DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-054

Xxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxx

FINAL DECISION

[redacted] **Deputy Chair:**

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on February 28, 2002, upon the BCMR's receipt of the applicant's completed application and military records.[1]

This final decision, dated December 12, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by revoking his conviction by summary court-martial.[2] He alleged that his summary court-martial and general discharge resulted from a 25-minute period of unauthorized absence that was caused by

[1] The applicant originally applied to the BCMR on June 3, 1997. However, his case was administratively closed on July 16, 1997, when the Chairman determined that he had simultaneously applied to the Discharge Review Board (DRB). Under 33 C.F.R. § 52.13, applicants must exhaust such administrative remedies before applying to the BMCR. However, on July 23, 2001, the DRB informed the applicant that because his allegations are "of a medical nature," the DRB does not have jurisdiction, and he should reapply to the BCMR.

[2] In his original application to the DRB, the applicant asked that board to upgrade his discharge to honorable, but the DRB determined that it had no jurisdiction over the matter and directed the applicant to apply to the BCMR. Therefore, although the applicant did not expressly ask the BCMR to upgrade his discharge on his DD 149 application form (perhaps due to confusion about the boards' authorities), this Board will consider the matter of the applicant's discharge as well.

his bipolar disorder.[3] He alleged that it is unjust for him to have been court-martialed since, but for his bipolar disorder, he would never have gone absent without leave (AWOL). The applicant alleged that his medical records show that he has been diagnosed with the disorder and was already bipolar at the time he went AWOL.

In support of his allegation, the applicant submitted a statement from the CO of his Reserve unit. The CO stated that while serving at the unit, the applicant "performed well and did his duties without any hesitation. He was dependable and very courteous. He was a credit to the US Coast Guard." The CO stated that he did not learn about the applicant's bipolar disorder until after the applicant was discharged. He also stated that the officers at the unit were quite surprised when they learned about the applicant's trouble at boot camp "since he was expected to be among the best candidates there." The CO stated that he supports the applicant's request for an honorable discharge.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On June 6, 19xx, the applicant, then 23 years old, enlisted in the Coast Guard Reserve for eight years under the RK program, which required that he complete basic training, attend "A" School or get on-the-job training to become a petty officer, and drill regularly for at least 6 years. A court memorandum in his record indicates that, while attending basic training in Cape May, New Jersey, on July 1, 19xx, the applicant was found to have been AWOL from about xxxx p.m. to xxxx p.m. The circumstances of this incident are not in the record. On August 2, 19xx, while still at the training center, he was convicted of the unauthorized absence by summary court-martial and was sentenced to 7 days' confinement in the brig; forfeiture of $200; and reduction in pay grade from E-2 to E-1. On August 26, 19xx, after he served his period of confinement and completed basic training, the applicant was advanced again to E-2.

On September 12, 19xx, the applicant was assigned to inactive duty at a drilling unit near his home. From that date until the next summer, he performed his drills fairly consistently, missing drills only in April. In the summer of 19xx, he performed 11 weeks of on-the-job training to become a petty officer. He also took several correspondence courses, but he never passed the courses and never qualified as a petty officer.

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[3] Bipolar disorder is a mood disorder characterized by recurrent depressive episodes and manic episodes and sometimes by psychotic or catatonic features. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR), p. 382 et sec. The average age at onset is 20. *Id.* at 386. Truancy and occupational failure are common features of the disorder. *Id*. at 394. Paranoia, anxiety, and irritability are common symptoms of bipolar disorder. Eugene Braunwald et al., eds., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 15TH EDITION (McGraw-Hill, 2001), p. 2551. Under Chapter 5 of the Coast Guard Medical Manual, bipolar disorders are considered physical disabilities disqualifying for military service.

The applicant performed drills steadily through early April 19xx. He received a Certificate of Appreciation for his work in security zone operations in December 19xx. Also, in March 19xx, his commanding officer (CO) made a very positive entry in his record stating that the applicant had volunteered for an assignment with little advance notice and great enthusiasm even though it required that he change his plans and take time off from his civilian job. The CO stated that he had performed a very long and strenuous job outstandingly, professionally, and wholeheartedly.

The applicant, however, performed no drills at all in May, June, or July 19xx. He drilled once in August 19xx, failed to drill in September and October, and drilled one last time on November 2, 19xx. He performed no drills at all thereafter.

