DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-044

[redacted]
SA/E-2 (former)

FINAL DECISION ON RECONSIDERATION

This proceeding was conducted according to the provisions of section 10 U.S.C. § 1552 and 14 U.S.C. § 2707. The Chair docketed the case after receiving the completed application and military records on December 13, 2018,[1] and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 10, 2020, 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, who served in the Coast Guard from November 10, 1981, to February 15, 1985, asked the Board to make the following corrections to his military record:

1. Remove non-judicial punishment (NJP) from his record;
2. Restore his rate to E-3 (seaman), instead of E-2 (seaman apprentice);
3. Award him "time served";[2]
4. Award him "front and back pay for loss of compensation from February of 1985 until present";
5. Award him "unemployed benefits, vacation pay and travel and transportation entitlement"; and
6. Award him educational benefits.

Regarding these requests for relief, the applicant made the following claims:

[1] The applicant's original personnel data file (PDR) had previously been lost during litigation in 1995, but in BCMR Docket No. 2018-018, the Board directed the Coast Guard to create a new one with all of the records available in its databases. On February 8, 2019, the applicant amended his request for relief, which restarted the Board's ten-month period under 14 U.S.C. § 2707 pursuant to 33 C.F.R. § 52.26.

[2] The Board interprets this as a request for credit for "constructive service" from February 1985 to the present.

- The applicant argued that his NJP should be removed because he was denied his right to trial and his right to confer with counsel regarding the decision to accept or refute NJP as required by the Military Justice Manual.
- The applicant argued that he was improperly separated while he was receiving medical care for a knee injury. He stated that his separation therefore violated Chapter 1.B.11.f., "Undergoing Medical Treatment or Hospitalization," of a COMDTINST.
- The applicant stated that although he received an honorable discharge, he was improperly denied "vacation pay, travel and transportation entitlement" under Article 1.B.28.d. of COMDTINST M1000.4.
- The applicant alleged that when he was signing his original DD 214 in 1985, the yeoman presented him with only the short form for signature and folded the long forms at the bottom so that he could not see the derogatory information.
- The applicant further stated that because he only signed the short form and not the long form, his DD 214 was not properly distributed to other government agencies. As a result, he alleged, he was "denied unemployed compensation CG pays unemployment premiums to ex-servicemember's state home of record." And because the Veterans' Administration (VA) did not timely receive his DD 214 in 1985, the VA was not properly notified of his knee injury.

Regarding the timing of his request, the applicant admitted that he knew of the errors in "19850226/1995" but stated that the Coast Guard "attempted to conceal the Applicant's re-enlistment code, lost records and failed to distribute Applicant's DD 214 to the proper agencies, resulted into loss of benefits and employment opp. and improper separation."

To support these claims for relief, the applicant submitted the following documents, which were not in the record before the Board when it decided BCMR Docket No. 2018-018:[3]

- Copies of his Leave and Earnings Statements (LESes) for the months of August, September, and October 1984 show no entitlements; allotments totaling $527.00 in August and September and $579.00 in October; and no deductions. They also show that he used one day of leave on August 22, 1984, and had accumulated 13.5 days of unused leave by the end of October 1984.
- An email from the Coast Guard Pay and Personnel Center dated November 2, 2018, states only that "Records prior to 1997 are not available."
- A Rating Decision for the applicant by the VA, dated December 17, 2018, states, "Service connection for post-traumatic stress disorder (PTSD) with persistent depressive disorder and delusional disorder is granted with an evaluation of 100 percent effective March 17, 2014," pursuant to a decision of the Board of Veterans Appeals dated September 4, 2018. The Rating Decision states that that board had "conceded the stressors as occurring in military service" and that "treatment records on file denote mental health treatment on a

[3] The applicant's complaint that he was involuntarily discharged while receiving medical treatment and listed evidence constitute new material that was not in the record before the Board in BCMR Docket No. 2018-018 and so requires the Board's reconsideration of his case pursuant to 10 U.S.C. § 1552(a)(3)(D).

recurrent basis." It states that at a VA examination conducted on November 20, 2018, the applicant had been diagnosed with PTSD, persistent depressive disorder, and delusional disorder. The examiner had found that

> the PTSD was at least as likely as not aggravated by military service and that the delusional disorder was at least caused in part by military service events and provides a rational for the opinions. The examiner notes the diagnoses and symptoms involved render you totally disabled noting there is total occupational and social impairment.

