

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:

XXXXXXXXXX
XXXXXXXXXXXXXXXXXX

BCMR Docket
No. 2001-049

FINAL DECISION

ULMER, Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on February 26, 2001 upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated November 15, 2001, is signed by three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Relief

The applicant asked the Board to correct his record to show that he was discharged from the Coast Guard due to physical disability (high blood pressure) that was incurred on or aggravated during a period of active duty.

The applicant enlisted in the Coast Guard on June 23, 1972. He was discharged on August 14, 1972 due to a physical disability (high blood pressure) that existed prior to enlistment. The applicant alleged that neither his pre-enlistment physical nor a subsequent medical evaluation determined that he was suffering from high blood pressure. The applicant also claimed that he did not discover the alleged error until August 18, 2000. He stated that the Board should find that it is in the interest of justice to consider his application because "[he has] never needed or asked for help until now. [He has] been able to manage, but now he is on disability from work[er's] comp[ensation] and other medical problems."

EXCERPTS FROM THE RECORD AND SUBMISSIONS

The record contains a medical report of the applicant's pre-enlistment medical examination, dated XXXXXX. It indicated that it was necessary to monitor the applicant's blood pressure twice per day for three days. The readings for this three-day period were 148/90 & 160/80, 130/80 & 172/85, 140/90 & 140/88. After these readings, the applicant was determined to be acceptable for enlistment. However, for

reasons not explained in the medical report, the applicant did not enlist at that time. Subsequently, he underwent an additional three-day observation of his blood pressure from XXXXXX to XXXXXX. The readings were 136/88 & 144/90, 136/90 & 130/86, 140/88 & 148/86. His blood pressure at this time was noted to be borderline acceptable. Shortly afterwards, on June 23, 1972, the applicant enlisted in the Coast Guard.

XXXXXXXXXX, approximately five days after the applicant's enlistment, the following notation was made in his medical record: "This man is to be transferred to [holding] company pending medical records and blood pressure readings and pulse[.]" His blood pressure was monitored over a period of seven days. The readings were 146/114 & 160/112, 156/100 & 160/100, 160/100 & 165/95, 148/106 & 170/120, 164/108 & 160/100. On July 7, 1972, he was referred to the hypertension clinic for evaluation, where he was diagnosed by a physician as having hypertension. The physician made the following recommendation:

Assuming that the hypertension was detected at the time of his enlistment physical, this condition ante-dated his entry in the Coast Guard and on evaluation he should be separated from the Coast Guard as having a pre-existing physical abnormality.

On XXXXXXXXXXX, a medical board convened to determine the applicant's physical condition and fitness for duty. The applicant was diagnosed as having hypertension of undetermined etiology that rendered him unfit for duty. The medical board report also contained the following pertinent information:

[The applicant] received his pre-induction physical examination at . . . XXXXXXXXXXXXXXX. At this time, the physical examination revealed borderline hypertension, that is, systolic blood pressure ranging from 136 to 144 and diastolic blood pressure ranging from 86 to 90. There were no other physical abnormalities noted at that time and the patient was found qualified for induction into the Coast Guard. The only previous episode of hypertension that the patient could relate was on 24 June 1971 when he was treated for an electrical shock by a private physician and his blood pressure was found to be 170/100 immediately after the shock. However, . . . the following day when the patient returned for follow-up, the blood pressure was normal and there were no further complications. The patient relates a strong family history of hypertension . . .

[The applicant] received his pre-training physical examination . . . XXXXX XXXX. At that time, he was again found to be hypertensive and to document this he was followed for a period of seven day blood pressure readings twice daily. The systolic blood pressure was in the range from 146 to 170 while the diastolic blood pressure ranged from 95 to 120.

This degree of hypertension is disqualifying according to the Coast Guard Medical Manual . . . therefore, [the applicant] is being recommended for discharge from the [Coast Guard].

. . . It is therefore the recommendation of this Medical Board that [the applicant] be discharged from the [Coast Guard] on the basis of a pre-existing physical defect neither incurred on nor aggravated by a period of military service. This defect is found disqualifying in . . . [the] Coast Guard Medical Manual. . .

On August 4, 1972, the applicant certified by his signature that he had been advised of the findings and recommendations and disposition made by the medical board and he did not desire to submit a rebuttal.

On August 4, 1972, the applicant also signed a sworn statement from himself to the Commandant certifying the following:

I certify that it has been explained to me that . . . I am entitled, as a matter of right, to a full and fair hearing before a Physical Evaluation Board prior to my separation from the United States Coast Guard if I demand such hearing.

I further certify that it has been fully explained to me that if I sign this statement I may be separated from the . . . Coast Guard in the near future without further hearing and without disability retirement pay or severance pay and without any compensation whatsoever. However, all payments ordinarily accruing to personnel discharged under honorable conditions are due and payable.

With full knowledge of the findings of the medical board convened in my case and with full knowledge of my rights in this matter I hereby certify that I do not demand a hearing before a physical evaluation board and request that I be separated from the United States Coast Guard as soon as possible.