On February 9, 19xx, the CO sent the applicant a letter by certified mail to inform him that he was initiating action to discharge him from the Reserve in accordance with Article 12-B-11 of the Personnel Manual because of his "uninterrupted pattern of shirking." The CO noted that the applicant had been absent 24 times since November 2, 19xx, and that the command's efforts to contact him had been unsuccessful. The CO stated that his performance marks supported a general discharge, which could prejudice him in civilian life. He also told the applicant that he was entitled to submit a statement on his own behalf. Along with this letter, the CO sent the applicant a form on which he was supposed to acknowledge the notification and indicate whether he objected to being discharged and intended to submit a statement.

On February 13, 19xx, the applicant acknowledged the notification and responded, stating that he "would like very much to be awarded a general discharge, under honorable conditions."

On May 4, 19xx, the Commandant directed the CO to issue the applicant a general discharge "by reason of misconduct (shirking)," in accordance with Article 12-B-18 of the Personnel Manual, with an RE-4 reenlistment code (not eligible for reenlistment) and an HKJ separation code (which meant "misconduct—an established pattern of shirking"). The applicant was discharged from the Reserve on the same day.

SUMMARY OF THE APPLICANT'S MEDICAL RECORDS

The applicant's Coast Guard medical records contain no evidence of any mental illness or disorder.

On July 17, 19xx; July 30, 19xx; and June 23, 19xx, the applicant was treated at a psychiatric hospital on an outpatient basis. From June 28 to July 2, 19xx, he was hospitalized in a manic phase of bipolar disorder.

From July 26 to August 18, 19xx, the applicant was hospitalized in a manic phase of bipolar disorder.

From May 8 to May 18, 19xx, the applicant was hospitalized in a depressive phase of bipolar disorder.

On August 2, 1995, a psychologist, Dr. B, wrote a letter stating that, from November 19xx through 19xx, he treated the applicant for his complaints of nervousness. Dr. B stated that at that time, he diagnosed the applicant with a paranoid personality disorder with frequent obsessive-compulsive episodes.

On August 14, 1995, a psychiatrist, Dr. Q, wrote a letter stating that he treated the applicant in four sessions from June 26 through August 18, 19xx. Dr. Q stated that during those sessions, the applicant told him about the incident at boot camp for which he had been court-martialed. The applicant told the doctor that he had tried to escape by swimming across a body of water that was too wide to swim across. He also told his doctor that, since that incident, he had felt irritable, nervous, and pathologically suspicious, and he had had difficulty maintaining relationships. Dr. Q described the applicant as sad, tense, and anxious and stated that he had diagnosed the applicant with a bipolar disorder and paranoid personality disorder.

On August 30, 1995, the applicant applied to the Department of Veterans' Affairs (DVA) for disability benefits. On November 12, 1996, the DVA informed the applicant that it had determined that his bipolar disorder was service connected and that it had been 30-percent disabling since August 30, 1995. The DVA explained that although "Service records do not show onset during service, … private [medical] records show treatment during active service interval. Veteran has been hospitalized approximately yearly for short periods, [and] is taking medication."

On May 19, 1997, a psychiatrist, Dr. F, wrote a letter to the Commandant stating that he had been treating the applicant for bipolar disorder since July 1994. Dr. F also stated that the applicant was unemployed and had required two in-patient hospitalizations in the three years he had been treating him.

On July 3, 1997, the DVA reaffirmed the applicant's 30-percent disability rating.

VIEWS OF THE COAST GUARD

On July 22, 2002, the Chief Counsel submitted an advisory opinion in which he recommended that the Board deny relief in this case for untimeliness but, if not, for lack of merit. Copies of that advisory opinion and its enclosures are attached to this Final Decision below.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 25, 2002, the Chairman sent the applicant a copy of the advisory opinion and invited him to respond within 15 days. On August 2, 2002, the Board received a letter from the applicant's father.[4] He stated that when his son went AWOL in 19xx and skipped his drills in 19xx, he was in the early stages of a bipolar disorder that became "amply evident shortly thereafter." He alleged that it is well known that bipolar disorder "does not develop overnight" and that, since his son's disease was "incipient, it is absurd to pretend that he could have been aware of his medical condition or to report it to his chain of command." The applicant's father further alleged that the onset of his son's condition during his military service has been substantiated by the DVA and that his son's continuous and deteriorating bipolar disorder since July 19xx should excuse his failure to file a timely application.

