his belief that management took actions against him based on discriminatory motives. He did not present sufficient evidence to refute management's testimony in which they denied acting on discriminatory motives. Furthermore, insufficient evidence was provided that any of the alleged statements were made by management or his coworkers. None of the incidents are linked to Complainant's race or national origin.

A hostile work environment claim must fail unless there exists some linkage between the hostile behavior and the complainant's membership in the identified protected class. *Brookey v. Secy of Agriculture*, EEOC Request No. 01986339 (2001). In this case, Complainant did not provide sufficient evidence to establish a link between the incidents in his harassment claim and his protected class.

For these reasons, and based on the entirety of evidence in the record, we find that Complainant failed to prove that he was subjected to discriminatory harassment as claimed.

CONCLUSION

Based upon the full evidentiary record, CSCG concludes Complainant failed to prove that USCG discriminated against him as alleged. Since Complainant is not the prevailing party, he is not entitled to

payment of attorney's fees, costs, or compensatory damages, and no corrective action is required.

On January 1, 2018, the applicant submitted a 10 page rebuttal to the Coast Guard's Final Agency Decision, wherein he contested the Coast Guard's decision and findings. The applicant stated that several witness statements corroborate a generalized pattern of the harassment and discrimination he faced and provided arguments for each of the findings he contested.⁸

On February 20, 2018, the applicant received a letter from the Department of Veterans Affairs (VA) wherein he was given a 100 percent disability rating due to service-connected PTSD, increased from a previous rating of 70 percent.

VIEWS OF THE COAST GUARD

On July 30, 2019, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC.

The JAG argued that the applicant is not eligible for medical retirement. According to the JAG, pursuant to Article 2.C.2.c. of the Physical Disability Evaluation Systems Manual (PDES), COMDTINST M1850.2D, "If a member being processed for separation or retirement for reasons other than a physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments." The JAG stated that here, the applicant failed to produce any evidence that he was incapable of performing his job. To the contrary, the JAG argued that his medical record states:

Pt transferred from [redacted] Hosp on a 5150 for SI [suicidal ideation]. Pt told police he wanted to cut his wrists and drive off a cliff. Started to experience SI when he was told he would be deploying again. Recently returned from 10 mo. and said he was subject[ed] to verbal discrimination during this time (coworkers implied he was giving away information to drug smugglers); he and his partner divorced when he returned from his first deployment.

Pt reported that before was sent to [redacted] for school he was on a ship. Other sailors on the ship were telling him that he was a spy, drug smuggler, etc. because he was "being too nice" to some detainees on the ship. Made a report (that is still open) that he was discriminated against by unit. Liked people at school in [redacted], but said he failed his classes; thought he failed because he was depressed. Saw a psychiatrist on case who told him he had an avoidant personality disorder and there was no Tx the military could provide for him. Yesterday he found out he was going to be sent back to the unit in [redacted] and then out to sea, with the plan for him to transfer to another base. Felt depressed, hopeless and trapped that there was now ay to [get] out of the deployment. Said he does not want to return to his unit and began to experience active thoughts of SI when he was told to leave last night.

///

Pt's depressive symptoms are mostly likely a result of experiencing several stressful events that are best explained by an adjustment disorder with mixed depression and anxiety.

Pt likely has suffered from a major depressive episode in the past, but at the present time does not meet diagnostic criteria (lacks two week time frame).

⁸ The Board has already provided a thorough review and summary of the applicant's allegations and arguments regarding the alleged discrimination and harassment he allegedly encountered aboard a Coast Guard cutter in both the "Applicant's Request and Allegations" and "Applicant's Response to the AO" sections of this decision. For efficiency, the Board will not summarize the applicant's arguments here.

The JAG stated that at the time of the applicant's discharge, he was diagnosed with "DSM-V Diagnosis: Adjustment Disorder with Mixed Anxiety and Depressed Mood; Compulsive Traits." The JAG further stated that the time the applicant was notified of his Command's intent to discharge, he was not diagnosed with PTSD or Major Depressive Disorder. The JAG explained that a Coast Guard Medical Officer concluded that not only did the applicant not have PTSD or Major Depressive Disorder, but the Medical Officer did not question the applicant's fitness for duty. Accordingly, at the time of the applicant's diagnosis of adjustment disorder, it must be presumed that the Medical Officer concluded that the applicant was not unfit for continued duty due to any potential or apparent mental impairment as required by the PDES Manual. Furthermore, the JAG argued that the applicant's medical record shows that the applicant wanted to remain in the Coast Guard and return to duty, just not aboard his previous cutter.

