

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 37-96


FINAL DECISION ON REQUEST FOR RECONSIDERATION

 Chairman:

This proceeding, BCMR No. 37-96, has been conducted pursuant to the provisions of section 1552 of title 10, United States Code, and section 52.67 of title 33 of the Code of Federal Regulations. This proceeding was commenced on the BCMR's receipt of the applicant's request for reconsideration of the final decision in BCMR No. 392-91. BCMR No. 37-96 commenced on December 5, 1995.

This final decision on the request for reconsideration, dated December 20, 1996, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Background

The applicant, a  (pay grade E-7), was granted a top secret security clearance on May 7, 1979. The clearance was extended in 1986, but it was not extended again in 1991.

On October 1, 1990, the Commandant proposed to revoke the applicant's security clearance on the basis of 12 items of derogatory information, including misrepresentations regarding educational background and employment history. They were considered to demonstrate dishonesty and lack of maturity. The Commandant also stated that the applicant was taking medication for hypertension (high blood pressure) that impaired his ability to cope with stress. On February 27, 1991, a Security Review Panel recommended that the denial of the applicant's security clearance be affirmed. The Commandant approved the panel's recommendation that the applicant's security clearance be terminated.

On September 11, 1991, the applicant retired from the Coast Guard with a 100% disability rating for severe hypertension.

Application and Decision in BCMR No. 392-91

On September 19, 1991, the applicant filed an application with the BCMR requesting that it direct the Coast Guard to remove all the records from his military record relating to the termination of his security clearance or in the alternative, corrected to show that his security clearance was terminated due to medical reasons. The applicant asked the BCMR to restore his security clearance on the ground, inter alia, that the revocation of his security clearance was the result of inaccurate information, poor investigative techniques, violations by investigators, including violations of regulations, violations of civil rights, and lack of qualified individuals to evaluate medical information.

On September 30, 1992, the Board denied the applicant's application. It found that the Commandant had the authority to remove the applicant's security clearance and to deny the applicant's request for the reinstatement of the clearance. The Board further held that the applicant did not prove that the Coast Guard had committed an error or injustice with respect to the termination of a security clearance.

Application in BCMR No. 37-96

On December 5, 1995, the BCMR received a request to reopen BCMR No. 392-91, on the ground that the applicant had been diagnosed as having a pituitary brain tumor, on October 19, 1995. This diagnosis was made approximately three years after the decision was issued in BCMR No. 392-91. The applicant asserted that the removal of his security clearance in 1991 should be documented "as medically based" because medical evidence "suggests that tumor possibly began developing "more than 10 years ago."

The application for reconsideration of BCMR No. 392-91 was docketed as BCMR 37-96.

The applicant alleged that the background investigation, with respect to his security clearance, took place within the 10-year period of his tumor. He said that he believed that "the presence of an undiagnosed brain tumor with its adverse neurological effects and the adverse effects of a prescribed medication, unknowingly affected [his] conduct which led to [his] security clearance termination."

The applicant did not question the Commandant's authority to remove his security clearance, but he requested that this removal be documented "as medically based." Upon notification that the BCMR would reconsider the application, the applicant submitted approximately 24 exhibits to the Board, all of which were medical in nature. The applicant submitted reports by doctors who

examined him since 1994 and three who examined him since 1995. None of these examinations took place while he was in the Coast Guard. All the other submissions were articles and journal entries on brain tumors and pituitary tumors from medical textbooks and medical journals.

Views of the Coast Guard

On June 10, 1996, the BCMR received a recommendation from the Coast Guard with respect to the applicant's request for reconsideration. The Coast Guard reviewed the new information and "determined that the reason for denial of Applicant's security clearance should not be changed." The Service found that the BCMR concluded that the Commandant had the authority to terminate his security clearance and that the applicant had not provided substantial proof that the Commandant erred in his determination. The Coast Guard also said that the applicant's request should be denied on the ground that the BCMR "has not been designated to determine eligibility for access to classified material, and does not have the authority to grant access to classified material. "

Response of the Applicant to the Views of the Coast Guard

On June 24, 1996, the applicant submitted a Department of Defense policy statement (DOD 520-0.2-R) on security clearance access. The DOD statement listed five disqualifying factors and two mitigating factors in determining eligibility for "sensitive duties or eligibility for access to classified information." The applicant alleged that "all negative factors which led to termination [of his security clearance] would have been mitigated under [the DOD] policy."

The applicant emphasized that "[a]ll evidence in this case is medically based."

REGULATION REGARDING RECONSIDERATION

Paragraph (a) of § 52.67 of the BCMR's rules provides that "[r]econsideration of an application for correction of a military record shall occur if an applicant requests it and the request meets the requirements set forth in paragraph (a)(1) or (a)(2) of this section."

Under paragraph (a)(1), reconsideration shall occur if the applicant presents "evidence or information that was not previously considered by the Board" that could result in a determination other than the one originally made. Evidence or information may only be considered if it could not have been presented to the Board in its original determination if the applicant has exercised "reasonable diligence" (emphasis added). Under paragraph (a)(2), reconsideration shall occur if the applicant presents evidence that the Board "committed legal or factual

error" in the original proceeding that could have resulted in a different determination.

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, BCMR No. 392-91, and applicable law:

1. The Board has jurisdiction of the case pursuant to section 1552 of title 10, United States Code.

2. The applicant requested reconsideration of the decision in BCMR No. 392-91.

3. There are four primary requirements for reconsideration of a decision under § 52.67 of the Board's rules:

a. The term "reconsideration" means considering an additional time. Reconsideration is not a procedure for the original determination of an application or a determination de novo based on new allegations. Rather, it is an effort to set aside an earlier determination on the basis of new evidence or proof of legal or factual error.

b. The applicant is required to present evidence or information that was not previously considered by the Board, or he or she is required to show that the Board committed legal or factual error in not considering specified material in the original determination.

c. The new evidence or information or the legal or factual error "could have resulted in a determination other than that originally made."

d. The new evidence or information "could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence."

4. Three years after his separation from the Coast Guard, the applicant was diagnosed as having a brain tumor; the tumor was surgically removed following its discovery. The presence of the tumor could not, however, have changed the BCMR's disposition in the original proceeding.

The Board, in the original proceeding (BCMR 392-92), found that the Commandant could remove the applicant's security clearance and could deny his request for reinstatement of his security clearance. The security clearance could

not have been terminated in 1991, however, on the ground that the applicant had a brain tumor, because he was not aware of the tumor until 1995.

5. Section 6-A of the Military Personnel Security Program (COMDTINST M5510.16) provides that "[t]he Secretary of Transportation has authorized the Commandant to clear United States citizens under his jurisdiction for access to classified information."

6. The applicant could not have disclosed the fact that he had a brain tumor while he was in the Coast Guard because he did not know that he had such condition. The fact that he had such condition neither increased nor decreased the likelihood that his security clearance would have been terminated.

7. Therefore, the applicant has failed to meet the standard for reconsideration set forth above.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application for reconsideration of the final decision in BCMR No. 392-91, with respect to an application to correct the military record of _____) is denied.

