

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-126

██████████ ██████████ ██████████
MK3 (former)

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 June 18, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 16, 2022, 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 Machinery Technician third class (MK3/E-4) who was honorably discharged on August 24, 2006, asked the Board to refer him to the Physical Disability Evaluation System (PDES) for medical separation or retirement based on his Traumatic Brain Injury (TBI). Alternatively, he asked the Board to correct his record by changing the separation code of JNC (unacceptable conduct) and the reenlistment code of RE-4 (ineligible to reenlist) on his discharge form DD-214.¹

The applicant, through counsel, argued that his service-connected TBI contributed to the behavioral issues that led to his discharge. He stated that before his TBI, he served honorably in the United States Army and the Coast Guard. Then, on March 23, 2004, while on active duty in the Coast Guard, the applicant fell off a ladder from a height of approximately 10 to 15 feet. He stated that he experienced a brief period of unconsciousness. The applicant stated that after the fall, his performance and overall mental health started to deteriorate. He argued that had the

¹ The DD Form 214 provides the member and the service with a concise record of a period of service with the Armed Forces at the time of the member's separation, discharge or change in military status (reserve/active duty). In addition, the form is an authoritative source of information for both governmental agencies and the Armed Forces for purposes of employment, benefit, and reenlistment eligibility, respectively. The DD 214 is issued to members who change their military status among active duty, reserve, or retired components or are separated/discharged from the Coast Guard to a civilian status. COMDTINST M1900.4D.

residual effects of his TBI been properly examined, he would have been medically separated or retired.

The applicant argued that if his primary request is not granted, the separation code and reenlistment code on his DD-214 should be upgraded. He argued that a JNC separation code and RE-4 reenlistment code are unjust and prejudicial. The applicant cited the liberal consideration policy to support his request.

To support his application, the applicant submitted medical and military records. The relevant documents are included in the summary of the record below. He also submitted a letter from a relative named Ms. D. She stated that after the applicant's discharge in August 2006, he did not have any money to find a place to live. Instead, the applicant moved in with his grandparents. After living with his grandparents for a few months, the applicant moved into Ms. D's camping trailer with his family. Ms. D stated that it took another two months for the applicant to save enough money to rent his own apartment. She stated that she even had to give the applicant money for his first month's rent. Ms. D concluded by stating that if it were not for her and the applicant's grandparents, he would have been out on the streets with nowhere to live.

SUMMARY OF THE RECORD

On September 2, 1999, the applicant enlisted in the United States Army. He was released from active duty on September 1, 2002.

The applicant enlisted in the Coast Guard on November 13, 2002. Immediately upon enlisting, the applicant was stationed aboard a cutter in the Pacific.

On March 3, 2003, the applicant hit his head on a fire valve. He sought medical treatment for a 12 millimeter laceration above his forehead. The wound was cleaned with sterile saline and was not deep enough for sutures. The applicant experienced blurry vision for about five minutes.

On November 20, 2003, the applicant sought medical treatment for a 2 centimeter laceration on his head. He received sutures and was given ibuprofen to treat the pain and inflammation. The applicant denied a loss of consciousness, blurred vision, nausea, or a loss of vision.

On March 23, 2004, the applicant fell off a ladder. According to the Mishap Report, the applicant was attempting to retrieve AC filters. When the applicant reached the top of the ladder, it slid out from underneath him. The ladder was found to be missing the safety rubber footing. The applicant was instructed to never climb a ladder without someone holding on to it and to always inspect equipment before using it.

On March 25, 2004, the applicant received a follow-up examination and CT scan results. The examiner noted that the applicant had sustained a head injury after falling 10 feet from a ladder. According to the medical notes, no one was around when the applicant fell. However, someone attended to the applicant once they heard the ladder crash. The applicant's medical records show that he experienced vertigo, numbness/tingling, and neck and back pain. He denied

nausea, vomiting, and diarrhea. The examiner noted that the applicant's head, ears, eyes, nose, and throat examination was unremarkable, but noted a slight tenderness upon palpation at the neck, back, and shoulders.

On July 14, 2004, the applicant had an appointment at a neuropsychology clinic to evaluate him for dyslexia. The applicant reported experiencing problems comprehending written information, omitting information, and organizing words. He reported that verbal problems had been occurring most of his life and that he had never liked to speak in front of people. The examiner noted that the applicant had recently had a head injury in which he fell from a ladder and was unconscious for one to three minutes. According to the examiner, MRI results reported no focal mass effect or shifts. Overall, the applicant's level of intellectual functioning was average. However, his achievement scores showed strengths and significant weaknesses. His academic strengths included mathematics and listening comprehension. On the other hand, the applicant's reading and written language composite scores were extremely low. He was diagnosed with a reading disorder and a disorder of written expression. The examiner noted that the written examinations required for the applicant's job, as well as his daily reading before an audience, were likely very challenging and perhaps anxiety provoking in light of his academic weaknesses. With regard to accommodations, the examiner suggested that the applicant's reading duties be limited with additional time given. Further, the examiner suggested that the applicant consult with a speech therapist or a professional who works with adults with reading issues for strategies to compensate for reading comprehension. Finally, the examiner noted that the applicant had no psychological issues of concern.

On July 22, 2005, the applicant was stationed at a Coast Guard base in the northwest. At the time, he was a Machinery Technician second class.

On November 9, 2005, the applicant received an Administrative Remarks form ("Page 7") informing him that he was a candidate for reduction in rate by reason of incompetence in accordance with Article 5.C.38. of the Coast Guard Personnel Manual. The Page 7 noted that the applicant had received substandard marks on his performance evaluation in the following performance dimensions: Professional Specialty Knowledge, Quality of Work, Monitoring Work, Using Resources, Communicating, Setting an Example, Integrity, and Respecting Others. The applicant was advised that he had three months to demonstrate satisfactory progress and meet the requirements of his position in order to retain his present rate. He was further advised that failure to do so would result in reduction in rate to MK3.