[4] The applicant did not list his father as his counsel on his application to the Board. Therefore, this statement is not accepted by the Board as a statement by the applicant himself. However, it has some evidentiary weight regarding the onset, duration, and severity of the applicant's condition.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The record indicates that the applicant has exhausted his administrative remedies because he applied to the DRB, but that board found that it had no jurisdiction over his case.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.[5] The applicant was released from boot camp into the inactive Reserve after having been court-martialed in 19xx, and he received his general discharge in 19xx. Therefore, the Board's three-year statute of limitations had expired for both of these matters even when the applicant first applied to the BCMR in 1997. Accordingly, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reasons for the delay and conduct a cursory review of the merits of the case.[6] Although the applicant did not explain why he delayed applying to the Board, the record indicates that since before the statute of limitations expired, he has been suffering from a serious mental illness. In addition, a cursory review of the merits of this case indicates that the applicant was being treated for a serious mental illness prior to his general discharge from the Reserve for shirking. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

4. In judging the accuracy of any military record, the Board initially presumes that Coast Guard officers have acted correctly, lawfully, and in good faith.[7] To overcome this presumption of regularity, an applicant must present at least some clear and credible evidence indicating that an error or injustice exists in his record. If the presumption is overcome, the Board will weigh the evidence in the record to determine whether the applicant has proved by a preponderance of the evidence that his record is erroneous or unjust and requires correction. "[T]he Secretary and his boards have an

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[5] 10 U.S.C. § 1552(b).

[6] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 19xx).

[7] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 19xx); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief."[8]

5. The applicant argued that his conviction by summary court-martial in the summer of 19xx should be "revoked" because he was suffering from a mental illness at the time. However, the Board has no authority to overturn a conviction by court-martial, but it may grant clemency with respect to a sentence by court-martial.[9] In support of his allegation, the applicant submitted a report from Dr. Q in which the psychiatrist stated that when the applicant sought treatment from him in 19xx, he told the doctor that he had been court-martialed for apparently irrational behavior: trying to escape by swimming across a body of water too wide to swim across. However, other than Dr. Q's 1995 statement of what the applicant told him in 19xx about the 19xx incident, there is no evidence in the record that the applicant was mentally ill when he went AWOL. His military record contains only a court memorandum indicating that he was AWOL for approximately 25 minutes on July 1, 19xx. Moreover, as the Chief Counsel argued, the passage of time since the incident has made it impossible for the Coast Guard to present evidence supporting the cause, correctness, and fairness of the applicant's 19xx conviction and sentence. Therefore, the Board finds that the applicant's claim with respect to his unauthorized absence and summary court-martial is barred by the doctrine of laches.

6. The applicant argued that his May 19xx general discharge for shirking was unjust because he was suffering from bipolar disorder. Statements in the record by a psychologist, Dr. B, and a psychiatrist, Dr. Q, indicate that in 19xx and 19xx, prior to his discharge from the Reserve, the applicant was suffering from nervousness and paranoia, symptoms of incipient bipolar disorder.[10] Dr. B diagnosed him with a paranoid personality disorder, and Dr. Q diagnosed him with bipolar disorder and paranoid personality disorder. Hospital records and the statement of Dr. F indicate that in the year following his discharge, the applicant was treated at a psychiatric hospital on an outpatient basis and that, from June 1993 to May 1997, he was hospitalized about once each year in either a manic or depressive phase of bipolar disorder.

7. According to the DSM-IV-TR, truancy and occupational failure are common features of bipolar disorder.[11] Therefore, and in light of the fact that the applicant drilled regularly for his first two years in the Reserve, the Board finds that in all likelihood, the applicant's subsequent failure to drill, or "shirking," was caused by his bipo-

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[8] *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959).

[9] 10 U.S.C. § 1552 (f)(2).

[10] Eugene Braunwald et al., eds., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 15TH EDITION (McGraw-Hill, 2001), p. 2551.

[11] American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR), p. 394.

lar disorder. Because the applicant never informed the Coast Guard of his condition, his CO cannot be faulted for attributing his failure to drill to intentional misconduct. Nevertheless, the Board finds that the applicant has overcome the presumption of regularity and proved by a preponderance of the evidence that his general discharge by reason of misconduct was, in fact, erroneous. Moreover, the Board finds that the applicant's receipt of a general discharge for shirking when he was suffering from bipolar disorder "shocks the sense of justice." *See Reale v. United States*, 208 Ct. Cl. 949 (1976), and Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

8. The applicant has proved that when he was discharged from the Reserve on May 19xx, he suffered from bipolar disorder, which constitutes a physical disability disqualifying for retention,[12] and that the disability likely caused his discharge. Therefore, the Board should correct the applicant's narrative reason for separation, which was "Misconduct," and his separation code, HJK, which denotes shirking,[13] and determine which narrative reason for separation and separation and reenlistment codes he should have received. Several such codes were authorized for members separated because of a disability, and some denote entitlement to either severance pay or retirement.[14] Although the applicant did not request a disability retirement or severance pay, to correct his record in accordance with these findings, the Board must determine whether he was entitled to either form of compensation.