In addition, the JAG argued that the procedures and presumptions applicable to the VA evaluation process are fundamentally different from and often more favorable to the veteran than those procedures and presumptions applied under the PDES. The JAG explained that the VA is not limited to the time of the applicant's discharge. According to the JAG, if a service-connected condition later becomes disabling, the VA may award compensation on that basis. The JAG argued that the VA's subsequent finding that the applicant was 100 percent disabled is not binding on the Coast Guard, nor indicative of differing or conflicting opinions between the Coast Guard and VA medical officials. The JAG stated that the sole standard for a PDES disability determination is unfitness for duty. Here, the JAG argued there is no evidence that the applicant could not perform his duties. The JAG further argued that the applicant failed to establish that at the time of his discharge, the Coast Guard committed an error or injustice.

The JAG argued that the applicant's mental health issues are considered a "Condition, Not a Disability." According to the JAG, a joint read of the PDES Manual and the Medical Manual, COMDTINST M6000.1F, establish that the applicant did not suffer from a disease that could be referred for PDES processing. Instead, the JAG claimed the applicant suffered from a condition where the appropriate remedy was administrative separation from the service. The JAG explained that Article 2.A.9 of the PDES Manual holds that certain conditions and defects may cause a member to be unfit for continued duty and yet not have physical disabilities within the normal meaning of the law, thereby subjecting the member to administrative separation, including personality disorders.

The JAG explained that the applicant was sad due to his perceived harassment aboard his previous cutter, which resulted in the applicant being involuntarily placed in the hospital for suicidal ideation. According to the JAG, the applicant's symptoms improved, especially when he learned that he would not be returned to his previous cutter, but they returned when he learned he was being administratively discharged and that he would be getting a divorce due to his spouse's infidelity. The JAG quoted CAPT W, the Coast Guard's expert psychiatrist who submitted a medical opinion in accordance with 10 U.S.C. § 1552(g), who stated the following:

This is consistent with adjustment disorder and not a longer term mental health disorder such as depression. Additionally, the treating psychiatrist specifically considered depression and reported that he [the applicant] did not qualify for a diagnosis of Major Depression at that time. At his separation physical, the physician noted that his [the applicant's] symptoms were improving, thus not needing a re-evaluation for his diagnosis.

Adjustment Disorders are considered an administrative separation in the Coast Guard and does not warrant a medical board. The VA may have given him a diagnosis of depression, but this would be post active duty.

The JAG argued that following the opinions of the treating physician, the Coast Guard Medical Officer at the time of discharge, and CAPT W, this Board must conclude that the applicant had an adjustment disorder while in the Coast Guard. The JAG explained that Adjustment Disorders require administrative separation pursuant to Article 12.B.15.b.3 of the Military Separations Manual, COMDTINST M1000.4, which states, “The purpose of discharges for unsuitability is to free the Service of members considered unsuitable for further service because of: (3) Apathy, defective attitudes, adjustment disorders as listed in reference (d), Coast Guard Medical Manual, COMDTINST M6000.1, Chapter 5, inability to expend effort constructively, or other observable defect for which a separation designator code (SPD code) exists that renders a member unsuitable for further military service.” The JAG argued that all the medical evidence provided by the applicant establishes that the applicant did not have a mental health disease as defined by the PDES Manual and Coast Guard Medical Manual, during his time in the service, and expert opinions concur in this assessment. The JAG explained that because the applicant had a mental health *condition*—Adjustment Disorder—and not a mental health *disease*, he was not entitled to the PDES process, and because he was not entitled to the PDES process, he was not entitled to a medical discharge. The JAG claimed that the applicant was properly administratively separated from the Coast Guard due to his Adjustment Disorder.

The JAG argued that the applicant bears the burden to establish, by the preponderance of the evidence, that he was entitled to a medical discharge, and he has failed to carry his burden here. According to the JAG, the applicant attempts to support his claim that he had PTSD with a VA diagnosis for PTSD and Major Depressive Disorder. However, the JAG claimed this argument fails for two reasons: 1) the Coast Guard did not diagnosis the applicant prior to or contemporaneously with his discharge as having PTSD and/or Major Depressive Disorder; and 2) the applicant does not now or then have PTSD.

