

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-224

**XXXXXXXXXXXXX
XXXXXXXXXXXXX**

FINAL DECISION

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 Chair docketed the case after receiving the completed application on July 27, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 19, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct her record to show that she received a medical (disability) separation in 1996, instead of an administrative separation for failing to maintain the Coast Guard's weight standards. She was unable to maintain the weight standards, she alleged, only because she had to take the hormone supplement Provera after she was diagnosed with polycystic ovarian disease. She alleged that she was unjustly denied a medical separation because of racial prejudice.¹

In support of her allegations, the applicant submitted copies of documents from her medical and military records and an article from the *New England Journal of Medicine*, dated September 28, 1995, which states that among women with polycystic ovary syndrome, "[o]besity is common but not universal." The applicant also submitted medical records from 2009 showing that she continues to suffer gynecological problems.

Although more than a decade has passed since her discharge, the applicant argued that it is in the interest of justice for the Board to waive the statute of limitations "because the problem was a medical problem," which continues to exist and requires treatment.

¹ The applicant did not elaborate on her claim of racial prejudice or submit any corroborative evidence.

SUMMARY OF THE RECORD

The applicant enlisted as a seaman on active duty in 1988 and advanced to yeoman third class (YN3) in March 1990. She exceeded Coast Guard weight standards and was placed on weight probation in both March and June 1992 and in January 1994. Although she successfully reduced her weight during these probationary periods, on September 7, 1995, the applicant was found to be 33 pounds over her maximum allowable weight (MAW) of 180 pounds and to have 39% body fat, which was over the maximum body fat standard of 33%. After a doctor certified that she was fit for duty and to diet and exercise, the applicant was referred to a dietician, placed on weight probation, and warned that if she failed to lose 33 pounds or to drop below 33% body fat by April 20, 1996, she would be separated. Pursuant to this probation, her unit counseled her, sent her to a 5-day Navy diet seminar, and allowed her extra time to exercise during working hours. When the applicant's weight probationary period ended on April 22, 1996, she weighed 208 pounds and her body fat measured 36%. Because she did not meet the Coast Guard's standards, she was advised on a Page 7 that she would be separated.

On April 23, 1996, the applicant consulted a doctor, Dr. L, and requested a waiver of the weight standards. Dr. L noted that a gynecologist, Dr. U, had advised the command that the applicant had a history of ovarian dysfunction, which frequently causes weight gain, and that "this condition causes the vast majority of patients with it to be overweight." Dr. L wrote that the applicant's polycystic ovarian disease and treatment with Provera "may cause weight gain, but this should not preclude staying within the CG weight standards in my opinion." Dr. L noted that he told the applicant that a waiver was not justifiable and that she should continue her "weight reduction program by prudent diet (has seen nutritionalist) and sensible exercise daily." Dr. L referred the applicant to Dr. B for a second opinion at her request and noted that "she may require an Initial Medical Board [IMB] due to this permanent condition which requires medication to control. This medication may also contribute to weight gain = Provera."

On April 30, 1996, the applicant consulted Dr. B, who noted that "GYN consultant feels the diagnosis is part of the cause for her weight gain. This was confirmed by textbook refer. Also on Provera causing wt gain. ... Individual is exercising and on restricted diet but unable to meet the measurement standards pertaining to total body fat of 30% or less. ... She has now presented a Weight in Water of 29% from a local sport organization that she paid for with her own funds. ... MAW variant? Falls within the total body fat allowance."

On May 1, 1996, Dr. B wrote, "Discussion with [Dr. L] and we decided that the individual does meet the letter of the regulation. That does not mean her current weight is healthy for her, and she should continue diet and exercise to reduce it. I will check the veracity of the determination and if solid I will pass the individual on percentage of body fat."

On May 9, 1996, the applicant's commanding officer (CO) notified her that he would initiate the applicant's discharge for weight control failure. The applicant responded by stating that she did not object to the discharge.

On May 14, 1996, Dr. B advised the applicant's CO that hydrostatic body composition analysis on April 30, 1996, had shown that the applicant's body fat percentage was 30% and thus

within Coast Guard standards. The doctor recommended that the applicant's MAW be revised based upon her current weight in accordance with paragraph 4.B. of COMDTINST M1020.8C.

On May 24, 1996, the applicant's CO sent the Coast Guard Personnel Command (CGPC) a memorandum recommending that the applicant be expeditiously discharged for weight control failure. In his memorandum, the CO noted the applicant's history of weight probationary periods; the hydrostatic testing on April 30, 1996; and the fact that CGPC had told him that hydrostatic testing was not an acceptable method of determining a member's body fat. Regarding the applicant's efforts to lose weight, the Group Commander alleged that, although the command had gone to "extraordinary lengths" to help her succeed, "all of our efforts have failed to produce the kind of lifestyle changes that sustained compliance with Commandant policy would require of her."