9. Reservists such as the applicant who were performing inactive duty training prior to September 1996 were only entitled to a disability retirement if they were unfit to perform their duties because of a permanent disability rated at 30 percent or greater on the DVA's schedule for rating disabilities and if they incurred the disability not due to their own misconduct and as the proximate result of performing active duty or inactive duty training; while traveling to or from their duty stations; or while staying

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[12] Coast Guard Medical Manual, Chapter 5.B.10.

[13] In his advisory opinion, the Chief Counsel stated that the applicant's separation code, HKJ, did not exist. However, that code was a proper separation code under the regulations that existed in 19xx. COMDTINST M1900.4C, Chapter 2.C.

[14] COMDTINST M1900.4C, Chapter 2.C., includes the following allowable combinations of codes for disability separations:

- SJF, denoting permanent retirement by reason of physical disability, and either the RE-3P or RE-4 reenlistment code.
- JFL, denoting a separation for physical disability with severance pay, and an RE-4 reenlistment code.
- JFM, denoting a separation for a physical disability that existed prior to enlistment and that does not entitle the member to a disability retirement or severance pay, and the RE-4 reenlistment code.
- JFP, denoting a separation for physical disability incurred through intentional misconduct or willful neglect, and the RE-4 reenlistment code.
- JFR, denoting a separation for a physical disability that did not exist prior to entry on active duty but that does not entitle the member to a disability retirement or severance pay, and either the RE-3P or RE-4 reenlistment code.

at the duty station overnight immediately prior to performing duty or between periods of duty if commuting from the reservist's residence is unreasonable.[15] Such reservists were entitled to severance pay if their disability was rated at less than 30 percent.[16] The applicant has not proved that his bipolar disorder was the proximate result of his performance of active duty or inactive duty training. Therefore, he has not proved that he should have been assigned a disability rating and awarded a retirement or severance pay when he was discharged in May 19xx.

10. The applicant has also alleged that he was suffering from bipolar disorder during his two extended periods of active duty in the summers of 19xx and 19xx. Reservists such as the applicant who had less than eight years of active service and who were serving on active duty for periods of at least 30 days in 19xx and 19xx were entitled to a disability retirement if their permanent disability was rated at 30 percent or greater on the DVA's schedule and was the proximate result of their military service.[17] Reservists with less than eight years of active service were entitled to severance pay if (a) they incurred the disability while entitled to basic pay and either (b)(1) the disability was rated at less than 30 percent and was the proximate result of performing active duty or (b)(2) the disability was rated at 30 percent or greater.[18] Although according to Dr. Q, the applicant told him that his being AWOL in the summer of 19xx was the result of an irrational belief that he could escape boot camp by swimming across a very wide body of water, the Board finds that this report is insufficient by itself to prove that the applicant incurred his bipolar disorder while entitled to basic pay during the summer of 19xx. Moreover, although the applicant may have first been diagnosed with bipolar disorder in the summer of 19xx while he was serving on active duty for on-the-job training, this fact would not prove that he incurred his bipolar disorder while entitled to basic pay in the summer of 19xx. Nor has he proved that his bipolar disorder was at least 30-percent disabling at that time or that his bipolar disorder was the proximate result of his military service. Therefore, the Board finds that the applicant has not proved that if he had been diagnosed by the Coast Guard with bipolar disorder in the summer of 19xx or 19xx, while he was serving on active duty for periods of greater than 30 days, he would have been entitled to either a disability retirement or severance pay.

11. Because the applicant has proved by a preponderance of the evidence that he was suffering from bipolar disorder when he was discharged for shirking in May 19xx and because his bipolar disorder likely caused or greatly contributed to his failure to drill, the Board finds that the applicant's discharge should be upgraded to honorable. His conviction by summary court-martial in the summer of 19xx does not preclude an honorable discharge under Article 12-B-2 of the Personnel Manual, and his record and

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[15] 10 U.S.C. § 1204.

[16] 10 U.S.C. § 1206.

[17] 10 U.S.C. § 1201.

[18] 10 U.S.C. § 1203.

the letter from his CO indicate that, other than the one incident at boot camp, he performed quite well when he was able to participate. In addition, the Board finds that if the Coast Guard had known of his bipolar disorder, he would have been discharged by reason of physical disability under Article 12-B-15 of the Personnel Manual.