Also on November 9, 2005, the applicant received a Page 7 in which he was counseled on his inability to follow directions. The applicant was instructed by his Supervisor to find technical information on the clutch air system. He was instructed to not ask anyone for the answer. Instead, he was instructed to only reference the ship's information book or the tech hub. The applicant answered the question correctly regarding the system. When asked by his Supervisor, the applicant stated that he found the information in the ship's information book. However, information on the clutch air system was not included in the book. After further investigation, it was determined that the information was acquired from a fellow shipmate. The applicant was advised that his conduct was unacceptable.

On November 10, 2005, the applicant received a Page 7 in which he was counseled on his inability to follow directions. The applicant had been told many times as a break-in that he was not to do anything to the ship's plant without qualified personnel present. Despite such instructions, the applicant decided to energize the split plant bow thruster without permission. The applicant was advised that his conduct could have caused damage to equipment or personnel.

On December 7, 2005, the applicant received a Page 7 in which he was counseled on his inability to follow standard safety practices. The applicant was told twice by a senior Petty Officer not to distract him with horseplay while he was working on a live 450 volt circuit. He was advised that his actions could have resulted in harm to himself, shipmates, or equipment. When the applicant was confronted by his department head, he initially denied the conduct but later admitted to it. He was further advised that his behavior was unacceptable.

On December 8, 2005, the applicant received a Page 7 in which he was counseled for not following instructions. He was advised that morning muster began at 7:30 a.m. On several occasions, the applicant had reported late. He was advised that this behavior was unacceptable.

On December 21, 2005, the applicant was prescribed a light to help treat Seasonable Affective Disorder (SAD). According to the physician, the applicant had experienced depression since moving to his new base because of the increased darkness in winter.

On January 4, 2006, the applicant received a Page 7 in which he was counseled on his inability to follow instructions. The applicant had been instructed by his Supervisor to inspect and run the pumps before the cutter departed. When the applicant's Supervisor asked him how the pumps had performed, the applicant stated that he had forgotten to complete the task. Later that same day, the applicant was tasked with conducting training to the ship's crew regarding the pumps. The applicant's training was incorrect and had no organization. The applicant was notified that his training showed that he had little-to-no working knowledge of the pumps. A few days later, the applicant conducted training with a break-in crewman. The applicant was notified that his instructions on the engine room emergency bilge suction system was incorrect. The applicant was notified that his performance was unacceptable.

On January 10, 2006, the applicant received a Page 7 in which he was counseled on his inability to follow instructions. While the applicant was standing duty as an inport crewman, a senior officer asked him six questions pertaining to his qualifications. The applicant was instructed to research and answer the questions after his watch. In the morning, the applicant only knew one of the answers to the six questions. The applicant was notified that his performance was unacceptable.

On January 18, 2006, the applicant received a Page 7 in which he was counseled on his inability to follow procedures for conducting a tune-up on a diesel engine. The applicant was tasked by a senior officer to conduct a basic tune-up on both main diesel engines. The applicant could not comprehend the task. The applicant was unable to follow basic instructions out of the manufacture's manual. The senior officer had to instruct the applicant on basic engine fundamentals such as where the flywheel was located and how to find the front and rear of the

engine. The applicant was notified that his performance was unacceptable and that he should have been able to complete the task with little supervision.

On January 25, 2006, the applicant received a Page 7 in which he was counseled on his inability to retain knowledge as a qualified inport watchstander. He had demonstrated a lack of working knowledge of the engine room fixed CO2 system and had completely forgotten that the system was available to him during a fire drill. The applicant was notified that this was required knowledge for his position. He was further notified that by not maintaining a familiarity with the fixed CO2 system, he had placed the ship and its crew in jeopardy.

On January 30, 2006, the applicant received a Page 7 in which he was counseled on his inability to follow instructions. Specifically, he was counseled about arriving to work on time for “engineering plant light-offs.” He was notified that this was the fourth time in less than six months that he had been counseled for the same infraction.

On February 24, 2006, the applicant received a Page 7 in which he was counseled on his inability to follow instructions. The Page 7 documented two specific instances. In the first instance, the applicant was told to clean the Hydraulic Power Unit while another member would clean the Bow Thruster space. The applicant stated that he understood the instructions. About an hour later, the applicant was found cleaning the Bow Thruster space. The applicant was notified that for the last six months, his blatant disregard toward instructions was unacceptable. In the second instance, the applicant was instructed to open the four auxiliary saltwater valves. The applicant had completed this task an estimated 20 to 30 times in the past. A few hours later, it was found that only three of the valves had been opened. The applicant was notified that he could no longer be trusted with the simplest of tasks. Accordingly, he was told that he could not complete tasks unsupervised. The applicant was reminded that he was still on performance probation for incompetence.

On March 3, 2006, the applicant received a Page 7 notifying him that his three-month observation period to satisfy the requirements of Article 5.C.38. of the Coast Guard Personnel Manual had finished on February 1, 2006. The applicant was found to be incompetent in the rate of MK2. A required special evaluation was completed on February 1, 2006, and the applicant was reduced in rank to MK3.

On March 10, 2006, the applicant received a Page 7 in which he was counseled on his inability to follow standard shipboard policies. He had been instructed on numerous occasions about how to properly dispose of oily bilge waste. Despite such instruction, the applicant improperly dumped oily water in the sink. This caused an oily water mess in and around the pump room sink. Further, the applicant initially denied that he had caused the mess, after which he admitted that he was the one who dumped the oily water in the sink. The applicant was notified that his conduct was unacceptable and would not be tolerated.