PRIOR CASE: BCMR DOCKET NO. 2018-018

In his prior application, the applicant complained to the Board that his Coast Guard record had been lost, and he asked the Board to restore his service record and create a DD 214[4] showing that his rank at discharge was E-3 instead of E-2. He also asked the Board to upgrade his narrative reason for separation and his RE-4 reenlistment code. He alleged that the DD 214 that he received upon discharge was issued in a "deceitful manner" because the copy he signed was the short form and did not include the narrative reason for separation or the reenlistment code, so he was not aware that that the DD 214 contained any derogatory information. The applicant stated that he was homeless and needed a DD 214 to obtain housing.

The applicant stated that he was taken to mast/non-judicial punishment (NJP) for going to a doctor without permission but alleged that his supervisor had given him permission and that the investigating officer was biased because he had previously accused him (the applicant) of disrespect. He also alleged that he was never advised of his rights before being punished at mast, did not waive his rights, was not afforded the opportunity to consult with an attorney, and received cruel and unusual punishment (NJP) because he is African American. The applicant stated that after being taken to mast, he was sent away for temporary sea duty so that he could not appeal the NJP and then he was discharged shortly after returning from sea duty.

In his response to the advisory opinion, the applicant also claimed that he never received "travel pay" upon discharge and he never received unemployment compensation.

The applicant stated that he discovered the errors on his DD 214 on December 9, 1985, and argued that the Board should find it in the interest of justice to consider his application because he attempted to address the alleged mistreatment by the Coast Guard in 1995 and that later filed a civil action in Federal Court.[5]

The database of the National Personnel Records Center (NPRC) showed that it had received the applicant's PDR (which would have included his DD 214) from the Coast Guard after he was discharged in 1985. But NPRC had sent his PDR to the Coast Guard in 1995—presumably pursuant to the applicant's attempt to address the alleged mistreatment and civil suit—and it was

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[4] After receiving the original application docketed as 2018-018, the Chair searched for the applicant's military record in order to docket the case, as required by 33 C.F.R. § 52.21(c)(2). Neither NPRC nor the Coast Guard could find the applicant's military record and the Coast Guard admitted that it had been lost.

[5] The BCMR has no record of processing a previous application from the applicant, but he may have applied to the Coast Guard's Discharge Review Board.

never returned to NPRC. The Board and the Coast Guard concluded that his PDR had been lost,[6] but the Coast Guard was able to provide print-outs from its old Joint Uniform Military Pay System (JUMPS) Data Repository, which is a historical pay database that is no longer in use. The JUMPS records show that the applicant had served on active duty in the Coast Guard from November 10, 1981, to February 15, 1985; that on November 9, 1984, he had received NJP, which included 7 days of extra duty and reduction in pay grade from E-3 to E-2; and that upon discharge, he had received a JHJ separation code, which denotes an involuntary discharge due to unsatisfactory performance, and an RE-4 reenlistment code, which means that he is ineligible to reenlist. The JUMPS print-outs do not show his characterization of service (honorable, etc.), but the VA verbally confirmed to the Personnel Service Center (PSC) that its records show that the applicant had received an honorable discharge. And the applicant submitted a letter from the VA dated December 23, 2013, which states that he had received an honorable discharge from the Coast Guard on February 15, 1985.

In the Final Decision in BCMR Docket No. 2018-018, the Board found the application to be untimely:

> The applicant's request to have his rank, reenlistment code, and narrative reason for separation on his DD 214 corrected is untimely under 10 U.S.C. § 1552(b) because he received his DD 214 in 1985 but he did not file his application within three years of his discharge. He alleged that he was unaware of his separation code, reenlistment code, and narrative reason for discharge in 1985 because he received only the short-form copy of his DD 214. However, under COMDTINST M1900.4D, the manual for preparing DD 214s, members being discharged are required to sign both the short-form copy of the DD 214 (without that information) and the long-form copy (with the information). The manual states, "The member being separated shall sign each copy separately in ink to ensure that they are aware of the differences of the information contained on certain copies of the DD Form 214." Members are then provided a short-form copy and are advised that they may also have a long-form copy if they request one. Therefore, the applicant presumptively signed and knew the content of the long-form copy of his DD 214 upon his discharge in 1985, and his application is untimely.