12. Accordingly, the applicant's request should be granted in part. His discharge should be upgraded to honorable; the authority for his discharge should be Article 12-B-15 of the Personnel Manual; and his narrative reason for discharge should be "Physical Disability," instead of "Misconduct." It is unclear from the record whether his bipolar disorder pre-existed his enlistment in the Reserve, which would call for a JFM separation code, or began sometime thereafter, which would call for a JFR code. Since there is no evidence in the record that his bipolar disorder pre-existed his enlistment and the DVA has decided that his condition is service-connected, the Board finds that the most appropriate separation code for the applicant is JFR, which indicates that he was discharged because of a physical disability but was not entitled to retirement or severance pay; and his reenlistment code should be RE-3P.[19] However, the records concerning his summary court-martial should remain unchanged.

[19] Under Chapter 2.C. of COMDTINST M1900.4C, members separated with the JFR code could receive either an RE-4 code, which prohibits reenlistment, or an RE-3P code, which means that the member performed well and may reenlist if he can prove that his disability no longer exists. Under current standards, all members discharged because of a physical disability not caused by their own misconduct or willful neglect receive an RE-3P code.

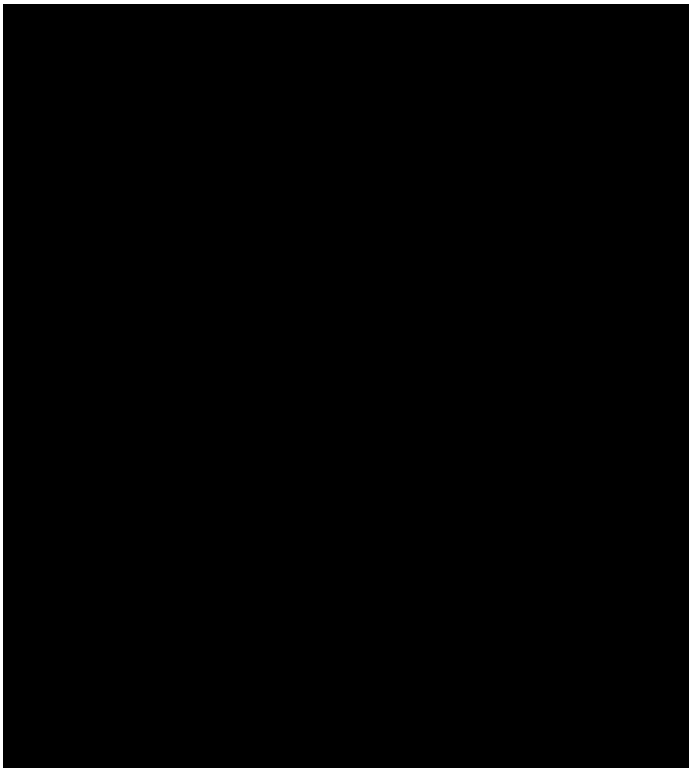
ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

His May 19xx discharge shall be corrected to honorable; the authority for his discharge shall be corrected to Article 12-B-15 of the Personnel Manual; his narrative reason for separation shall be corrected to "Physical Disability"; his separation code shall be corrected to JFR; and his reenlistment code shall be corrected to RE-3P.

The Coast Guard shall issue him a new discharge certificate reflecting his honorable character of service.

These corrections do not entitle him to either severance pay or a disability retirement, and no other relief shall be granted.



Memorandum

Subject: ADVISORY OPINION IN CGBCMR DOCKET NO. 2002-054 (XXXXX)

Date:

5420/3

From: Chief Counsel, U.S. Coast Guard

Reply to Attn. Of: G-LMJ [redacted]

To: Chairman, Board for Correction of Military Records (C-60)

Ref: (a) Applicant's DD Form 149 dated 16 May 1997

1. I adopt the analysis provided by Commander, Coast Guard Personnel Command in enclosure (1) and request you accept his comments and my following additional comments as the Coast Guard's advisory opinion recommending denying relief.

2. Summary of Analysis**:** The Board should deny relief in this case for lack of timeliness or alternatively, lack of merit. The Applicant seeks "revocation of summary court marshal (sic) in which I was confined 7 days; forfeiture of $200.00 per month for one month and reduction to pay grade E-1." Applicant's General Discharge (under honorable conditions) and RE-4 code were properly assigned and are unrelated to his earlier Summary Court-Martial (SCM). The only basis the Applicant presents for requesting a revocation of the punishment awarded by the SCM is an allegation that at the time of the SCM he suffered from bipolar disorder. There is no indication in his Coast Guard records that he suffered from bipolar disorder. The Applicant has produced no evidence demonstrating that the character and nature of his discharge was incorrect, nor does the Applicant present any evidence that his bipolar disorder is cause to revoke the findings of the SCM. Therefore, no relief should be granted.

