

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-007

 
Fireman's Apprentice (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 December 7, 2022, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 6, 2024, 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 Apprentice (FA/E2), who was administratively separated on May 22, 2006, asked the Board to correct his military record by upgrading his type of separation on his DD-214, from "Discharge" to "Medical Retirement;" his characterization of service from General—Under Honorable Conditions to Honorable; his separation code, JKK, denoting an involuntary discharge for misconduct due to drug abuse; and his narrative reason for separation from Misconduct to Retirement. The applicant also asked that his rank and paygrade be reverted back from FA-E2 to FN-E3.

The applicant alleged that his mental and physical conditions predated his discharge and DD-214. According to the applicant, it was originally recommended that he be medically separated due to his back condition and PTSD, but the applicant was influenced by his command to ignore the Coast Guard doctor and finish his tour. The applicant alleged that finishing his tour made his conditions worsen. The applicant stated he did not want to continue to taking his prescribed medications because of their addictive properties and he did not like how they made him feel, which is why he chose to use cannabis for its pain and stress-relieving properties.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 3, 2002, at age 22. On this same date, the applicant signed an Administrative Remarks Form CG-3307 (“Page 7”) acknowledging his understanding that illegal use or possession of drugs would not be tolerated. Additionally, on the applicant’s enlistment paperwork, he admitted to having tried marijuana five times when he was 17.

On May 14, 2004, the applicant and the Executive Officer certified that the applicant had received the annual Command Drug and Alcohol awareness training.

On May 22, 2006, the applicant was discharged from the Coast Guard. His DD-214, which he signed, shows a General discharge for Misconduct pursuant to Article 12-B-18 of the Personnel Manual with an JKK separation code.

On March 9, 2020, the applicant submitted a claim for benefits to the Department of Veterans Affairs (VA), Benefits Administration. On April 14, 2021, the Veterans Benefits Administration decided the following:

1. Evaluation of right lower extremity radiculopathy, sciatic nerve, which is currently 10 percent disabling, is increased to 20 percent effective March 9, 2020.
2. Service connection for left lower extremity radiculopathy, sciatic nerve is granted with an evaluation of 20 percent effective March 9, 2020.
3. Service connection for right knee patellofemoral pain syndrome, flexion is granted with An evaluation of 10 percent effective March 9, 2020.
4. Service connection for right knee patellofemoral pain syndrome, extension is granted with an evaluation of 0 percent effective March 9, 2020.
5. Evaluation of major depressive disorder (previously rated as adjustment disorder with depressed mood), which is currently 50 percent disabling, is continued.
6. Evaluation of lumbar spondylosis with intervertebral disc syndrome and fusion, which is currently 20 percent disabling, is continued.
7. Entitlement to Individual Unemployability is deferred.

On December 29, 2021, the VA sent the applicant a letter regarding his benefits. The letter included the following benefit decisions:

- Entitlement to individual unemployability is granted effective March 9, 2020.
- Evaluation of major depressive disorder, which is currently 50 percent disabling, is increased to 70 percent effective November 3, 2021.
- Evaluation of lumbar spondylosis with spinal stenosis and intervertebral disc syndrome and fusion, which is currently 20 percent disabling, is increased to 40 percent effective November 3, 2021.
- Evaluation of right lower extremity radiculopathy, sciatic nerve, which is currently 20 percent disabling, is increased to 40 percent effective November 3, 2021.
- Evaluation of left lower extremity radiculopathy, sciatic nerve, which is currently 20 percent disabling, is increased to 40 percent effective November 3, 2021.

- Evaluation of right knee patellofemoral pain syndrome, extension, which is currently 0 percent disabling, is increased to 30 percent effective November 3, 2021.
- Service connection for painful/unstable scar, lower back is granted with an evaluation of 20 percent effective November 3, 2021.
- Evaluation of scar, lower back, which is currently 0 percent disabling, is continued.
- Evaluation of right knee patellofemoral pain syndrome, flexion, which is currently evaluated 10 percent disabling, is decreased to 0 percent effective November 10, 2021.
- Basic eligibility to Dependents' Educational Assistance based on permanent and total disability status is established from March 9, 2020.
- Entitlement to special monthly compensation based on housebound criteria being met is granted from November 3, 2021.
- Service connection for bilateral hearing loss is denied.
- Service connection for tinnitus is denied.