Nevertheless, the Board waived the statute of limitations because "it is very important for every veteran to have an official military record and DD 214" and granted partial relief. The Board directed the Coast Guard to issue the applicant a DD 214 to document his time on active duty and specified that his rank and paygrade should remain SA and E-2; that his characterization of

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[6] The applicant had submitted his original application on March 19, 2014. On April 11, 2014, the Chair notified the applicant that the Board was unable to docket his case because the NPRC did not have his PDR as it had been "charged out" by another government office. The Chair continued to order his PDR over the next two years but the orders were cancelled. On September 13, 2017, the applicant submitted a second DD 149 to the Board asking that it provide him with a copy of his DD 214 and stating that NPRC told him that they did not have his records and that the Coast Guard had jurisdiction over the matter. In support of his application he submitted two letters. In the first letter dated, May 8, 2017, the Personnel Service Center advised the applicant that his records had been checked out by Coast Guard Headquarters in 1995 and that he would need to grant NPRC permission to add any documents to his record. The second letter is from NPRC to the applicant dated August 19, 2017, and states that NPRC is the physical custodian of the military records of former members of the U.S. Armed Forces but that the Commandant, U.S. Coast Guard, retains legal custody of military records. On October 24, 2017, the Chair sent a request to the Coast Guard's Personnel and Pay Center for copies of any historical pay records that they could find to show that the applicant had served on active duty. The Coast Guard replied on November 1, 2017, and submitted print-outs from the JUMPS Data Repository. After reviewing the print-outs, the Chair concluded that they contained sufficient information about the applicant's military service to warrant docketing the case.

service/discharge should be honorable; that his reenlistment code should remain RE-4; that his separation code should remain JHJ; and that his narrative reason for separation and separation authority should be "Unsatisfactory Performance" and Article 12-B-9 of COMDTINST M1000.6, respectively.[7] The Board also directed the Coast Guard to establish an official PDR for the applicant with the new DD 214, all of the available records for him, and a copy of the Board's decision and to follow all of the applicable guidelines for the disposition of DD 214s and PDRs.

The Board denied the applicant's requests regarding "travel pay" and "unemployment compensation" because did not submit any evidence about these issues and he was not entitled to separation pay because he had fewer than six years of service.[8] The Board also denied his requests for advancement to SN/E-3 and for a different narrative response for separation and reenlistment code:

> The Coast Guard's records show that the applicant was reduced in rate at mast from E-3 to E-2 in November 1984, a few months before his discharge. He alleged that he was not afforded due process in the conduct of his mast, but he submitted no evidence to support his allegation, and members are not afforded the same rights at mast that they receive in a criminal proceeding. For example, members are not entitled to representation by an attorney at mast,[9] and members assigned to a cutter are not entitled to refuse punishment at mast and demand trial by court-martial.[10] Although members are not required to incriminate themselves at mast, the rule that would preclude unwarned statements from consideration in a court does not necessarily apply at mast,[11] and procedural violations generally do not invalidate punishment imposed at mast.[12] Therefore and given the presumption of regularity accorded his command in the conduct of the mast,[13] the Board finds no grounds for removing the NJP from the applicant's record or reversing the punishment by upgrading his paygrade. … Because there are no grounds for removing the NJP from the applicant's record and his separation code, narrative reason for separation, and reenlistment code are presumptively correct,[14] the Board finds that the applicant has not proven by a preponderance of the evidence that his narrative reason for separation, separation code, or reenlistment code are erroneous or unjust. … The applicant has not submitted any evidence to rebut the presumption of regularity accorded these records.

The applicant now has an official PDR with a DD 214 prepared in accordance with the Board's order; a copy of the Board's decision in 2018-018; and copies of his JUMPS records.

VIEWS OF THE COAST GUARD

On June 27, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

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[7] Article 12-B-9 of COMDTINST M1000.6, the Personnel Manual in effect in 1985, authorized discharges due to "Unsatisfactory Performance," and the Separation Program Designator Handbook required members discharged for "Unsatisfactory Performance" to receive the JHJ separation code and an RE-4 reenlistment code.

[8] COMDTINST 1910.1.