The JAG argued that in order to establish that there was an error or injustice, the applicant must show that the Coast Guard knew he had PTSD and/or a Major Depressive Disorder. However, the JAG stated that at the time of the applicant’s separation, he had neither. The JAG argued that if the Coast Guard did not know, or have reason to suspect, that the applicant had a major depressive disorder, then it would not have been possible for the Coast Guard to have committed an error or injustice. In addition, the JAG stated that during his tenure in the Coast Guard, the applicant was not diagnosed with PTSD or Major Depressive Disorder, and the only relevant medical records pre-discharge from the Coast Guard establish that the applicant had an Adjustment Disorder, which does not equate to PTSD and/or Major Depressive Disorder.

The JAG explained that CAPT W reviewed all of the applicant’s medical records and determined that the applicant did not have PTSD at the time of his separation. Specifically, CAPT W stated,

I disagree with the diagnosis of PTSD. For a diagnosis of PTSD, one must have trauma as described in DSMV as “exposed to one or more events that involved death or threatened death, actual or threatened serious injury, or threatened sexual violation.” In the record provided, he repeatedly reported his trauma was from being discriminated again. Additionally, his Veterans Affairs psychiatrist also reports he does not qualify for a diagnosis of PTSD.

The JAG argued that the applicant did not and does not now have PTSD as he did not have a life threatening injury, was not the victim of physical or sexual assault, was not in combat, nor in a natural disaster. The JAG claimed that to have PTSD, one must suffer from one of these events, and the applicant denied suffering or witnessing any of them. Furthermore, the JAG argued that the applicant VA medical records from June 22, 2017, establish that the applicant does not have PTSD and/or Major Depressive Disorder. The June 22, 2017, medical note states:

Based on today's evaluation, it is unclear whether veteran's symptoms meet criteria for Adjustment Disorder with Depressed Mood and Anxiety (with military harassment as a stressor), Other Specified Stressor-Related Disorder, Social Anxiety Disorder and/or Specified Depressive Disorder. Veteran does not meet criteria for PTSD, despite service-connected diagnosis, as he denied exposure to life-threatening situations and related symptoms.

The JAG argued that based on the above cited statement, the applicant does not have the conditions he claimed entitled him to relief. The JAG stated that if the applicant did not have PTSD and/or Major Depressive Disorder at the time he was separated, and did not have it as of June 22, 2017, then the Coast Guard could not have committed an error or injustice and the applicant is not entitled to relief.

The JAG further argued that the applicant was unsuitable for continued service due to suicidal ideation. The JAG stated that CAPT W discussed whether or not a medical discharge or an administrative discharge was more appropriate for the applicant, but determined that the applicant displayed the alleged behaviors not because of a long-term mental health issue—indicative of a disorder like Major Depressive Disorder—but rather due to the applicant's fears/concerns over returning to his previous cutter. Specifically, CAPT W stated:

As with the claim of a medical discharge [*sic*] vs an administrative discharge; in my opinion, the diagnosis at the time of separation is correct [adjustment disorder]. This issue making him unsuitable for continued military service was his suicidality. He became suicidal upon hearing that he was returning to his unit and it improved upon hearing he was separated and did not have to return to the unit (according [to] the treating psychiatrist at [redacted] AFB). This is consistent with adjustment disorder and not a longer term mental health disorder such as depression. Additionally, the treating psychiatrist specifically considered depression and reported he did not qualify for a diagnosis of Major Depression at that time. At his separation physical, the physician noted that [his] symptoms were improving, thus not needing a re-evaluation for his diagnosis. Adjustment Disorders are considered an administrative separation in the Coast Guard and does not warrant a medical board. The VA may have given him a diagnosis of depression, but this would be post active duty.

The JAG stated that CAPT W also observed that the applicant's mental health had improved as soon as the applicant learned that he was not going back to his previous cutter. The JAG argued that this mental health improvement is indicative of the applicant not having Major Depressive Disorder, but instead an Adjustment Disorder. Accordingly, the JAG argued that the applicant was not and should not have been referred to a medical board. The JAG stated that the only time the applicant was diagnosed with a mental health issue that might have been subject to a Coast Guard medical board was by the VA, and only after he was discharged. The JAG argued that this VA diagnosis is not binding on the Coast Guard.