This letter also notes that the applicant's major depression was "previously rated as an adjustment disorder with depressed mood."

VIEWS OF THE COAST GUARD

On September 13, 2023, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant failed to submit a timely application and has failed to show why it is in the interest of justice to excuse the delay. The JAG noted that the applicant was discharged on May 22, 2006, for drug use, but this application was not submitted until December 29, 2021, over fifteen years later. The JAG stated that the applicant's explanation for the delay is that the VA had only recently told him he was entitled to this benefit. The JAG argued that the applicant should have been aware of the characterization of his discharge at the time of his discharge. The JAG stated that this delay "materially prejudiced" the ability of the Coast Guard to provide records and therefore, should not be excused. The JAG noted that should the Board decide to apply "liberal consideration" to this case, the burden of proof is not altered.

The JAG argued that the applicant has failed to prove an error or an injustice in the characterization of his discharge. The JAG noted that the applicant was requesting the discharge be changed to honorable and the code to be a medical discharge. The JAG enumerated the evidence provided by the applicant: the applicant's own claim that his command influenced him to continue to serve with his PTSD and back condition against Coast Guard medical advice; and a 2021 VA benefits decision identifying major depressive disorder as a service-connected disability. The JAG argued that VA rating decisions are not binding on the Coast Guard. Further, the JAG noted that the applicant proffered no evidence that he suffered from PTSD or a back condition, that a Coast Guard doctor recommended he separate for medical reasons, or that his command influenced him to stay. The JAG stated a search of the Coast Guard records did not reveal claims of a mental health condition nor is there record of a Medical Evaluation Board. The JAG claimed that the Coast Guard did not have Service Treatment Records accessible. Therefore, the JAG stated that because the applicant did not provide any medical records from his time in service, showing that he had PTSD or a back condition, the applicant failed to meet his burden or establishing by a preponderance of the evidence that there was an error or injustice in his record.

The JAG noted that the applicant did not dispute his use of illegal drugs while in the Coast Guard but asserted that he chose to use illegal drugs instead of the legal medications provided by the Coast Guard medical staff. The JAG, assuming *arguendo* that the applicant did have the medical conditions requiring medications, argued that the applicant could have discussed different options with the Coast Guard medical staff. The JAG further noted that the applicant was aware of the illegal drug policy from the time he signed his recruitment paperwork. The JAG argued that the applicant provided no evidence to overcome the presumption of administrative regularity and, thus, failed to meet his burden of establishing by a preponderance of evidence that there is an error or injustice in the record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 28, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response was received.

APPLICABLE LAW AND POLICY

Article 12 of the Coast Guard Personnel Manual, COMDTINST M1000.6A (October 2005), provides the necessary guidance on discharging a service member for misconduct due to drug use. In relevant part:

12.B.2.f. Standards of Discharge.

1. Honorable Discharge. A member's commanding officer or higher authority can effect a separation with an honorable discharge if the member is eligible for or subject to discharge and the member merits an honorable discharge under the standards prescribed here. Issuing an honorable discharge depends on:

...

7. Misconduct (except involvement with illegal drugs or obstructing drug urinalysis testing by tampering).

2. General Discharge. The member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 1.B.2.f. (1)(a) of this Manual, the specific reason shall be stated in an entry on an Administrative Remarks, Form CG-3307, entry in the member's PDR. A general discharge applies in these situations:

a. The member either:

1. Has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia;

...

Article 12.B.18.b. provides the following guidance on separating a member for misconduct due to involvement with drugs:

12.B.18.b. Reasons to Discharge for Misconduct.

...

4. Drugs.

a. Involvement with Drugs. *Any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drug, as defined in Article 20.A.2.k., will be processed for separation from the Coast Guard with no higher than a general discharge.* Commanding Officer, Training Center Cape May is delegated final discharge authority for members assigned to recruit training or prior service training program under this Article in specific cases of drug use before enlistment (as evidenced by a positive urinalysis shortly after entering training). New inductees shall sign an Administrative Remarks; CG-3307 entry acknowledging the presence of drugs in their bodies is grounds for a general discharge for misconduct. (Emphasis added.)