The applicant's separation was suspended while she underwent evaluation by an IMB because of her obesity and polycystic ovarian disease. The IMB reported on June 12, 1996, that the applicant had been "placed on the weight program and given intermittent Progesterone therapy for amenorrhea secondary to Polycystic Ovary Disease." The IMB stated that she was fit for full duty despite her obesity and polycystic ovarian disease and that the "prognosis for this patient will depend on the vigor with which she pursues weight control because Polycystic Ovary Disease is associated with and thought to cause over weight." The IMB stated that she had no disability that prevented her from performing all the duties of her rate and recommended "continued weight management with diet/exercise and measured through hydrostatic weighing vs standard weight procedures, which would require a waiver."

On July 9, 1996, the CO forwarded the IMB's report to CGPC with a memorandum stating that "[o]ur interpretation of Chapter 3 of Commandant Instruction M1020.8C is that personnel with a medical condition that chronically prevents them [from] maintaining their maximum allowable body weight are to be separated, either discharged or medically retired as appropriate." He reported that at the start of her weight probation, a doctor had determined that losing weight would not be detrimental to her health, but beneficial, and that he did not think her diagnosis should excuse her from maintaining the Coast Guard weight and body fat standards:

If [the applicant's condition] is a ratable disease, we have no objection to her medical retirement. We cannot recommend retention if the ovarian problems are going to present an obstacle to consistently maintaining her allowable weight. While the board findings suggest that the condition would make weight loss more difficult, it in no way appears to suggest that she cannot or should not lose the excess weight. It is not unusual—in fact it is almost the norm—for people identified as chronically overweight to evidence secondary problems such as bad backs, bad knees, bad ankles, or some other health problem that precludes an aggressive exercise program. Historically Commandant has not considered these a sound basis for excusing someone from maintaining their allowable weight. I see nothing in this case that would merit an exception.

The applicant rebutted the IMB's report to CGPC on July 17, 1996, noting that several doctors had found that polycystic ovarian disease and treatment with Provera cause women to gain weight. She also stated that Dr. B had told her that she met the Coast Guard's standards because of the results of her hydrostatic testing and that a YNC had cursed at her about the letter from the gynecologist and had told her that the command watched what she was eating in the office and at lunch.

CGPC submitted the IMB's report and the CO's memorandum with the applicant's rebuttal to a Central Physical Evaluation Board (CPEB) to determine whether she was fit for full duty and, if not, what her disability rating should be. On September 13, 1996, the CPEB found the applicant fit for full duty and noted that she was "eligible for retention in accordance with Encl (3) to COMDTINST M1020.8C." The applicant's counsel advised her of these findings in both a telephone conversation and a memorandum on September 18, 1996. The memorandum notes that under the rules, she could not reject the finding that she was fit for full duty, but she had a right to submit a rebuttal and request for reconsideration if she submitted new medical information within 15 days of their conversation. The memorandum also notes that if the applicant took no further action, the CPEB's findings would be forwarded for final approval.

On September 23, 1996, the applicant submitted a request to be assigned to the Selected Reserve upon the expiration of her enlistment on October 23, 1996.

On September 30, 1996, the applicant's CO asked Commander, CGPC whether hydrostatic testing was an acceptable means of determining a member's percentage of body fat. He noted that "[t]he Board section [of CGPC] feels the hydrostatic body fat analysis is legitimate and [the applicant] should be retained, the Separations section says the hydrostatic body fat analysis is invalid and she should be separated pursuant to [Article 12-B-16 of the Personnel Manual]. I need to know which is correct." Commander, CGPC replied to the CO on October 8, 1996, stating that hydrostatic testing "is not valid based on the fact that the Coast Guard's only allowable method for determining body fat percentages is provided for in COMDTINST M1020.8C." Also on October 8, 1996, CGPC advised the CO that Commander, CGPC had approved the findings of the CPEB on October 2, 1996, and that the applicant "shall not be retired or separated by reason of physical disability."

On October 8, 1996, the Group Commander advised the applicant that he was initiating her discharge because she had failed to meet the weight or body fat standard and "medical personnel [had] determined that it would not be detrimental to [her] health to lose the excess weight." Pursuant to her pending discharge, the applicant underwent a physical examination on October 10, 1996, and was found fit for duty and/or separation. After the examination, Dr. B noted in the applicant's record that the IMB had found her fit for full duty and that she was being separated because the Coast Guard did not accept hydrostatic weighing as a way to measure body fat. Dr. B wrote that he told the applicant that other members have received waivers in the past based on hydrostatic weighing. He concluded that "[t]his is the type matter that will have to be sorted out at a higher level and I would suggest she seek counsel of a legal authority since I can offer no further assistance medically."

On October 11, 1996, the applicant acknowledged notification of and objected to the proposed discharge. In her statement, she noted that several doctors had found that her weight gain could be attributed to her medical condition and treatment with Provera and that hydrostatic testing on April 30, 1996, had shown her body fat percentage to be within the Coast Guard standard. Regarding the timing of the discharge proceedings, the applicant noted that she had 10 days to object to the finding that she was fit for full duty; that her 15-day period for appealing the results of the CPEB were still pending; and that as of October 23, 1996, she would have more

than eight years of service and so would be entitled to an Administrative Discharge Board (ADB). She stated that if she were discharged before these issues were resolved or if she were denied her rights, she would pursue relief through congressional or legal channels.