Finally, the JAG argued that although the applicant, as a Latino, is a member of a protected class, the EEO investigation found no discriminatory behavior from the applicant's shipmates aboard his previous cutter. Furthermore, the JAG stated that the discriminatory and harassing

treatment the applicant alleged he received from his superiors and crewmembers was never substantiated. Accordingly, the JAG stated that because there was no discrimination, then there could be no injustice to which the applicant could have suffered. The JAG argued that the Coast Guard followed all procedures as it relates to the provisions of medical care, administrative investigations, and the discharge/separation process.

Coast Guard Psychiatric Opinion

Because the applicant alleged that mental health issues contributed to his discharge, pursuant to 10 U.S.C. § 1552(g)(1), the Coast Guard was required to obtain and include a medical opinion from a clinical psychologist or psychiatrist with its advisory opinion. Although the JAG quoted portions of this medical opinion throughout her advisory opinion, the entirety of the medical opinion was not provided. For that reason, the Board has recorded the medical opinion, submitted on May 28, 2019, by a CAPT W of the United States Public Health Services (USPHS) in full below:

After reviewing the case and considering his claims, the follow is my opinion,

1) I disagree with the diagnosis of PTSD. For a diagnosis of PTSD, one must have trauma as described in DSM5 as “exposed to one or more event(s) that involved death or threatened death, actual or threatened serious injury, or threatened sexual violation.” In the record provided, he repeatedly reported his trauma was from being discriminated against. Additionally, his Veterans Affairs psychiatrist also reports he does not qualify for the diagnosis of PTSD.

2) With the claim of a Medical discharge vs an administrative discharge; In my opinion, the diagnosis at the time of separation is correct. The issue making him unsuitable for continued military service was his suicidality. He became suicidal upon hearing that he was returning to his unit and it improved upon hearing he was being separated and did not have to return to the unit (according the treating psychiatrist at [redacted] AFB). This is consistent with adjustment disorder and not a longer term mental health disorder such as depression. Additionally, the treating psychiatrist specifically considered depression and reported he did not qualify for a diagnosis of Major Depression at that time. At his separation physical, the physician noted that symptoms were improving, thus not needing a re-evaluation for his diagnosis. Adjustments Disorders are considered an administrative separation in the Coast Guard and does not warrant a medical board. The VA may have given him a diagnosis of depression, but this would be post active duty.

As an additional note. Other ethical and legal considerations may be necessary, but as a government employee, I feel the need to address a concern for fraud waste and abuse. According to his VA records, this member is getting a 70% service connected disability for PTSD. As noted above, in my opinion he does not have PTSD because he does not meet the criteria defined in the DSM5. Additionally, his treating VA psychiatrist also agrees he does not have PTSD. It also needs to be noted, I do not believe this member fraudulently claimed PTSD. His paperwork on his application was consistent with his EO complaint. I believe this was an administrative mistake within the VA.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 16, 2019, the Chair sent the applicant a copy of the Coast Guard’s advisory opinion and invited him to respond within thirty days. The Chair received the applicant’s response on October 29, 2020.

The applicant alleged that whistleblowers and servicemembers in general who have engaged in the EEO process, have uncovered patterns of misdiagnoses. According to the applicant,

these whistleblowers and servicemembers have claimed they were erroneously diagnosed with adjustment disorders and personality disorders. The applicant alleged that the military uses these erroneous diagnoses for the purpose of facilitating large scale discharges with little to no liability to the military branches, most notable within the Coast Guard, making any such diagnosis unreliable. The applicant argued that subsequent to his discharge, several mental health experts from with the VA, as well as third party providers, have reassessed and re-diagnosed him with more serious mental health issues, stemming from his time in the Coast Guard, including PTSD and Major Depressive Disorder. The applicant stated that the Coast Guard recommends denying relief despite a preponderance of the evidence that shows he was willing but unaware that he was unable to perform his duties due to his PTSD, which developed and was aggravated by his time in the Coast Guard.