...

Article 12.B.18.e. states that before initiating an administrative discharge for misconduct for a member who, like the applicant, has fewer than eight years of total military service, the command must take the following steps:

Commanding officers shall process members with fewer than eight years of total active and inactive military service recommended for honorable or general discharge for misconduct as follows:

1. Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 12.B.18.b. supported by known facts).
2. Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.
3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.

Article 20 of the Coast Guard Personnel Manual (June 2007), provides the relevant guidance on the preponderance of the evidence standard used when determining if a drug incident has occurred and the illegal use of prescription drugs. The relevant sections are as follows:

20.A.1.a. Policy. Substance and alcohol abuse undermine morale, mission performance, safety, and health. They will not be tolerated within the Coast Guard. Thus, drug and alcohol screening is mandated by law, (10 USC 1090), to identify, treat, and rehabilitate members of the Armed Forces who are dependent on drugs or alcohol. Furthermore, the possession, use, or distribution of a controlled substance as defined in the Uniform Code of Military Justice (UCMJ), Article 112a, and (10 USC 912a), constitutes a serious breach of discipline. Effective leadership at all levels is necessary to curb substance and alcohol abuse in the Coast Guard. Each command must be prepared to identify and eliminate substance and alcohol abuse.

...

20.A.1.c. Objectives.

The objectives of the substance and alcohol abuse prevention programs are to:

1. Reduce the incidence of substance and alcohol abuse by Coast Guard members;
2. Detect and separate from the Coast Guard those members who abuse, traffic in, or unlawfully possess drugs; and
3. Facilitate the identification, treatment, and rehabilitation of members who are found to be chemically dependent on drugs or alcohol prior to discharge from the Coast Guard.

...

20.A2k. Drug Incident.

1. Any of the following conduct constitutes a drug incident as determined by the commanding officer:

- a. Intentional use of drugs;
- b. Wrongful possession of drugs;

...

e. A civil or military conviction for wrongful use, possession, or trafficking of drugs, unless rebutted by other evidence.

2. The member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident.

3. If the conduct occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.

...

20.C.3.d. Determining a Drug Incident.

In determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record (PDR), and chain of command recommendations. Evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statement(s). If the evidence of a possible drug incident includes a positive urinalysis result, the command should also determine whether the urinalysis was conducted in accordance with this article and whether the collection and chain of custody procedures were properly followed. The commanding officer may delay final determination to pursue any of these options deemed appropriate:

1. Ask the member to consent to a urinalysis test as outlined in Article 20.C.2.a.
2. Direct the member to participate in a urinalysis evaluation program for a maximum of six months as outlined in Article 20.C.2.a.
3. Request the laboratory reexamine the original documentation for error.
4. Request the laboratory retest the original specimen. Retesting requires additional urinalysis confirmation documentation and reduces the quantity of urine available for future directed retesting; i.e., in the case of court-martial. This should not be a routine course of action.

e. The findings of a drug incident shall be determined by the commanding officer and an Administrative Discharge Board, if the member is entitled to one, using the preponderance of evidence standard. That is, when all evidence is fairly considered, including its reliability and credibility, it is more likely than not the member intentionally ingested drugs. A preponderance of the evidence refers to its quality and persuasiveness, not the number of witnesses or documentation. A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof.

...

20.C.4. Findings of a Drug Incident. If after completing the investigation described in Article 20.C.3, the commanding officer determines that a drug incident did occur, he or she will take these actions:

1. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served a total of eight or more years, will also be processed under Articles 12.B.31. and 12.B.32.,- as appropriate.

2. Disciplinary Action. Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application filed by the applicant was not timely. To be timely, an application for the correction of a military record must be submitted to the Board within three years after the alleged error or injustice was discovered or should have been discovered.¹ The record shows that the applicant received and signed his DD-214 showing his separation and reenlistment codes and discharge for Misconduct on May 27, 2006. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in May 2006, and his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.² 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 "analyzing both the reasons for the delay and the potential merits of the claim based on a cursory review"³ to determine whether the interest

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

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

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.”⁴ Although the record shows that the applicant long delayed his application to the Board, the record also shows that he has been diagnosed with major depressive disorder, which might well have interfered with his ability to submit his application. In light of his mental health condition, the Board will excuse the untimeliness of the application and consider the case on the merits.