On April 7, 2006, the applicant received a Page 7 in which he was counseled on his inability to perform SEOPS and inport watch standing fundamentals. The applicant had shown a lack of aptitude in donning and stowing firefighter gear, performance in drills, and basic knowledge of shipboard firefighting doctrine. Consequently, he was assigned extra military instruction.

On May 9, 2006, the applicant received a Page 7 in which he was counseled on his inability to follow instructions. The applicant had been instructed by the Officer of the Day to stop sitting on the deck and talking to non-rated personnel, who had already been granted liberty for the day, and to finish cleaning up so that liberty could be granted for the rest of the crew. Fifteen minutes later, the applicant was still sitting on the deck talking. The applicant was notified that his behavior showed a blatant disregard for instructions and demonstrated a lack of respect toward senior officers.

On May 16, 2006, the applicant received a Page 7 in which he was counseled on his inability to utilize his Chain of Command. The applicant was notified that he had been counseled several times in the past but that he still failed to follow instructions.

On May 18, 2006, the applicant had a psychological evaluation. The reason for the evaluation included depression, poor performance at work, difficulty adjusting to ship life, difficulty fitting in with peers, and difficulty for the applicant and his family to adjust to the weather and remoteness of his new base. The applicant was diagnosed with an adjustment disorder² with depressed mood.

On May 25, 2006, the applicant had a follow-up appointment. The applicant reported that he had started to feel better. For instance, he was falling asleep more easily and sleeping through the night. He stated that he continued to experience work issues but that he was trying strategies recommended by his counselor.

On June 8, 2006, at a follow-up appointment, the applicant reported that he was relieved because he had been transferred from the ship to port services. He also reported that his prescribed antidepressant was helping him and that he did not feel as “edgy” as before.

At a follow-up appointment on June 16, 2006, the applicant reported that he was doing well with counseling. He also reported that he continued to do well on his antidepressant. The applicant stated that his family was ready to come back from visiting relatives overseas, but he did not have the money to bring them home. He stated that this was a stressful issue for him.

On June 26, 2006, the applicant was notified by his Commanding Officer (CO) that he was being discharged from the Coast Guard for unsatisfactory conduct and performance. The CO cited the applicant’s repeated abuse of Coast Guard regulations and policies from October 2005 to June 2006. For instance, the applicant had been awarded NJP on May 1, 2006. Then, on May 22, 2006, the applicant introduced insects aboard his ship. Additionally, the CO stated that since being placed on probation, the applicant had continued to demonstrate unsatisfactory conduct and performance. The CO cited the numerous Page 7s documenting the applicant’s blatant disregard of Coast Guard

² An “adjustment disorder” is a psychological response to an identifiable stressor that results in the development of emotional or behavioral symptoms. Adjustment disorders are normally temporary and disappear when the stressors disappear. Adjustment disorders are not personality disorders. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR), p. 679. The Coast Guard relies on the DSM when diagnosing members with psychological conditions. See Coast Guard Medical Manual (COMDTINST M6000.1B), Chap. 5.B.1.

instructions, policies, and values. The applicant was advised that his marks supported an honorable discharge. He was also advised of his rights including the right to submit a statement on his behalf and the right to consult with a military attorney.

On June 27, 2006, the applicant was escorted to a medical clinic by his command for a mental health evaluation. The applicant's command reported that they had been attempting to contact the applicant while on leave but that he would not answer his phone. When his command located him, the applicant had moved to a small one-bedroom apartment. The applicant had been lying to his command about his family situation. The applicant's command escorted him to the clinic because they were concerned that he was a risk to himself. The examiner described the applicant's appearance as tearful with poor eye contact. The applicant stated that he was unable to figure out solutions to his problems. He reported that he had recently stopped taking his antidepressant and resumed drinking. He admitted to recently drinking more alcohol than he had in a long time. The applicant agreed that alcohol lowers his inhibition and that he made poor choices when he drank. He also acknowledged that alcohol made him feel more despondent and hopeless. A description of the applicant's issues were stated as follows:

Repeatedly lied to his command before finally admitting that his family had been in [redacted] since April. Member believed he would get his family back to the states before his command knew they were gone. However, this plan fell through because of member [sic] significant financial problems including \$18,000-20,000 in credit card debt along with very little savings. He admits to not having the money to bring his family back from [redacted].

The applicant was diagnosed with an adjustment disorder with depressed mood. The examiner recommended that the applicant temporarily move from his apartment to the ship or barracks and that guns and medications be removed from his apartment. The examiner stated that he would refer the applicant to Work Life to figure out his financial problems. He also advised the applicant to abstain from alcohol and restart his antidepressant. The applicant was released with duty limitations.

On June 28, 2006, the applicant had a follow-up examination. The reason for the evaluation included difficulty adjusting to a new unit as evidenced by his poor work performance and difficulty following instructions. According to the examiner, the applicant continued to display poor judgment and was easily overwhelmed by daily stressors that resulted in him feeling helpless and hopeless. The examiner stated that the applicant had difficulty handling multiple stressors and used alcohol as a coping mechanism when overwhelmed. First, the examiner noted that the applicant had a history of struggling in high school with reading comprehension and writing. The examiner opined that the applicant's learning difficulties could be impacting his work performance. The examiner also noted that the applicant and his family had been unable to adjust to remote island living and overcast/rainy weather. He complained that he and his family were depressed and unhappy. The applicant stated that he sent his family to live with his wife's family for several months but that he failed to report it to his command. His family remained there because he did not have the funds to bring them back. The applicant had lied to his command about his family's whereabouts and continued to collect his higher Cost of Living Adjustments. Finally, the examiner noted that the applicant had disciplinary issues pending and that he had significant financial issues. The examiner stated that the applicant had been prescribed an antidepressant and was being monitored by a local mental health counselor.