Furthermore, the applicant alleged that he did meet the conditions outlined in 1.C.2.b.1.a and b of the PDES Manual, COMDTINST M1850.2D, because he was rendered unable to perform his duties after the events detailed in the EEO investigation and the subsequent trauma that resulted from the events. The applicant claimed that his ASVAB score of 85 proves that he was able to perform his duties prior to the discrimination and harassment he faced. The applicant claimed that it was only after almost a year of bullying and harassment that he was unable to perform in class or learn the simplest tasks, which included the duties of his rank. According to the applicant, any reasonable, logical thinking individual would find these facts as pretty compelling and as evidence that meets the standards of a preponderance of the evidence, that he was involuntarily disabled and unable to perform his duties.

The applicant alleged that despite not being separated under the PDES as he should have been, at the time of his pending separation, he did ask for treatment instead of separation. In addition, the applicant alleged that he also requested a medical board so that he could be heard, but his request was refused based on the Coast Guard's diagnosis of Adjustment Disorder. Moreover, the applicant alleged that the PTSD definition used by the Coast Guard to support its finding that the applicant does not have PTSD, was taken from the VA's website article on the history of PTSD. The applicant stated that it is noteworthy that the Coast Guard uses the very first formulation of the concept of PTSD dating back to the year of 1980, in order to support their misdiagnosis of an adjustment disorder instead of his more serious condition of PTSD and Major Depressive Disorder. In doing so, the applicant alleged that the Coast Guard is merely dismissing and sweeping the main issue in question under the rug—can a stressor constituted by racial trauma cause PTSD. The applicant alleged that in the DSM-V, the American Psychiatry Association stated, "Racial trauma may merit a DSM-V diagnosis of PTSD when there is identifiable index trauma (Criterion A), re-experiencing of the trauma (Criterion B), avoidance of trauma reminders (Criterion C), negative mood/cognitions (Criterion D), and hyperarousal (Criterion E)." The applicant further cited VA's Deployment Risk and Resilience Inventory-2 which stated, "[e]xposure to harassment that is non-sexual but that may occur on the basis of one's biological sex or minority or other social status. Categories of harassment include constant scrutiny, questioning one's ability and commitment, and threat to safety."

The applicant stated that after lengthier and more in-depth treatment and assessment, as early as April 20, 2017, the prevailing medical opinion has been a diagnosis of PTSD with Major Depressive Disorder, for which there is an established service-connected disability rating of 100

percent. The applicant alleged that this meant that when presented with his EEO investigative file, the mental health experts and adjudicators at the VA reasonably concluded that the events and facts included in the investigation, satisfied the criterion for a stressor event leading to PTSD as described in DSM-V. The applicant argued that even if the VA's diagnosis is not binding on the Coast Guard, it is nonetheless substantial evidence and represents a preponderance of the evidence, supporting his claim that his initial diagnosis was wrong. The applicant argued that the VA's diagnosis cannot be dismissed simply because the standards are more lenient and favorable to veterans and because diagnostic standards and current definitions do not change and are the same everywhere, whether or not they are followed by the provider. The applicant alleged that PTSD and Major Depressive Disorder were present before his discharge and that his symptoms were grossly misdiagnosed by the Coast Guard. The applicant claimed that his symptoms still persist to this day, with a lengthy medical file that supports his PTSD and Major Depressive Disorder diagnosis.

The applicant stated that the Coast Guard's analysis in the Final Agency Decision (FAD) and its statement that "insufficient evidence was provided that any of the alleged statements were made by management or his coworkers" is factually inaccurate. The applicant alleged that the investigative record contains ample evidence that at least some of the alleged statements regarding him being a drug smuggler were in fact made. Accordingly, the applicant argued that common sense says that he was harassed, treated differently, and denied work opportunities by those individuals making the harassing and demeaning comments. The applicant further argued that because there is ample evidence that discriminatory statements were made toward him, the statements should be considered by this Board.