[9] MANUAL FOR COURTS-MARTIAL UNITED STATES (2012), p. V-3.

[10] *Id.* at V-2.

[11] *Id.* at V-4.

[12] *Id.* at V-2.

[13] 33 C.F.R. § 52.24(b).

[14] *Id.*

The JAG argued that the Board should deny relief because the applicant did not submit any new relevant evidence or identify a misapplied law and so did not meet the requirements for reconsideration in the Board's regulations at 33 C.F.R. § 52.67.

Regarding the NJP and reduction in rate, the JAG stated that the Board already found in BCMR Docket No. 2018-018 that the applicant had received the due process he was entitled to at the time of his mast, and he did not submit evidence rebutting that ruling. The JAG pointed out that the Board found no grounds for removing the NJP or for changing the applicant's narrative reason for separation ("Unsatisfactory Performance") or reenlistment code. The JAG noted that "members are not afforded the same rights at a Captain's Mast [as at a court-martial], and there is a presumption of regularity in favor of the Coast Guard."

The JAG stated that the only new claims in the latest application are the applicant's claim that he was improperly discharged while undergoing medical treatment and his requests for "time served" with back (and future) pay, "vacation pay," and educational benefits. Regarding the applicant's request for "time served" and 33 years' worth of back pay, the JAG stated that the Board already found in 2018-018 that the applicant had been properly discharged, and he submitted no evidence to the contrary. Therefore, the JAG argued, the applicant "is not entitled to relief related to improper separation." The JAG noted that the Board held in 2018-018 that the applicant "did not submit sufficient evidence to overcome the presumption that the Coast Guard paid him everything he was due." The JAG concluded that the Board thus already held that the applicant is not entitled to any type of pay or benefits and, since he "was properly separated, and upon separation the Coast Guard paid everything he was due, then Applicant is not now entitled to 'Time Served' or compensation related to same."

The JAG noted that the only new material in the applicant's request for reconsideration was the VA's 2018 Rating Decision. The JAG stated that this Rating Decision is not evidence that the applicant was receiving medical treatment for a knee injury at the time of his discharge.

The JAG also adopted the findings and analysis provided in a memorandum submitted by the Commander, Personnel Service Center (PSC). PSC recommended that the Board deny the applicant's requests because he failed to submit evidence to support his allegations. PSC also noted that the applicant "was not entitled to travel pay or unemployment compensation because he had less than six years of service and the Coast Guard does not pay unemployment compensation."

PSC stated that although the applicant's original PDR was lost, the VA must have received a copy of his DD 214 in 1985 because the VA had recorded his honorable characterization of service/discharge in the VA's database. PSC noted that there is no evidence that the applicant was ever referred to a Medical Board and that the applicant should apply to the VA for benefits "for all service-connected injuries as well as educational benefits as they manage post-service educational benefits and entitlements."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 5, 2019, and October 17, 2019, the Board received responses from the applicant to the views of the Coast Guard.

The applicant argued that his application was not untimely under new policy.[15] The applicant also disagreed with the Coast Guard's claim that his request did not meet the requirements for reconsideration. He noted his new allegations about signing his DD 214, about undergoing medical care for a knee injury, about being improperly discharged and entitled to pay, and about being "denied unemployed compensation CG pays unemployment premiums to ex-servicemember's state home of records." Therefore, he argued, his application for reconsideration met the requirements in 10 U.S.C. § 1552(a)(3)(D).

The applicant repeated his allegations about how he was deceived when signing his original DD 214 and alleged that because the yeoman had him sign only the short form and not the long form, his DD 214 was not properly distributed to other government agencies after his discharge. He alleged that he provided the VA with a copy of his DD 214 when he sought medical treatment for his knee, and the VA told him that "they had no information" on him.

Regarding his request for removal of the NJP, the applicant noted that courts have found that members are entitled to counsel regarding the decision about whether to accept NJP or demand trial by court-martial. The applicant claimed that he was denied due process because he was not permitted to consult an attorney before he accepted NJP in 1984. Therefore, he was denied a "substantial right" and his NJP should be invalidated.