On July 8, 2006, the applicant underwent a one-hour psychiatric diagnostic interview at an Army Medical Center with Dr. H. The medical center at the applicant's station had requested a psychiatric evaluation of the applicant and a fitness for duty statement. The applicant's chief complaint was that he was stressed from work and his family's inability to adjust to living at his assignment location. He stated that because his family was unable to adjust to the severe winters, he was under a great deal of stress which negatively affected his work performance. Then, in May 2006, the applicant's family left his assignment location and moved to his wife's hometown. He stated that this added to his stress and eventually led to his alcohol incident. The treatment goal for the applicant included providing him assistance in dealing with stress-related work and assistance in coping with the loss of support from his family. The treatment plan also included increasing his medication. The applicant was diagnosed as follows:

Axis I: Adjustment Disorder-Depressed Mood (309.0)

Axis II: Personality Disorder NOS (301.9)

Axis III: See Ambulatory Medical Record

Axis IV: Stressors: Occupational

Axis V: Global assessment of functioning (GAF):

Current: 61-70 Mild impairment of functioning

Maximum. Functioning in past 12 months

61-70 Mild impairment of functioning

Clinical Condition: STABLE

Suicide Risk: none

Homicide Risk: none

Formulation: Highly motivated to remain on active duty, but under a great deal of stress as he feels guilty about putting his wife and children under such severe stress. Impairment in functioning is manifested by: poor concentration and some mild dyslexia.

Also on July 8, 2006, Dr. H, on behalf of the Department of Psychiatry at the Army Medical Center, sent a letter to the medical center at the applicant's station. Dr. H stated that the applicant had been unable to successfully adapt to the stress of balancing the responsibilities of his occupation with those of providing support and encouragement to his family. Further, Dr. H stated that the application had limited coping skills which made it unlikely that he would be able to acquire the leadership skills necessary for continued advancement in the Coast Guard. The prognosis of the applicant was poor due to the presence of a personality disorder which pre-existed his induction into the Coast Guard and prevented him from successfully adapting to a military lifestyle. The recommendation was for the applicant to remain in present duty status awaiting completion of an Administrative Separations Board and that he be administratively separated as soon as possible.

On July 20, 2006, the applicant had a follow-up appointment with Dr. H. The applicant was concerned about dizziness that he was experiencing when he tilted his head back to stare at something. Dr. H noted that the applicant was trying to stay active but that he continued to drink about a six-pack a week. He also reported that he missed his family but that there were no immediate plans for them to return from overseas due to ongoing financial issues. The applicant was diagnosed with an adjustment disorder with depressed mood. Dr. H advised the applicant to continue taking his prescribed antidepressant and continue his weekly meetings with the mental health counselor. He further advised the applicant that alcohol would contribute to his feelings of depression and recommended that he abstain from alcohol. The applicant was released with duty limitations.

On July 28, 2006, Dr. H spoke on the telephone with the applicant's mental health counselor. The counselor stated that the applicant consistently showed poor judgment when confronted with multiple decisions/stressors. He stated that the applicant was easily overwhelmed by these stressors and became hopeless, helpless, and lonely. The counselor recommended that the applicant move from his apartment to the barracks, that Work Life help him with his financial problems, and that he abstain from alcohol.

On August 21, 2006, the applicant received a medical pre-separation examination. On the Report of Medical History form, the applicant indicated that he had, or had ever had, dizziness or fainting spells, frequent or severe headaches, a head injury with memory loss or amnesia, or a period of unconsciousness or a concussion. The applicant's narrative description of his injury states the following: "Fall off ladder 15 feet up, Mar 2004. Still have dizz and headache." The examiner's description of the applicant's injury states: "Fell off ladder in 2004 getting fillers at top of storage, 15 feet high, ladder slipped. Awoke on the ground [with] chief asking "are you ok?" Body felt sort of numb, evaluation at [redacted]. Has dizziness since then. Noted vertigo [while] lying down or if hyperextended neck. Lasts 1 min or 30 sec. Vertigo...last[s] several minutes. Gets it once or twice a week. Had staples on back of head. Rare tinnitus." Also on the form, the applicant indicated that he had, or had ever had, depression or excessive worry. The examiner's description of the applicant's depression states the following: "Notes marked stress when working on [redacted] due to interpersonal problem with MK1. Seen Nov 2005 with stress due to adjustment disorder for family having difficulty with move from [redacted] to [redacted]. Family subsequently returned to [redacted]."

On August 22, 2006, the applicant received another pre-separation examination. In the section regarding the applicant's defects and diagnoses, the examiner noted that the applicant had no gag reflex, an impaired bilateral finger dexterity, an adjustment disorder, and a personality disorder. In the recommendations section, the examiner stated the following: "Unclear if these findings are chronic, suspect they are pre-existing as patient cannot remember gagging previously. Has never tried to put thumb to small finger. Unlikely to be related to prior head injury. If increase vertigo, may see if able to be evaluated by VA neurology given head injury while active duty." The applicant was found to be qualified for service.

On August 24, 2006, the applicant was discharged for unsuitability in accordance with Article 12.B.16. of the Coast Guard Personnel Manual. His DD-214 shows "honorable" as the character of discharge; "unsuitability" as the narrative reason for separation; RE-4 (ineligible for reenlistment) as the reenlistment code; and JNC (unacceptable conduct) as the separation code.