3. Summary of the Facts:

[The Applicant's BCMR application is dated 16 May 1997 and was originally assigned docket number 134-97. The case was apparently transferred to the Discharge Review Board (DRB) for action. On July 23, 2001 the DRB determined that the case fell outside the DRB's authority and returned the case to the BCMR. See G-WPM-1 letter 5420 dated 23 July 2001.]

On 06 June 19xx, the Applicant enlisted in the Coast Guard Reserve for a period of 8 years.

On 10 August 19xx, the Applicant was found guilty of unauthorized absence (UA) at SCM. He was sentenced to seven days confinement at the [redacted] Naval Brig, forfeiture of $200.00 per month for one month and reduction to pay grade E-1.

On 09 February 19xx, the Applicant was informed by Commanding Officer, Coast Guard Reserve Unit (CGRU) Base [redacted] that action would be taken to discharge him from the Coast Guard. The basis for the discharge was an "uninterrupted pattern of shirking."

On 13 February 19xx, the Applicant provided the Commanding Officer CGRU Base [redacted] with a written statement. The Applicant averred in part: "I would like very much to be awarded a general discharge, under honorable conditions."

On 04 May 19xx, the Applicant was issued a General Discharge Certificate DD Form 257. The Applicant had completed a total 3 years, 10 months and 28 days of his 8-year enlistment. The Applicant was assigned a separation code HKJ and a re-enlistment code RE-4 (not eligible for reenlistment). The HKJ separation code does not exist. JKD is the appropriate separation code for shirking and the record should be changed accordingly.

On 12 November 1996, the Department of Veterans' Affairs (VA) awarded the Applicant a disability of 30% for service connected bipolar disorder. The VA determination states that the "service records do not show onset during service, however private records show treatment during active service interval." Some private records (in Spanish) were included in the Applicant's BCMR package, submitted 16 May 1997. The private records were included and referenced in the VA determination. A report from xxxxxxxxx M.D. shows treatment for "features of a paranoid personality from 19xx to 19xx," and a report for xxxxxxxxxxx, M.D. shows treatment in August 19xx for a bipolar disorder and paranoid personality.[20]

4. Analysis of the Case:

a. *Applicant failed to submit a timely application and has not provided sufficient reason why it is in the interest of justice to excuse the delay.*

(1) Although the Applicant claims that he discovered the alleged error in November 1996, the record clearly shows that Applicant was or should have been aware of the allegations he made in his application within three years of his 10 August 19xx SCM. Applicant submitted his application more than xxx (x) years after the Statute of Limitations expired.[21]

(2) Under 10 U.S.C. §1552(b) and further regulations in 33 C.F.R. §52.22, an application must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. If an application is untimely, the Applicant must set forth in the application reasons why its acceptance is in the interest of justice. In addition, the Board must deny relief unless Applicant presents sufficient evidence to warrant a finding that it would be in the interest of justice to excuse the failure to file timely. In making this determination, the Board

[20] Note that these treatments are one and two years after the award of punishment by the SCM from which the Applicant seeks relief.

[21] The Applicant provides no explanation for his alleged discovery of the error in November 1996, other than perhaps that was when he received the disability rating form the VA. From the private records provided to the VA, the Applicant discovered or should have discovered the existence of his condition in 19xx. See Blocks 9 and 11.b. DD149.

must consider the reasons for delay and make a cursory review of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F. 3d 1396 (D.C. Cir. 1995). As discussed *infra*, Applicant has failed to offer substantial evidence that the Coast Guard committed either an injustice or error in discharging him with a general discharge based on shirking. Therefore, the BCMR should dismiss this case with prejudice.

b. *xxxxxx years transpired from the time of the SCM and the Applicant's initial application to the BCMR and should be barred by the doctrine of laches*.

(1) Alternatively, the Board should deny the requested relief on the basis of the doctrine of laches. The Board's enabling statute, 10 U.S.C. § 1552, provides that the Secretary, acting through boards of civilians, may correct a military record "when he considers it necessary to correct an error or remove an injustice." Thus, the Secretary is not compelled to correct a record, but may exercise considerable discretion in determining whether such a correction is "necessary" to make the Applicant whole. In the present case, the Board should decline to grant the requested relief based upon the equitable doctrine of laches. See, e.g., Sargisson v. United States, 12 Cl. Ct. 539, 542 (1987).