Regarding his request for travel pay and unemployment compensation, the applicant alleged that he was entitled to travel pay under Article 1.B.28.d. of COMDTINST M1000.4 (the current Military Separations Manual) and Chapter 5 of the Joint Travel Regulations (JTR), which provide that any enlisted member discharged with an honorable or general discharge "is entitled to transportation in kind and meal tickets from the place of discharge to his or her home of record." He also noted that under Article 1.B.28.d. of the Military Separations Manual, at the time of discharge, the Coast Guard must counsel members about their rights and benefits as a veteran and that the "more important benefits … administered by Government agencies other than the Coast Guard" include education benefits and Veterans Group Life Insurance Unemployment Compensation. Article 1.B.28.d. also requires the Coast Guard to

> [i]nform all separating members about the "Ex-Service's [sic] Unemployment Compensation Act of 1958" (P.L. 85-848) which authorizes unemployment insurance protection to ex-service members who began their active service in the Armed Forced after 31 January 1955. The Department of Labor has prepared an informative pamphlet, available through the normal source of supply, about this Act's provisions.

[15] The applicant cited guidance issued by the Department of Defense, which does not apply to the Coast Guard BCMR. The Coast Guard BCMR applies its own guidance concerning PTSD, which does require the Board to waive the statute of limitations when requests for upgraded discharges are based on mental health disorders.

The applicant also alleged that the Board committed legal errors in 2018-018 by failing to follow 10 U.S.C. § 1552(a)(3)(B) and (C) because the Board was required "to notify him in writing indicating the specific information or documents necessary to make the claim complete and reviewable by the board," and "the Board was required to make every reasonable effort to obtain the records." The statute states the following:

> **(B)** If a board makes a preliminary determination that a claim under this section lacks sufficient information or documents to support the claim, the board shall notify the claimant, in writing, indicating the specific information or documents necessary to make the claim complete and reviewable by the board.
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> **(C)** If a claimant is unable to provide military personnel or medical records applicable to a claim under this section, the board shall make reasonable efforts to obtain the records. A claimant shall provide the board with documentary evidence of the efforts of the claimant to obtain such records. The board shall inform the claimant of the results of the board's efforts, and shall provide the claimant copies of any records so obtained upon request of the claimant.

The applicant also argued that the Board's claim that he was not entitled to legal representation at mast is contradicted by the caselaw showing that a member is entitled to consult counsel when deciding whether to accept NJP or demand trial by court-martial. He repeated his claim that he was denied "meaningful assistance of counsel" in 1984 when he was deciding whether to waive his right to court-martial and accept NJP.

Regarding his request for "time served," the applicant noted that "[w]here an involuntary separation from the military is precipitated by the commission of legal error, the action has been declared void and this court may award back pay to the aggrieved serviceman," citing *Ricker v. United States,* 396 F.2d 454 (1968). He argued that the Coast Guard's claim that he is not entitled to "time served" because he did not submit sufficient evidence is contradicted by the laws requiring the Board to make reasonable efforts to obtain the records and to notify him about insufficient documentation.

Regarding his request for vacation pay, the applicant stated that the records he has submitted "show he wasn't paid all he was due" and he asked the Board to obtain his records since he is having difficulties obtaining his records pursuant to 10 U.S.C. § 1552(a)(3)(C).

Regarding his separation for Unsatisfactory Performance, the applicant alleged that his original DD 214 "actually stated his discharge was for [being a] burden to the command." The applicant asked to Board to obtain his records pursuant to 10 U.S.C. § 1552(a)(3)(C).

The applicant argued that the fact that he was not evaluated by a Medical Board before his discharge is irrelevant because a member does "not need to undergo a medical evaluation board prior to discharge to have a service-connected injury. It's the servicemember's medical or personnel records that support the service-connected injury or disability."

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 over this matter pursuant to 10 U.S.C. § 1552.

2. Under 10 U.S.C. § 1552(a)(3)(D), "[a]ny request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination." Because the applicant has made new requests concerning pay and benefits and submitted LESes and a VA Rating Decision that were not in the record when the decision in BCMR Docket No. 2018-018 was issued, the Board finds that his request meets the statutory requirements for reconsideration. Therefore, the Board is reconsidering his requests.

3. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years of the applicant's discovery of the alleged error. Although the applicant alleged that the narrative reason for his discharge and reenlistment code were hidden from him when he signed his DD 214, more than thirty years have passed since he signed it, and the yeoman who prepared his DD 214 and gave it to him presumptively acted "correctly, lawfully, and in good faith."[16] Moreover, only the Personnel Command at Coast Guard Headquarters could issue the separation orders, and before issuing orders to separate the applicant for "Unsatisfactory Performance" under Article 12-B-9 of the Personnel Manual then in effect, the Personnel Command must have received from the applicant's command documentation showing that

- the applicant had been placed on performance probation for six months and advised of the terms of his probation in writing;
- the applicant had been advised in writing that failing probation would result in a discharge for "Unsatisfactory Performance" with either an RE-4 or RE-3Y reenlistment code; and
- the applicant had failed probation and been notified in writing of the reason for his discharge and his right to submit a statement and to object to the command's recommendation for discharge.[17]

In light of these requirements and the applicant's signature on his DD 214, the Board finds that he knew the reason for his discharge in 1985 because the Personnel Command would not have issued separation orders for a discharge for "Unsatisfactory Performance" with an RE-4 without documentation showing that the command had completed these steps. Therefore, the preponderance of the evidence shows that these requests are untimely. Likewise, the applicant knew he had been reduced in rank at NJP, knew whether he was being treated for a medical condition, and knew what pay and benefits he had received (or had not received) as a result of his military service in 1985, and so all of his requests for relief are untimely.

4. In finding 3 in the Board's decision in Docket No. 2018-018, the Board waived the three-year statute of limitations only because the applicant had no PDR or DD 214. These two errors have already been corrected by the Board and so the Board's reason for excusing the untimeliness of his application in 2018 no longer exists. In *Allen v. Card*, 799 F. Supp. 158 (D.D.C.

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

[17] COMDTINST M1000.6, Article 12-B-9.

1992), however, the court stated that the Board should not deny a claim for untimeliness without analyzing "both the reasons for the delay and the potential merits of the claim based on a cursory review"[18] 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."[19] Pursuant to these instructions, the Board finds the following:

a. Regarding the applicant's claims about the NJP and reduction in rate, the Board finds no reason to excuse the untimeliness of his request and no grounds for granting the requested relief. As the applicant noted, a member is entitled to counsel by an attorney when making the decision whether to accept mast and NJP, instead of demanding trial by court-martial, but a member is not entitled to representation by an attorney at mast.[20] The Coast Guard is entitled to a presumption of regularity,[21] and the fact that the applicant cannot recall being advised by a JAG officer about a single decision—whether to accept NJP in lieu of trial by court-martial—more than thirty years after the fact is not persuasive evidence that he was not in fact advised by a JAG about that decision. The applicant's long-delayed claims on these issues do not cast substantial doubt on the propriety of the NJP or his reduction in rate.

b. The applicant's new claims about pay and benefits, the alleged illegality of his discharge, and "time served" cannot prevail. He submitted incomplete LESes showing no entitlements or deductions during a three-month period in 1984, but the Board does not believe that that the applicant would have waited more than thirty years to complain about not being paid properly for three months. And there is no evidence supporting his claims that he was illegally discharged under Article 12-B-9 of the Personnel Manual,[22] was denied transportation to his home of record upon his discharge, or was denied "vacation pay,"[23] unemployment benefits,[24] or educational benefits.[25] The applicant argued that the Board should provide him with the evidence

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

[19] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n.14, 1407 n.19 (D.C. Cir. 1995).

[20] MANUAL FOR COURTS-MARTIAL UNITED STATES, part V.

[21] 33 C.F.R. § 52.24(b).

[22] The Board notes that even if the applicant had proven that the yeoman failed to show him his full DD 214, that would not prove that his discharge under Article 12-B-9 of the Personnel Manual was improper or illegal; it would only show that the DD 214 documenting his discharge had been erroneously prepared.

[23] "Vacation pay" is not a military term. Members are entitled to sell up to 60 days of accrued, unused leave when they are discharged, but the JUMPS print-outs show that the applicant's "END LV" amount was zero.