The applicant argued that the Coast Guard's assertion that "most expert opinions concur" that he had an adjustment disorder as opposed of PTSD and Major Depressive Disorder fails because the evidence in the medical files, including documents and assessments establish that he had PTSD and Major Depressive Disorder and not an adjustment disorder. The applicant explained that there have been differing medical opinions regarding his mental health diagnosis. One side, he argued, is the Coast Guard's assessment, with a vested interest in maintaining an adjustment disorder diagnosis and who has a history of misusing its diagnosis within its organization, and the other from a larger group of specialists with more neutral positions, who have been seeing and treating him over a longer period of time. The applicant claimed that in all medical specialties, the second, more documented and detailed assessment and diagnosis takes precedence over the first diagnosis. The applicant alleged that he displayed symptoms of PTSD from day one, after arriving at "A" School, well before receiving orders to return to his previous cutter, where the stressor event had taken place. The applicant claimed that after being unable to perform his duties, he reported his harassment and discrimination after his third day at "A" School. The applicant explained that it was the night before he was supposed to depart and return to his previous cutter, that his PTSD symptoms peaked, not after or during "A" School. The applicant alleged that his symptoms did not begin only after hearing he was to return to his previous cutter and then magically disappeared upon learning he would not have to return to the cutter, as claimed by the Coast Guard. Although the news did have a calming effect, the applicant claimed the news would have had the same effect on someone suffering from PTSD and Major Depressive Disorder who learned they would not have to return to imminent danger or a reliving of the stressor event. The applicant alleged that his mental health problems did not suddenly originate on the eve of the return trip to the stressor event

and did not disappear when he was not sent back.

The applicant argued that using the same standard on every case, not just his, would amount to denying medical retirements to all applicants not yet in service for twenty or more years, and would render the BCMR process devoid of any meaning or purpose. The applicant stated that he is not seeking any material or financial benefit but is seeking to recover some of his dignity—a dignity denied to the applicant by the Coast Guard when it diagnosed him with an adjustment disorder and quickly discarded him after engaging in the EEO process due to racial discrimination. This indignity, according to the applicant, is relived and on display every time he submits his DD-214. The applicant alleged that because of the Coast Guard’s erroneous and unjust diagnosis, he is precluded from being considered for employment or free from judgement in other normal aspects of his life, every time his DD-214 is reviewed by a prospective employer. The applicant argued that allowing a narrative reason of separation of “adjustment disorder” to remain on his record indicates that the applicant “failed to adjust” to racial discrimination and harassment, which should shock the sense of justice and, respectfully, be corrected by this Board.

APPLICABLE LAW AND POLICY

Article 5.A.3. of the Coast Guard Medical Manual, COMDTINST M6000.1F, provides the following guidance on Adjust Disorders:

Adjustment Disorders. These disorders are generally treatable and not usually grounds for separation. However, when these conditions persist or treatment is likely to be prolonged or non-curative (e.g., inability to adjust to military life/sea duty, separation from family/friends), process in accordance with Military Separations, COMDTINST M1000.4 (series) is necessary.

- a. 309.0 With depressed mood.
- b. 309.24 With anxiety.
- c. 309.28 With mixed anxiety and depressed moods.
- d. 309.3 With disturbance of conduct.
- e. 309.4 With mixed disturbance of emotions and conduct.
- f. 309.9 Adjustment disorder unspecified.

Article 1.B.15.b.3. of the Military Separations Manual, COMDTINST M1000.4, provides the following guidance on separations due to unsuitability:

The purpose of discharges for unsuitability is to free the Service of members considered unsuitable for further service because of:

...

- (3) Apathy, defective attitudes, adjustment disorders as listed in reference (d), Coast Guard Medical Manual, COMDTINST M6000.1 (series), Chapter 5, inability to expend effort constructively, or other observable defect for which a separation designator code (SPD code) exists that renders a member unsuitable for further military service.

Coast Guard Physical Disability Evaluation System’s Manual, COMDTINST M1850.2C, Article 2.C.2.f.i. provides guidance for service members who may experience disabilities as a civilian, but not necessarily as a service member. It states the following, in relevant part:

The existence of a physical defect or condition that is ratable under the standard schedule for rating

disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the Department of Veterans Affairs for disability compensation after release from active duty.

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) provides the following guidance on diagnosing PTSD and the criterion that must be met in order to receive a diagnosis of PTSD:

Note: The following criteria apply to adults, adolescents, and children older than 6 years. For children 6 years and younger, see corresponding criteria below.

A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:

1. Directly experiencing the traumatic event(s).
2. Witnessing, in person, the event(s) as it occurred to others.
3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.
4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse).

Diagnostic Features: The directly experienced traumatic events in Criterion A include, but are not limited to, exposure to war as a combatant or civilian, threatened or actual physical assault (e.g., physical attack, robbery, mugging, childhood physical abuse), threatened or actual sexual violence (e.g., forced sexual penetration, alcohol/drug-facilitated sexual penetration, abusive sexual contact, noncontact sexual abuse, sexual trafficking), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war, natural or human-made disasters, and severe motor vehicle accidents.