(2) The Applicant's allegation that he was improperly awarded punishment by a SCM in 19xx because at the time he was suffering from bipolar disorder is the entire basis of his claim. This alleged "error" is not established in the Applicant's service record, his health record, nor is it established by private medical record. Applicant took no action to correct the alleged "error" in 19xx, instead waited more than xxx years to challenge it before the BCMR. Where an Applicant's unexcused delay has caused substantial prejudice to the government, the claim for relief is generally barred under the equitable doctrine of laches. See, e.g., Sargisson v. United States, 12 Cl. Ct. 539, 542 (1987). The relevant period of delay may run even before the particular claim accrues, runs independent of any statute of limitations, and may involve periods of delay as short as eleven months. Id. Underlying the laches bar is the fundamental principal that equity aids the vigilant; the doctrine prohibits Applicants from delaying their BCMR applications, absent circumstances excusing the delay, while the evidence regarding their contentions becomes lost, stale, or inaccessible, or while the costs of investigating or correcting the matter accumulate. In the present case, the Coast Guard's ability to contact key witnesses has been severely hampered by the mere fact that they no longer serve in the Coast Guard and by the absence of key unit documents that have been destroyed or disposed of per paperwork disposition regulations. See, e.g., Paperwork Management Manual, COMDTINST M5212.12, (Most documents may be destroyed after 3 years). Therefore, considering the substantial delay between the "error" and date of application in this case and that the Applicant has the burden of production and proof, the Board should dismiss Applicant's claim with prejudice.

There was also no injustice committed in discharging Applicant from the Coast Guard. Applicant committed frequent acts of shirking as detailed in Commanding Officer, CGRU Base [redacted] letter 1910 dated 09 February 19xx. His actions could reasonably be expected to bring discredit upon the Coast Guard. Additionally, there is documented evidence that his command only acted after attempting to assist him in resolving these matters. In short, there is no evidence that the Coast Guard treated Applicant unjustly. This case manifestly does not constitute "treatment by the military authorities that shock the sense of justice." See, Sawyer v. United

States, 18 Cl. Ct. 860, 868 (1989) rev'd on other grounds, 930 F.2d 1577 (citing Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976)).

There being no error or injustice to which the Applicant can point, there is no basis for changing the character or nature of his discharge, nor is there a basis for revoking the punishment awarded by the SCM. Applicant properly received a general discharge and an RE-4 reenlistment code. The Separation Program Designator (SPD) code HKJ should be changed to JKD, the proper coed for shirking.

5. Recommendation: This application should therefore be denied for lack of timeliness, or alternatively, it should be denied for lack of merit. The Applicant's separation code should be changed from HKJ to JKD.

[redacted]
By direction

Encl: (1) CGPC memorandum 5420 undated
(2) Applicant's DD Form 149 dtd 16 May 1997
(3) Applicant's Service Record

MEMORANDUM

From: [redacted] CGPC-c

Reply to Attn of: [redacted]

To: Commandant (G-LMJ)

Subj: PROGRAM INPUT ON CGBCMR APPLICATION (xxxxx)

Ref: (a) CGBCMR Application 2002-054

1. 1. Comments on the application contained in reference (a) are attached as enclosure (1).

2. 2. I recommend no relief be granted. However, the Applicant's record should be corrected to change his separation code from HKJ to JKD.

3.

4. #

5.

6.

Enclosures: (1) Comments concerning CGBCMR Application 2002-054

Enclosure 1 - CGBCMR 2002-054

RELIEF REQUESTED BY APPLICANT:

1. The Applicant requests "revocation" of Summary-Court Martial sentence awarded in August 19xx, in which he was confined for seven days, forfeited $200.00 per month for one month and reduced in pay grade to E-1.

2. The Applicant's request specifies relief concerning his Summary Court Martial sentence. Though not specifically requested, we assume the Applicant also wants his General Discharge under honorable conditions upgraded to Honorable, based on the presumption that his misconduct was caused by his mental disability.

Note: The Applicant's BCMR request is dated May 16, 1997 and was originally assigned docket number 134-97. Apparently the case was transferred to the Discharge Review Board (DRB) for action. The DRB eventually returned the case to the BCMR for action.

APPLICANT'S STATED BASIS FOR RELIEF:

1. The Applicant alleges that he incurred a mental disability (bipolar disorder) while serving in the Coast Guard Reserve that caused him to go AWOL and shirk his IDT duty, which led to his discharge in 19xx for misconduct.

MATTERS OF RECORD:

1. The application is not timely.

2. June 6, 19xx: Per Form CG-3301 (Enlistment Contract – U.S. Coast Guard) Applicant enlisted in the Coast Guard Reserve for a period of 8 years.

3. June 8, 19xx: Per Form CG-3312A prepared September 10, 19xx, Applicant was found physically qualified for enlistment and retention in the Coast Guard Reserve. Reserve members are required to undergo quadrennial physicals to verify continued medical fitness to perform active duty. This is the only document related to the Applicant's medical status in the Coast Guard that could be located. Applicant's Coast Guard Medical Record could not be located.