4. The applicant alleged that the Coast Guard committed an error and injustice when it administratively separated him for misconduct and gave him a General—Under Honorable Conditions characterization of service as a result of his illegal use of a controlled substance, when it should have given him an Honorable discharge due to his mitigating circumstances. 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.⁵ 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.”⁶ And under the Board’s “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 VA records, and decide whether the preponderance of the evidence shows that the veteran had an experience of military sexual trauma and mental health condition(s) while in the Service that could excuse the veteran’s misconduct; whether the experience of military sexual trauma and mental health condition(s) actually excused the misconduct that adversely affected the discharge; and, if not, whether the experience of military sexual trauma and mental health conditions outweigh the misconduct or otherwise warrant upgrading the veteran’s discharge.

5. **Intentional Use of Marijuana.** The Board’s review of the record shows that the applicant used marijuana while a member of the Coast Guard. The record further shows that the applicant was discharged for illegal drug use and the applicant admitted to his illegal use in his application for relief to this Board. The applicant’s recruitment paperwork shows that he was aware of the Coast Guard’s policy on the use of illegal substances. Additionally, the applicant’s record shows that he had attended at least one annual Drug and Alcohol Awareness Training while on active duty. Article 20.C.4.1 of the Coast Guard Personnel Manual COMDTINST M1000.6A, “Findings of a Drug Incident,” states, “If after completing the investigation described in Article 20.C.3, the commanding officer determines that a drug incident did occur, he or she will take these actions: 1. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate.” Accordingly, the Board finds that the preponderance of the evidence shows that the applicant’s administrative discharge due to his illegal use of a controlled substance was not erroneous or unjust.

⁴ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

6. **PTSD.** The record shows that the applicant has been diagnosed with a major depressive disorder rather than PTSD, contrary to what the applicant claimed in his application to this Board. 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 VA records, and decide whether the preponderance of the evidence shows that the veteran had the mental health condition while in the Service; whether the mental health condition could excuse the veteran’s misconduct; whether the experience of military sexual trauma and mental health condition(s) actually excused the misconduct that adversely affected the discharge; and, if not, whether the experience of military sexual trauma and mental health conditions outweigh the misconduct or otherwise warrant upgrading the veteran’s discharge.⁷

In this case, the preponderance of the evidence does not show that the applicant suffered from PTSD while in the Coast Guard. Although the applicant claimed that he was diagnosed with PTSD during his time in the Coast Guard he failed to provide any evidence of the alleged diagnosis with his application. Because the applicant did not provide any evidence of a diagnosis of PTSD while in the Coast Guard or through the VA, the applicant has not proven by a preponderance of the evidence that PTSD outweighed or mitigated his misconduct while on active duty or otherwise warrants upgrading his discharge.

7. **Major Depressive Disorder and Back Condition.** The applicant provided VA benefits outcome letters that show he has been diagnosed with a major depressive disorder and lumbar spondylosis. Although the VA’s letters do not expressly state that his major depressive is service connected, they do show that he receives benefits for this condition. But the letters also show that the VA had previously diagnosed this condition as “adjustment disorder with depressed mood.” An adjustment disorder diagnosis that does not ameliorate normally results in an administrative discharge from the Coast Guard, not a medical separation. The applicant has submitted no evidence to show that he suffered from Major Depressive Disorder or a disabling back condition while in the Coast Guard. Nor has he shown that those conditions outweighed or mitigated his misconduct while on active duty or otherwise warrant upgrading his discharge.

8. The fact that the applicant’s service-connected conditions may have become worse over time does not mean that he should have received a medical retirement back in 2006, when the preponderance of the evidence shows that he was not disabled because he was never evaluated by a medical board. The applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted

⁷ According to the Diagnostic and Statistical Manual of Mental Health Disorders (DSM-5), the primary requirement for a diagnosis of PTSD is—

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).

correctly, lawfully, and in good faith.⁸ He has not proven, by a preponderance of the evidence, that his type of separation, characterization of service, narrative reason for separation, or his separation code are erroneous or unjust. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

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

June 6, 2024

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