On October 15, 2015, the applicant was evaluated for disability benefits with the Department of Veterans Affairs (VA). The applicant was diagnosed with major depressive disorder. The examiner found that the applicant had occupational and social impairments with deficiencies in most areas, such as work, school, family relations, judgment, thinking and/or mood. While the examiner noted that the applicant also had a diagnosis of TBI, the applicant's cognitive, emotional, and behavioral symptoms were attributed solely to his major depressive disorder. None of the applicant's cognitive, emotional, or behavioral symptoms were attributed to his TBI.

On February 8, 2016, the applicant completed a Review Evaluation of Residuals of Traumatic Brain Injury Disability Benefits Questionnaire. Under the section regarding diagnosis and medical history, the examiner indicated that the applicant had been diagnosed with a TBI in March 2004. The applicant's medical history was stated as follows:

The veteran is a forty-two year old left handed man. He served in the Army from 9/2/1999 to 9/1/2002 and then served in the Coast Guard from 11/13/2002 to 8/24/2006. He now has VA service connection for TBI. In his last evaluation he underwent a contract C&P exam for TBI on 3/31/2014. During today's appointment he describes a history of head injury similar to that established previously: about 3/2004 while stationed in [redacted], he was briefly knocked unconscious after falling about ten feet from a ladder. The veteran continues to describe TBI related headaches during today's appointment. They persist and remain stable. He currently has about 3-4 headaches each week. He experiences pressure anywhere over his head, without associated nausea, vomiting, photophobia, phonophobia, or osmophobia. No foods trigger his headaches. He denies any family history of migraine. He denies ever using illicit drugs. His headaches resolve within an hour of taking Ibuprofen. There are no incapacitating episodes.

During today's appointment the veteran continues to report TBI related vertigo that he describes as intermittent, brief, room spinning sensations. This vertigos persist and remains stable. When he feels it, all he can do is stay still until it passes. There otherwise is no specific treatment.

During today's appointment the veteran describes cognitive symptoms. He attributes them to TBI. He reports poor memory. He forgets dates, appointments, and conversations. He forgets to do things he has been told. He misplaces items like his keys and papers. He describes poor attention and concentration. He has sometimes left food burning on the stove. He is easily distracted. He loses track of this thoughts. His mind can wander. He describes problems with executive functions such as planning, organizing, prioritizing, self-monitoring, problem solving, and setting goals. He says he processes information slowly overall. He feels his cognitive problems are worsening over time. In the past he has seen speech pathology here at VAMC [redacted]. As a compensatory strategy, he now uses a white board at home; his family also writes notes for him.

The veteran's TBI has stabilized. After a thorough discussion, due to direct effects of TBI he at this time is not found to have clinically significant findings of seizure, hypersensitivity to light or sound, vision problems, cranial nerve dysfunction, decreased sense of taste or smell, hearing loss, speech or swallowing difficulties, weakness or pain, bladder problems, bowel problems, other balance or coordination problems, fatigue, malaise, autonomic dysfunction, endocrine dysfunction, psychiatric symptoms, or neurobehavior impairment. He does not use assistive devices for walking. He performs all basic and instrumental activities of daily living. His neurological examination today shows no objective cognitive deficits and is nonfocal.

During today's appointment the veteran is interviewed about occupational history. He has been unemployed since 2012. In his last employment he worked for the [redacted] for about five years until he finally received a medical retirement from [redacted] for what he describes as mental health issues. He reports that at this point he supports himself on benefits from Social Security, VA, and [redacted]. Without the need for employment, he says he now enjoys his time at home. He reports having a service dog for his mental health issues. He takes walks. He also performs some chores like taking care of laundry and cleaning.

The veteran already has VA service connection for TBI. His diagnosis remains the same. The grading of facet (1) for memory/attention/concentration/executive functions appropriately accounts for his cognitive symptoms. The subjective facet (7) is graded appropriately for his current level of disability from headaches and vertigo.

The applicant received an assessment of facets of TBI-related cognitive impairment and subjective symptoms of TBI. The applicant reported normal judgment, social interaction, orientation, motor activity, visual spatial orientation, neurobehavioral effects, communication, and consciousness. The applicant complained of mild memory loss (such as having difficulty following a conversation, recalling recent conversations, remembering names of new acquaintances, or finding words, or often misplacing items), attention, and concentration, but without objective evidence on testing. The applicant also complained of mild or occasional headaches and mild anxiety. The medical examiner noted that no diagnostic testing had been performed. Finally, the medical examiner noted that the applicant's residual conditions attributable to a TBI do not impact his ability to work.

On February 18, 2016, the applicant was again evaluated for disability benefits with the VA. The applicant was diagnosed with service-connected major depressive disorder. The examiner noted that the applicant's Social Security Disability records show that he had been deemed disabled primarily due to affective/mood disorder beginning in January 2012. The applicant's functional impairments included severe sleep disturbances, depression-related low energy and motivation, trouble getting along with other people at work, frequent passive suicidal ideation, and trouble with memory and concentration. Further, the applicant was unable to perform adequately in a loosely supervised work setting requiring little or no social interaction. The examiner concluded that based on the above findings, the applicant was rendered unable to secure and maintain substantially gainful employment due to service-connected major depressive disorder.