4. August 10, 19xx: Per Form CG-3304 (Court Memorandum), Applicant was found guilty of AWOL at a Summary Court Martial. He was sentenced to seven days of confinement to the [redacted] Naval Brig, forfeiture of $200.00 per month for one month and reduction in pay grade to E-1. No record of the Court Martial proceedings were presented for review.

5. Per the Reserve Administration and Training Manual, COMDTINST 11-B-2 in effect

at the time of Applicant's service, Reserve members are obligated to report any medical conditions to their chain of command that may render them unable to perform their military duties.

6. February 9, 19xx: Per letter 1910 from Commanding Officer, CGRU (Coast Guard Reserve Unit) Base [redacted] to Applicant, Subj: DISCHARGE, Applicant was informed of action taken to discharge him from the Coast Guard. This action was based on an "…uninterrupted pattern of shirking. November 2, 19xx is the date of your last drill in the unit for a total of 24 absences." Applicant was advised that he could submit a statement and that he could disagree with the recommendation for his discharge.

7. March 19xx: Per letter 1910 (First Endorsement) from Applicant to Commanding Officer, CGRU [redacted] Subj: DISCHARGE, Applicant acknowledged the Commanding Officer's action to discharge him from the U. S. Coast Guard, and did not object. Applicant attached a statement to this letter dated February 13, 19xx that read in part, "I would like very much to be awarded a general discharge, under honorable conditions."

8. May 4, 19xx: Per letter 1910 from Commandant to Commander, [redacted] Coast Guard District (rsa), Subj: AUTHORITY TO DISCHARGE xxxxxxxxxxxxxxxxxxx, USCGR, Applicant was directed to receive a General Discharge under honorable conditions by reason of misconduct (shirking).

9. May 4, 19xx: Per Form CG-3307 (Administrative Remarks Sheet), Applicant was discharged by reason of misconduct (shirking). Applicant was issued a general discharge certificate DD Form 257 CG. Applicant completed a total of 3 years 10 months and 28 days, of his 8-year enlistment contract. Applicant's separation code was HKJ and reenlistment code was RE-4 (not eligible for reenlistment). The separation code HKJ does not exist. The separation code used to discharge personnel for shirking is JKD.

10. November 12, 1996: Department of Veteran's Affairs (VA) rating decision document. Applicant was awarded a VA disability rating of 30% for a service connected bi-polar disorder. Decision further states that "Service records do not show onset during service, however private records show treatment during active service interval."

11. May 16, 1997: Per Applicant's BCMR application, Applicant alleges that he "suffered at the time of the alleged offense (AWOL 25 minutes of August 3, 19xx) a disabling condition called bipolar disorder." There is no documentation within Applicant's entire service record that suggests Applicant complained to Coast Guard officials or medical authorities of symptoms associated with bipolar disorder or any other

medical problem.

12. July 3, 1997: VA rating decision document. Applicant's 30% disability rating continued by the VA. Decision further states "Service medical records for the period entrance examination 05-25-xx to discharge do not show onset during service." Documentation of treatment by private physicians during his enlistment is cited, but is not included in Applicant's BCMR package.

CONCLUSIONS:

1. Applicant's summary court martial record was not provided. We cannot determine if there were any substantive/procedural administrative errors committed in the proceedings. There is no evidence in the record that indicates whether Applicant's mental condition was an issue or considered during the court martial proceedings.

2. Applicant's misconduct discharge for shirking was not related to his summary court martial conviction.

3. There is no documentation in Applicant's Coast Guard service record that he was ever evaluated for a mental condition or complained of symptoms associated with bipolar disorder during his enlistment. He failed to report a medical condition for which he was seeking treatment while in a non-duty status to his unit chain of command, as required by Coast Guard regulations. Even during the separation process, there is no evidence that he attempted to inform the Coast Guard of any medical or psychiatric condition that might explain his behavior.

4. The documentation Applicant now presents with his application about his condition does not provide evidence that his shirking of duties was the cause thereof, nor does he present evidence that his condition showed onset during enlistment, or that it was incurred during a period he was on active duty. In its rating decision the VA concludes that his disability is service connected, because he received treatment from private physicians during his Reserve enlistment. But the VA makes no finding that his disability was incurred during an active duty period or caused by his military service.

5. The Applicant received full due process during the separation process and was appropriately separated. The Applicant made no objection to the characterization of his discharge or present information concerning his medical condition that could possibly explain his misconduct.

6. Applicant is encouraged to continue to seek assistance through the VA to receive any benefits for which he may be eligible.

RECOMMENDATION:

1. I recommend no relief be granted.

2. The Applicant's record should be corrected to change his separation code from HKJ to JKD.