The CO appended the applicant's objection and other pertinent records to a memorandum to CGPC dated October 9, 1996, in which he recommended that she be expeditiously discharged for weight control failure. In this memorandum, the CO repeated the information in his memorandum of May 24, 1996; noted that the applicant had lost no more weight while the IMB and CPEB were pending; and also noted the IMB's finding that it would not be harmful for the applicant to try to lose weight. In addition, the CO noted that the applicant had recently submitted a Statement of Intent declaring her intent to leave active duty when her enlistment expired on October 23, 1996.

On October 15, 1996, CGPC ordered the CO to discharge the applicant no later than October 22, 1996. The applicant received an honorable discharge on October 22, 1996, due to "weight control failure" with an RE-3F reenlistment code. She was advised on a Page 7 that if she met her MAW when she had been out of the Service for at least six months but no longer than a year, she could request reenlistment and would be reenlisted "based on [the Service's] needs and the member's past performance."

In February 2002, the applicant submitted an application to the Board for Correction of Military Records (BCMR) in which she asked it to correct her reason for separation from "weight control failure" to "end of enlistment" and to upgrade her reenlistment code to RE-1 (eligible to reenlist). Because the BCMR's rules require applicants to exhaust their administrative remedies within the Coast Guard before applying to the BCMR, the Chair forwarded her application to the Discharge Review Board (DRB). On April 28, 2003, the DRB advised the applicant that her reenlistment code is correct and that she could apply for reenlistment at a recruiting office.

VIEWS OF THE COAST GUARD

On December 17, 2010, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief.

The JAG stated that the Coast Guard complied with the regulations in COMDTINST M1020.8 and that the applicant "had numerous documented warnings of pending discharge if she failed to maintain weight compliance." In addition, the JAG stated that the applicant's claim that she should have been granted a medical discharge is without merit based on the findings of the CPEB that she was fit for full duty.

In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC, successor to CGPC). The PSC stated that the application should be denied for untimeliness. Regarding the merits of the case, the PSC stated that although the applicant's condition frequently causes women to gain weight, the medical reports show that "nothing precluded her from still carefully watching her diet and maintaining a healthy weight and lifestyle." The PSC stated that it is "well documented

throughout the applicant's record that numerous medical professionals not only saw it as possible, but in fact healthy, if the applicant were to lose the weight" as the Coast Guard required. The PSC stated that the applicant was "discharged from the service for a preventable weight control problem." The PSC concluded that nothing in the record warrants a finding that the applicant's discharge for weight control failure was erroneous or unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2011, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to submit a written response within 30 days. No response was received.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The applicant knew in 1996 that she was being discharged for "weight control failure." Therefore, her application is untimely.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further instructed 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."²
4. Regarding the delay of her application, the applicant argued that it is in the interest of justice for the Board to waive the statute of limitations because her medical problems persist and still require treatment. The Board finds that the applicant's explanation for her delay is not compelling because she failed to show that anything prevented her from seeking correction of the alleged error more promptly.
5. A cursory review of the merits of this case indicates that the applicant received due process with respect to her discharge under the Coast Guard's Weight/Physical Fitness Standards for Coast Guard Military Personnel, Physical Disability Evaluation System Manual, and the Personnel Manual. When the applicant exceeded the weight and body fat standards, she was afforded a weight probationary period, nutritional counseling, and extra time for exercise. A doctor certified that it was safe and healthy for her to lose weight through diet and exercise, and

² *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

her probationary period was extended for several months. Her medical records show that her doctors acknowledged that her polycystic ovarian disease and treatment with Provera increased the difficulty of weight control for her but also found that losing weight to meet the Coast Guard's weight standards would be possible and healthy for her.³ However, her CO reported when he initiated her discharge both in May and October 1996 that although the command had gone to "extraordinary lengths" to help her lose weight, "all of our efforts have failed to produce the kind of lifestyle changes that sustained compliance with Commandant policy would require of her." Because of her medical condition, she was referred to an IMB, but like her CO, both the IMB and the CPEB found that she was fit for full duty. Unfitness for the duties of one's office, rank, or rating is the sole reason a member may receive a medical discharge or retirement.⁴ The applicant's military records are presumptively correct, and the applicant has submitted insufficient evidence to overcome the presumption.⁵ Therefore, the Board finds that the applicant's claim cannot prevail on the merits.

6. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

³ The Board notes that Article 2.E.4. of Weight/Physical Fitness Standards for Coast Guard Military Personnel, COMDTINST M1020.8 (series), states that a "member found to have an underlying medical condition that would make fitness activities detrimental to his/her health is still responsible for meeting MAW standards within the timeline specified by the probationary period."

⁴ Physical Disability Evaluation System Manual, Article 2.C.2.a.

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

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

Christopher M. Dunne

Frank E. Howard

Jennifer A. Mehaffey