[24] According to the U.S. Department of Labor, to receive for Unemployment Compensation for Ex-Servicemembers (UCX) today, a member must have completed his full initial period of enlistment, must have been honorably discharged, must apply to his State of residence with a copy of his DD 214, and must meet all other State requirements. In addition, in determining a veteran's entitlement to UCX, the States and the Department of Labor are required to "accept the information contained in military documents as final and conclusive," including the veteran's narrative reason for separation. U.S. Department of Labor, "Unemployment Compensation for Ex-Servicemembers (UCX): Fact Sheet" (undated), *available at* https://oui.doleta.gov/unemploy/docs/factsheet/UCX_FactSheet.pdf (last viewed January 9, 2020).

[25] Veterans' educational benefits are administered and paid by the VA. Under the Veterans Educational Assistance Program (VEAP), which the applicant could have participated in during his enlistment, the VA requires the veteran to have completed his first enlistment to be entitled to the benefits, and the benefits may only be used within 10 years after the date of discharge. U.S. Department of Veterans' Affairs, "Veterans Educational Assistance Program

necessary to prove his claims pursuant to 10 U.S.C. § 1552(a)(3)(B) and (C). But § 1552(a)(3)(B) requires the Board to notify the applicant of specific evidence that he needs to submit only if the Board "makes a preliminary determination" that the claim lacks sufficient information or specific documents needed to support the claim. In this case, the Board has not made any preliminary determinations, and so § 1552(a)(3)(B) does not apply.[26] Nor does the Board know of any specific documents that would prove his claims. As noted in footnote 8, above, the BCMR staff tried many times to obtain the applicant's PDR before concluding that it had been lost. And although the applicant alleged that he has been unable to obtain his own medical records from the VA, he submitted no "documentary evidence" of his efforts to obtain those records, as required by § 1552(a)(3)(C).[27] Under 33 C.F.R. § 52.24, the burden of proof remains on the applicant to submit sufficient evidence to overcome the presumption of regularity and prove his claims by a preponderance of the evidence. Because these new claims lack potential merit, the Board will not waive the statute of limitations to conduct a full review of them.

c. Regarding the applicant's request for a better narrative reason for discharge and reenlistment code, the Board finds that the statute of limitations must be waived pursuant to the Board's "liberal consideration" guidance.[28] The applicant submitted a Rating Decision of the VA showing that he has been found 100% disabled by service-connected PTSD, and pursuant to the guidance, the Board shall waive the statute of limitations whenever an applicant requests a modification of his narrative reason for separation or reenlistment code based in whole or in part on a claim of a mental health condition.

5. The applicant alleged that his narrative reason for separation and reenlistment code are erroneous and unjust. 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 record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[29] 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."[30] And under the "liberal consideration" guidance,[31] 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

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(VEAP)," *available at* https://www.benefits.va.gov/gibill/veap.asp (last updated March 2017; last viewed January 9, 2020).

[26] The Board is not part of the Coast Guard and so the Coast Guard's advisory opinion about his requests is not in any way a "preliminary determination" by the Board.

[27] The Board notes that a veteran may submit a VA form 10-5345, "Request for and Authorization to Release Health Information," directly to the Department of Veterans Affairs to request that copies of all of his Coast Guard medical records be sent to the BCMR.

[28] 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).

[29] 33 C.F.R. § 52.24(b).

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

[31] *See* footnote 30, above.

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.[32]

6. The preponderance of the evidence shows that the applicant was not diagnosed with PTSD until 2018. The VA found his PTSD to be "service connected" because of unexplained "stressors" that occurred during his enlistment in the Coast Guard. But there is no other evidence of the alleged stressors and no evidence that the applicant was suffering the symptoms of PTSD while he was in the Coast Guard. The VA's determination that he has service-connected PTSD now does not prove that he was suffering from PTSD while on active duty thirty years ago since the onset of PTSD may be delayed for years.[33] The VA noted that the applicant has been treated for his mental health for years and so presumably he would have been diagnosed with PTSD by the VA had the symptoms occurred before 2018. In fact, his history of mental health treatment at the VA and the lack of a diagnosis of PTSD until 2018 is substantial evidence that the applicant did not suffer symptoms of PTSD until quite recently. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that he was suffering from PTSD while in the Coast Guard or that his discharge for "Unsatisfactory Performance" and RE-4 reenlistment code are erroneous or unjust.

7. Therefore, the applicant's requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[32] *Id.*

[33] American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION (DSM-5) (2013), p. 276.

ORDER

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

January 10, 2020

[redacted]