On September 8, 2020, LCDR R, a Lieutenant Commander for the U.S. Public Health Service, reviewed the applicant's BCMR application and medical records pursuant to 10 U.S.C. § 1552(g) and provided the following psychological opinions:

- Q. Does the applicant have Post-Traumatic Stress Disorder/Traumatic Brain Injury/Other Mental Health Conditions, or experience a Sexual Assault or Sexual Harassment as documented in their medical/service record?
- A. Yes. Adjustment disorder and personality disorder, NOS.
- Q. Did the Applicant have the above conditions/disorders/etc. while in military service (i.e., during the misconduct or circumstances leading to separation)?
- A. Yes. See Psychiatric interview dated 8 July 2006.
- Q. Could the conduct (or circumstances) that led to Applicant's [separation, discipline, discharge, etc] be symptomatic of or otherwise related to, their condition(s) identified above?
- A. Yes. The member was functioning well until transferred to his last duty station [redacted] stating his performance issues were related to adapting to [redacted] from his prior duty station in [redacted]. Member had poor coping skills and was assessed as having a personality disorder prior to entry into service.
- Q. In your medical opinion, does the mental health condition or experience of sexual assault or sexual harassment excuse the conduct or poor performance that adversely affected the discharge?

- A. No. The member underwent a comprehensive psychiatric evaluation on 8 July 2006 by a retired military psychiatrist.

VIEWS OF THE COAST GUARD

On December 30, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case.

The JAG argued that the applicant's application is untimely. Regarding the merits of the case, the JAG argued that the applicant failed to show that the Coast Guard committed an error or injustice in his administrative separation. The JAG stated that military psychiatrists, both at the time of his separation and in review of his application, did not diagnose the applicant with a TBI. Further, the JAG stated that the applicant's diagnosis of an adjustment disorder and a personality disorder do not entitle him to a medical separation or retirement. The JAG stated that when members are diagnosed with an adjustment disorder or personality disorder, they are administratively separated for unsuitability.

The JAG also argued that the applicant failed to show that the Coast Guard committed an error or injustice in assigning his separation code and reenlistment code. The JAG argued that the Coast Guard acted in accordance with policy in applying the JNC separation code and RE-4 reenlistment code since the applicant was separated by reason of unsuitability.

Finally, the JAG argued that liberal consideration should not be factored in the Board's decision to upgrade the applicant's separation code or reenlistment code. First, the JAG argued that the applicant has not provided any evidence that he was contemporaneously diagnosed with a TBI or TBI-related symptomology. Next, the JAG argued that as a matter of law, liberal consideration only applies to mental health disorders that arise due to "combat or military sexual trauma." The JAG argued that neither combat nor military sexual trauma contributed to the applicant's mental health conditions. Finally, JAG argued that even if liberal consideration is applied to the applicant's request, his separation code and reenlistment code should not be upgraded. The JAG acknowledged that the applicant was diagnosed with an adjustment disorder and personality disorder. However, the JAG stated that LCDR R did not find a link between the applicant's mental health conditions and the conduct that resulted in his separation. Specifically, LCDR R opined that the applicant's disorders did not excuse his misconduct or inaptitude.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 14, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant contested the JAG's recommendation to deny relief.

The applicant first addressed the delay in his application. He argued that due to his disability, he has been unable to work through the complex process of assessing the errors in his 2006 discharge and preparing his application to the Board. He argued that he has "essentially been incapable of presenting his petition to the Board." The applicant argued that it was only in the last few years that he has been able to gather his records and procure legal counsel in this matter.

The applicant argued that he should have been referred to a PDES because there is an abundance of objective evidence in his record to show that three head injuries caused his mental health, performance, and ability to function within the Coast Guard to rapidly deteriorate. The applicant stated that the first head injury occurred on March 3, 2003, when he hit his head on a fire valve. He stated that he sustained a 12 mm long laceration above his eye and experienced blurry vision. The applicant's second head injury occurred on November 20, 2003. The applicant did not explain how he sustained the injury or any resulting symptoms. Then, on March 23, 2004, the applicant fell from a ladder at a height of approximately 15 feet.

The applicant argued that after his final head injury in March 2004, he constantly struggled to think, remember, speak, read, and follow instructions. He stated that his discharge notification cited no less than 27 instances of poor performance or misconduct. He argued that all of these instances occurred after March 2004. In fact, the applicant argued that his record contains no instances of misconduct or poor performance before his final head injury. He also argued that it was not until after his final head injury that he started to experience mental health issues. He stated that before March 2004, he was not diagnosed with any mental health disorders. However, after his final head injury, he experienced depression, alcohol abuse, suicidal ideations, and a rapidly deteriorating family situation.

The applicant submitted another letter from Ms. D. She stated that when the applicant was in high school, he was enrolled in ROTC. Ms. D stated that the applicant was very active and that all of the commanders really liked him. After high school, the applicant enlisted in the Army and attended vocational school. Ms. D stated that the applicant continued to excel. She stated that while the applicant was in the Army, he came home a couple of times to visit. During these visits, Ms. D recalled that the applicant was his "old self." Specifically, she stated that the applicant was not depressed. Ms. D stated that this changed when the applicant was discharged from the Coast Guard. She stated that soon after the applicant was discharged, he found employment but was unable to handle the job because of issues with his memory and that he became very depressed.

To support his request, the applicant provided a letter from the Department of Veterans Affairs (VA) dated November 3, 2017. The letter shows that the applicant received an 80% combined disability rating for the following service-connected disabilities as follows: TBI (10%); major depressive disorder (70%); and tinnitus (10%).

APPLICABLE LAW AND POLICY

Article 12.B.16.b. of the Coast Guard Personnel Manual in effect at the time of the applicant's discharge discusses causes for discharge for unsuitability as follows:

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

1. Inaptitude. Applies to members best described as unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn.
2. Personality Disorders. As determined by medical authority, personality behavior disorders and disorders of intelligence listed in the Medical Manual, COMDTINST M6000.1 (series), Chapter 5.
3. **Apathy, defective attitudes, adjustment disorders as listed in the 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.

4. Unsanitary Habits.
5. Alcohol Abuse. See Article 20.B.2. for guidelines on alcohol abuse cases.
6. Financial Irresponsibility.