On August 14, 1972, the applicant was discharged from the Coast Guard in accordance with Article 12-B-9 of the Personnel Manual.

Views of the Coast Guard

The Coast Guard recommended that the applicant's request be denied because it is both untimely and without merit.

The Coast Guard stated that the BCMR's regulations require that an application be denied if not filed within three years after the alleged error was or should have been

discovered, unless the Board decides to waive this requirement in the interest of justice. In making a determination whether to waive the statute of limitations, the Board must consider the reasons for the 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).

The Chief Counsel stated that the applicant has failed to offer any explanation for his 26 year delay in filing a correction application. The Chief Counsel stated that the applicant offered no substantial evidence that the Coast Guard committed either an injustice or error in discharging him because of a physical disability that existed prior to enlistment. He stated in the absence of strong evidence to the contrary, it is presumed that military superiors involved in this case discharged their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d. 1034, 1037 (D.C. Cir. 1992).

With respect to the applicant's claim that his hypertension did not exist prior to his enlistment, the Chief Counsel stated that the applicant offered no evidence that his time in the Coast Guard, which totaled 53 days, either caused or aggravated his disqualifying condition. The Chief Counsel stated that contrary to the applicant's allegation that no hypertension was found during his pre-enlistment physical, the record is clear that the applicant's blood pressure was "borderline acceptable" at the time of his pre-enlistment physical. The Chief Counsel further stated as follows:

[Two] weeks prior to the applicant's enlistment, [his] blood pressure was again recorded twice daily for three consecutive days. Two of the six readings were over the standards prescribed in the Medical Manual but were characterized as "borderline acceptable" . . . Then, four days after applicant's enlistment, he received his pre-training physical. During this physical, Applicant's degree of hypertension was found to be disqualifying per the Medical Manual. . . . Then from XXXXXXX, Applicant had blood pressure recordings performed twice daily. . . . Each of these blood pressure recordings exceeded the qualifying range for continued enlistment. On XXXXXXX, as a result of these blood pressure recordings, Applicant was referred to the Public Health Service Hypertension Clinic for consultation.

The Chief Counsel noted that the applicant did not choose to rebut the medical board and did not elect to have his case heard before the Central Physical Evaluation Board (CPEB). The Chief Counsel concluded his comments with the following: "[The] applicant has failed to (a) prove that the Coast Guard did not follow its own regulations when it discharged Applicant due to a physical disability that pre-existed his enlistment and (b) overcome the presumption that the Coast Guard officials involved in evaluating his case discharged their duties correctly, lawfully, and in good faith."

Applicant's Response to the Coast Guard Views

A copy of the Coast Guard views was sent to the applicant and he was urged to submit a response. He did not submit a response to the views of the Coast Guard.

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 submission, and applicable law:

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. It was untimely.

2. The application was not filed with the BCMR within three years of the date the alleged error or injustice was discovered or should have been discovered. The applicant was released from active duty on August 14, 1972, and he did not file his application for correction until February 26, 2001. The applicant claimed that he did not discover the alleged error until August 18, 2000. However, the reason for the applicant's discharge is well documented in his service record and is noted on his DD Form 214 (discharge document). The applicant should have discovered this alleged error on the date of his discharge or within three years thereafter.

3. The Board's regulations state that "[i]f an application is untimely, the applicant shall set forth reasons in the application why its acceptance is in the interest of justice. An untimely application shall be denied unless the Board finds that sufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file timely." The applicant did not offer a persuasive explanation for not filing his application sooner, but instead stated that he is in need of help because he is currently on worker's compensation and suffers from other disabling conditions.

4. In addition to the length of the delay and the reasons for it, the Board must also perform a cursory review of the merits in deciding whether to waive the statute of limitations in the interest of justice. See Allen v. Card, 799 F. Supp. 158 (D.D.C. 1992).

5. In this regard, the applicant has failed to show that the Coast Guard's determination that his high blood pressure pre-existed his entry on to active duty was in error or unjust. Chapter 2-A-23 of the COMDTINST M1850.2B (Physical Disability Evaluation System) states that "[a] disability is incurred when the physical impairment is contracted or suffered as distinguished from a later date when the member's physical impairment is diagnosed or renders the member unfit for continued duty." The applicant's problems with high blood pressure were noted during his pre-enlistment, enlistment, and pre-training examinations. In fact before he was permitted to enlist, the applicant's blood pressure was tracked for three days, after which he was found to be borderline acceptable.

6. Shortly after the applicant's enlistment, a medical board determined that the applicant's high blood pressure caused him to be unfit for active duty. The medical board also determined that the applicant's high blood pressure existed prior to enlistment. The applicant has not presented any evidence, except for his denial, that the conclusion of the medical board was in error or unjust.

7. The applicant has failed to provide sufficient evidence to support his claim that his condition was incurred on or aggravated by a period of active duty. He also has failed to provide sufficient evidence that would cause the Board to waive the statute of limitations in the interest of justice.

8. Accordingly, the applicant's request should be denied.

ORDER

The application of XXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Harold C. Davis, M.D.

Gareth W. Rosenau

Gloria Hardiman-Tobin