...

Differential Diagnosis:

Adjustment disorders. In adjustment disorders, the stressor can be of any severity or type rather than that required by PTSD Criterion A. The diagnosis of an adjustment disorder is used when the response to a stressor that meets PTSD Criterion A does not meet all other PTSD criteria (or criteria for another mental disorder). *An adjustment disorder is also diagnosed when the symptom pattern of PTSD occurs in response to a stressor that does not meet PTSD Criterion A (e.g., spouse leaving, being fired).*

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. The application was timely because it was filed within three years of the applicant's

discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that the Coast Guard erred when it separated him for an adjustment disorder instead of granting him a medical retirement for service-related PTSD. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁹ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."¹⁰

4. The applicant alleged that instead of being administratively separated for an adjustment disorder, he should have been processed through PDES and medically retired because of his service-connected PTSD. According to the applicant, he faced harassment and discrimination while aboard a Coast Guard cutter that was so severe that he later received a PTSD diagnosis from the VA. For the reasons explained below, the Board is not persuaded that the applicant is entitled to relief:

a. **Discrimination and Harassment:** The record shows that the Coast Guard initiated two investigations into the applicant's allegations of discrimination and harassment. The first was a Command Investigation initiated on April 22, 2016, with the ROI submitted on May 17, 2016, wherein it was found that the applicant's allegations of discrimination and harassment were unsubstantiated. The IO concluded that one or more members had made an unprofessional joke about the applicant helping smugglers, but that the times the applicant was reprimanded for taking pictures of civilian vessels during Coast Guard operations, giving food and drinks to detainees outside of normal procedures, and not providing interpretations in an efficient and trustworthy manner were the result of the applicant's conduct, not his race or ethnicity. A second investigation was conducted by the Coast Guard's EEO office and completed on November 20, 2017, with a Final Agency Decision. The EEO investigation concluded that the applicant had failed to demonstrate that the alleged examples of unwelcome conduct constituted an unlawful hostile work environment. The EEO investigation stated that the applicant had failed to show that the examples of discrimination and harassment he described were based on his protected status and that the evidence he did submit was based on his own, uncorroborated, subjective belief that actions were taken against him based on discriminatory motives. Though the applicant's subjective opinion is that he was discriminated against and harassed based on his national origin and ethnicity, that does not make it true and is not enough to overcome the presumption of regularity afforded to the Coast Guard and its officials.¹¹

This Board is not an investigative body and therefore does not have investigatory authority, but instead must rely on the investigations conducted by those vested with such authority.

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Here, two investigations were conducted and both similarly concluded that the applicant was not discriminated against or harassed due to his protected class and the applicant's evidence has not persuaded the Board that these investigations were flawed or unjustly conducted. Accordingly, the Board finds that there is no reason to disrupt the findings of both the Command Investigation and EEO investigation.

b. **PTSD and PDES Processing:** Although the VA awarded the applicant a 100% disability rating for PTSD based on his self-reported symptoms and experiences after his separation from the Coast Guard,¹² the applicant's military medical records cast substantial doubt on whether he was suffering from the symptoms of PTSD at the time of his separation. The applicant received multiple mental health evaluations and treatment from May 2016 through his discharge on September 1, 2016, yet he was never diagnosed with PTSD during those months. In this regard, the Board notes that the applicant's experience of discrimination and harassment, as described in his own complaints to the Coast Guard, does not meet the DSM-V's diagnostic criteria for PTSD, which requires, as Criterion A, "[e]xposure to actual or threatened death, serious injury, or sexual violence."¹³ The DSM-V states the following regarding the different diagnoses of adjustment disorder and PTSD:

In adjustment disorders, the stressor can be of any severity or type rather than that required by PTSD Criterion A. The diagnosis of an adjustment disorder is used when the response to a stressor that meets PTSD Criterion A does not meet all other PTSD criteria (or criteria for another mental disorder). An adjustment disorder is also diagnosed when the symptom pattern of PTSD occurs in response to a stressor that does not meet PTSD Criterion A (e.g., spouse leaving, being fired).