Article 2.C.2. of the Physical Disability Evaluation System, COMDTINST M1850.2D, discusses fitness for duty in relevant part:

(a) The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank, or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements of duties that a member may reasonably be expected to perform in his or her office, grade, rank, or rating.

...

(d) Inadequate performance of duty, by itself, does not constitute physical unfitness. The evidence must establish a cause and effect relationship between the inadequate performance and the evaluatee's physical impairments.

Article 3.F.16. of the Coast Guard Medical Manual, COMDTINST M6000.1F, discusses psychiatric disorders in relevant part:

e. Adjustment Disorders. Transient, situational maladjustment due to acute or special stress does not render an individual unfit because of physical impairment. However, if these conditions are recurrent and interfere with military duty, are not amenable to treatment, or require prolonged treatment, administrative separation should be recommended (see Chapter 5 Section B of this Manual).

The Separation Program Designator (SPD) Handbook, which is Enclosure 2 to the DD-214 Manual, COMDTINST M1900.D, states that one of the authorized narrative reasons for separation for members being discharged under Article 12.B.16. of the Personnel Manual is "unacceptable conduct." The corresponding separation code is JNC, and it means that the member is being involuntarily discharged "when member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed." The only authorized reentry code for this type of discharge is RE-4.

ALCOAST 252/09, issued on April 29, 2009, states that the Department of Defense created new separation codes to address the situation in which a member is unsuitable for military service because of a diagnosed adjustment disorder that does not constitute a physical disability but that prevents the member from adapting to military life. The ALCOAST explained that historically, when members were discharged for their inability to adapt to military life, the only available separation code was JNC with a narrative reason of "unacceptable conduct." However, the narrative reason of "unacceptable conduct" has a negative connotation. Consequently, the DOD recognized the need for additional narrative reasons and SPD codes that better fit the cause for discharge when a member is unable to adapt to military life. The ALCOAST specifies that the new narrative reason "adjustment disorder" and the new separation code JFY should be used when a member's involuntary discharge is "directed by an established directive when an adjustment disorder exists, not amounting to a disability, which significantly impairs the member's ability to function effectively in the military environment." For enlisted personnel, the re-entry code

assigned can be either RE-3G or RE-4. CGPSC (epm-1) will review the separation packages and make the determination for which re-entry code should be applied.”

ALCOAST 125/10, issued on March 18, 2010, states that, to align Coast Guard policy more closely to that of the Department of Defense, “[i]n cases where individuals are separated for cause and there is an option of assigning an RE-1 (eligible for reenlistment), RE-3 (eligible for reenlistment except for disqualifying factor), or RE-4, the RE-3 is the normal standard unless a different code is authorized by the discharge authority.” For example, the ALCOST notes that for members discharged because of alcohol incidents, an RE-3 code is prescribed unless the member engages in misconduct by, for example, incurring a DUI or refusing rehabilitative treatment, in which case an RE-4 code is prescribed.

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 applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.⁴ The record shows that the applicant signed and received his DD-214 when he was discharged on August 24, 2006. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2006, and his application is untimely.
4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁵ 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”⁶ 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.”⁷ Pursuant to these requirements, the Board finds the following:

a. The applicant waited more than thirteen years to submit an application to the Board. Regarding the delay in his application, the applicant argued that his disability prevented him from applying to the Board. However, the applicant did not explain why he was only recently able to gather his records and procure legal counsel to submit his application. The Board finds that

³ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁴ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁵ 10 U.S.C. § 1552(b).

⁶ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁷ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

the applicant's explanation for the delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

b. A cursory review of the merits of this case shows that the applicant's request for PDES processing lacks potential merit. The applicant argued that the Coast Guard committed an error in failing to issue him a medical separation or retirement because he suffered from a TBI. Pursuant to Article 2.C.2.a. of the PDES Manual, "[t]he sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service." The manual further states that inadequate performance of duty, by itself, does not constitute physical unfitness. The evidence must establish a cause and effect relationship between the inadequate performance and the member's physical impairments.⁸ In this case, the applicant's record shows that he fell off a ladder and hit his head on March 23, 2004. His record further shows that for more than a year after his fall, he did not receive any documentation of performance or conduct issues. Then, in November 2005, shortly after reporting to a new unit, the applicant began to experience performance and conduct issues. In June 2006, the applicant's CO recommended that he be discharged for such conduct as introducing insects aboard his ship and for his blatant disregard of Coast Guard instructions, policies, and values. In this case, the applicant failed to show how his head injury caused or contributed to such behavior. Instead, the applicant's record shows that his performance and conduct issues were due to his diagnosed adjustment disorder.⁹ According to the Diagnostic and Statistical Manual of Mental Disorders, an adjustment disorder is a psychological response to an identifiable stressor that results in the development of emotional or behavioral symptoms. According to the applicant's record, he had several identifiable stressors including significant financial problems and an inability to adjust to the weather and remoteness of his new base. The disputed record is presumptively correct,¹⁰ and the record contains no persuasive evidence that substantiates his allegations of error or injustice in his official military record.

Accordingly, with respect to his request for PDES processing toward a medical separation, the Board will not excuse the untimeliness of the application or waive the statute of limitations. His request for PDES processing should be denied.

5. The applicant also alleged that his separation code and reenlistment code are erroneous and unjust because a TBI caused or contributed to the behavior that resulted in the discharge. Although the applicant's application is untimely, the Board may excuse the untimeliness of an application if it is in the interest of justice to do so,¹¹ and the Board will excuse the untimeliness in this case because the applicant's request falls under the Board's "liberal consideration" guidance since the applicant is challenging his type of discharge based in part on

⁸ Article 2.C.2.d. of the Physical Disability Evaluation System Manual, COMDTINST M1850.2D

⁹ According to Article 3.F.16 of the Coast Guard Medical Manual, adjustment disorder do not render an individual unfit because of physical impairment.