Here the applicant's "stressor" of harassment and discrimination, as described in his complaints, does not meet the PTSD Criterion A because he was not directly exposed to actual or threatened death, serious injury, or sexual violence; nor did he allege that he witnessed the events in another's life. On the contrary, his described stressors were being the butt of a joke about being a smuggler because he had gotten in trouble for taking photos of operations; being yelled at and rejected as an interpreter for an HS1; having the galley chief question his removal of supplies from the galley; and having his spouse leave him for someone else. The applicant alleged that exposure to racial discrimination of the sort he described meets the requirements of Criterion A for a PTSD diagnosis, but a review of the DSM-V's diagnostic criteria for PTSD shows that the applicant's claim is unsupported.¹⁴ The Board has weighed the conflicting medical evidence and concluded that the pre-discharge military medical opinions are more persuasive than the VA medical opinions submitted by the applicant. Therefore, he has not proven, by a preponderance of the evidence, that the Coast Guard erred by not diagnosing him with PTSD and not processing him for a medical retirement under the PDES.¹⁵

¹² Physical Disability Evaluation System Manual, COMDTINST M1850.2C, Chapter 2.C.2.f.i. ("The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability.").

¹³ DSM-V.

¹⁴ The Board is not saying the racial discrimination and harassment can never cause PTSD. Instead, the Board is saying that the DSM-V, as written, does not support the applicant's claim that his experience of discrimination and harassment, as he described it, meets criterion A for a PTSD diagnosis in the DSM-V.

¹⁵ The Board notes that this finding does not necessarily contradict the diagnosis of the VA's doctors that the applicant

c. **Retaliation.** The applicant did not use the words retaliation or reprisal but alleged that he was discharged because of his EEO complaint of harassment and discrimination. The record shows the following chain of causation: The applicant admitted to a mental health provider and to others that he had thoughts of killing himself, but had no plans of actually harming himself in May 2016 and made suicidal threats in June 2016. Each time, he was evaluated by mental health professionals. These evaluations and testing resulted in the adjustment disorder diagnosis and the doctor's recommendation for an unsuitability discharge. The applicant's CO acted on the doctor's recommendation by initiating the discharge. Therefore, the preponderance of the evidence does not support the applicant's claim that he was discharged because he complained about harassment and discrimination.

d. **Due Process.** Article 1.B.15. of the Military Separations Manual, COMDTINST M1000.4, authorizes Commander, PSC to discharge members for unsuitability for military service. Article 1.B.15.b.3. lists diagnosed adjustment disorders among the bases for discharges for unsuitability, and it references Chapter 5 of the Coast Guard Medical Manual, COMDTINST M6000.1 (series). Chapter 5 of the Medical Manual states that a diagnosed adjustment disorder may render a member unsuitable for further military service and directs the command to discharge such members administratively, under the Military Separations Manual, rather than through the PDES. Here, the record shows that the applicant was diagnosed with an adjustment disorder by mental health professionals who recommended that he be separated for unsuitability because continued military service could exacerbate his condition. The record also shows that the applicant was properly notified of the proposed discharge by his CO and allowed to object, to request a second chance, and to submit a statement on his own behalf, as Article 1.B.15. of the Military Separations Manual requires. Therefore, the preponderance of the evidence shows that the applicant was properly administratively separated in accordance with Coast Guard policy.

7. The applicant made varied allegations and arguments. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or are not dispositive of the case.¹⁶

8. For the reasons outlined above, the applicant has failed to prove, by a preponderance of the evidence, that he should have been processed under the PDES and separated due to a physical disability. Nor has he shown that his narrative reason for separation was erroneous or unjust. Therefore, the applicant's requests for relief should be denied.

currently suffers from service-connected PTSD. Although the record does not support a finding that the applicant's experience of harassment and discrimination aboard the cutter, as he described in his complaints, met the criteria for a PTSD diagnosis, he could have experienced other traumas, and PTSD is a condition that can manifest symptoms and become disabling long after the traumatic incident occurred. However, the VA exists in large part to address veterans' service-connected medical conditions that are not diagnosed or disabling at the time of separation but become disabling after discharge. Becoming disabled after discharge by a service-connected condition that was not disabling prior to discharge does not make a veteran entitled to a military medical retirement. PDES Manual, Art. 2.C.2.

¹⁶ 33 C.F.R. § 52.24(b); see *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

ORDER

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

August 4, 2023

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]