¹⁰ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

¹¹ 10 U.S.C. § 1552(b).

an alleged mental health problem.¹² Therefore, the Board waives the statute of limitations in this case.

6. And under the “liberal consideration” guidance, when deciding whether to upgrade the discharge of a veteran based on an alleged mental health condition, the Board must liberally consider the evidence, including the applicant’s claims, and decide whether the preponderance of the evidence shows that the veteran had mental health condition(s) while in the Service that could excuse the veteran’s misconduct; whether the mental health condition(s) actually excused the misconduct that adversely affected the discharge; and, if not, whether the mental health conditions outweigh the misconduct or otherwise warrant upgrading the veteran’s discharge.¹³

7. The applicant argued that his separation code of JNC should be upgraded. However, the applicant did not specify to what he wanted his separation code changed. In 2009, the Coast Guard released ALCOAST 252/09 which announced the use of “adjustment disorder” as the new narrative description and JFY as one of the several new separation codes for those separated for an adjustment disorder. Although this type of discharge did not exist in 2006, the Board is authorized to upgrade discharges in light of current mores and policies.¹⁴ ALCOAST 252/09 was the result of a service-wide recognition that numerous people were prejudiced after leaving the service because of the outmoded language of “unacceptable conduct.” Although the Coast Guard erred and did not state “unacceptable conduct” as the applicant’s narrative reason for separation,¹⁵ his separation code of JNC is similarly prejudicial. The new adjustment disorder/JFY discharge is appropriate for a member who is unsuitable for military service because of a diagnosed adjustment disorder that prevents the member from adapting to military life. The Board finds that the applicant’s record clearly shows that he was diagnosed with an adjustment disorder. The Board also finds that the applicant’s adjustment disorder prevented him from adapting to military life. According to a psychiatric evaluation of the applicant that occurred on July 8, 2006, he was unable to successfully adapt to the stress of balancing the responsibilities of his occupation with those of providing support and encouragement to his family. Therefore, the new adjustment disorder/JFY discharge is appropriate for the applicant. Although the applicant did not ask the Board to change his narrative reason for separation, his separation code and narrative reason for separation must correlate. Therefore, the Board finds that the applicant’s DD-214 should be corrected to show that his narrative reason for separation is “adjustment disorder” and his separation code is JFY.

8. The applicant also argued that his reenlistment code of RE-4 should be upgraded. The applicant’s original separation code, JNC, required members to receive a reenlistment code of

¹² DHS Office of the General Counsel, “Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment” (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).

¹³ *Id.*

¹⁴ Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976).

¹⁵ At the time the applicant was discharged in 2006, members who were discharged for adjustment disorders received the separation code JNC, which was paired with the narrative reason for separation “unacceptable conduct”—and is defined as an involuntary discharge “when member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed.” While the applicant received the proper separation code of JNC, the Coast Guard erred and indicated “unsuitability” as his narrative reason for separation.

RE-4, which is a permanent bar to enlistment in any military service. However, the applicant's new separation code, JFY, permits members to receive a reenlistment code of either RE-3 or RE-4. A reenlistment code of RE-3 would allow the applicant to reenlist if he could prove to a military recruiting command that he no longer has the condition that caused him to be discharged from the Coast Guard in 2006. According to ALCOAST 125/10, the default reenlistment code for members discharged prior to the end of their enlistment is RE-3. However, ALCOAST 125/10 noted that the reenlistment code of RE-4 should be prescribed in cases with associated in-service misconduct. In this case, the applicant's military record shows that he committed misconduct during his enlistment. Specifically, in the CO's notification to discharge the applicant, he noted that the applicant was awarded NJP on May 1, 2006, and that he introduced insects aboard his ship. Further, the record shows that the applicant lied to his command for months about the location of his family while he continued collecting the higher Cost of Living Adjustments in the meantime.

9. The applicant argued that his reenlistment code should be upgraded because a TBI caused or contributed to the behavior that resulted in his discharge. The first formal mention of a TBI was documented in the applicant's records on October 15, 2015, when he was evaluated for disability benefits with the VA. From that point on, his medical records refer to a diagnosis of a TBI in March 2004. Although the applicant has proven that he had received a TBI at the time of his discharge, he must also show that the TBI actually excused the misconduct that adversely affected his discharge. As discussed in the finding above, the applicant's misconduct included receiving NJP, introducing insects aboard his ship, and lying to his command for months about the location of his family while collecting the higher Cost of Living Adjustments. However, the applicant failed to explain how his TBI had caused or contributed to such misconduct. On February 8, 2016, the applicant completed a Review Evaluation of Residuals of Traumatic Brain Injury Disability Benefits Questionnaire in which he discussed the symptoms of his TBI at length. The applicant cited headaches, vertigo, a lack of concentration, and memory loss as the primary symptoms. Such symptoms do not explain or justify the applicant's behavior of introducing insects aboard his ship or lying to his command about his family's whereabouts for an extended period of time. Therefore, the applicant failed to prove by a preponderance of the evidence that his RE-4 reenlistment code is erroneous or unjust.

10. Accordingly, the Board will order the Coast Guard to issue the applicant a new DD-214 showing that he was discharged due to an adjustment disorder with a JFY separation code. No other correction is warranted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former MK3 [REDACTED] [REDACTED] USCG, for correction of his military record is granted in part. The Coast Guard shall issue him a new DD-214 with “adjustment disorder,” instead of “unsuitability,” as the narrative reason for separation and a JFY separation code, instead of JNC.

December 16, 2022

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