

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-153

[REDACTED]

FINAL DECISION

This is a proceeding 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 on June 20, 2008, upon receipt of the applicant's completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 16, 2009, 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 asked the Board to correct his record by changing his date of commission and his signal number (position on the active duty promotion list (ADPL)) to the date and number he earned at the U.S. Coast Guard Academy with the graduating class of [REDACTED]. He applicant alleged that his commissioning was unfairly delayed by four months because medical personnel at the Academy health clinic failed to warn him that a medication he was prescribed following PRK eye surgery was prohibited.

The applicant explained that on [REDACTED], he underwent photorefractive keratotomy (PRK) eye surgery having received permission to do so at his own expense from the Academy. Prior to the surgery his uncorrected vision was measured at 20/400. Following the successful surgery, the surgeon prescribed him Econopred, a steroidal eye drop to promote healing. In accordance with the surgeon's instructions, he used the eye drops for more than a year. "During this time, and consistent with the directions given by the Academy, [he] applied for the required medical waiver to get [his] commission. The initial commissioning recommendation was sent to USCG HQ on [REDACTED]"

On [REDACTED], however, six days before graduation day, [REDACTED], he was told that his request for a waiver had been denied because all of his eye examinations had been performed while he was still using the eye drops. Although he had had several meetings with the Academy's medical clinic staff pursuant to his need for a medical waiver to be commissioned, he

had never been warned that the eye drops would be a problem. He alleged that if he had known using the eye drops would prevent him from being commissioned with his class, he would have asked his surgeon to “wean [him] off the drops.”

The applicant alleged that because he was never warned that the steroidal eye drops would prevent him from being commissioned with his class, he was not commissioned until [REDACTED], although he was allowed to graduate with the class on [REDACTED]

The applicant stated that he met with the eye surgeon on [REDACTED] who set a schedule that weaned him off the eye drops as of [REDACTED]. The Academy clinic staff told him to wait two weeks after being weaned from the eye drops before undergoing another eye examination. At an examination on [REDACTED], the surgeon found that the healing process was complete and that he did not have to restart the Econopred eye drops.

The applicant faxed the results of this eye examination to the Academy but was told that “the differences in his intra-ocular pressures were too great and outside the Coast Guard’s standards.” He had never heard of this standard and asked for instructions. A Coast Guard doctor told him to wait another 30 days before having another examination because “the Coast Guard wanted to be assured that [his] vision was stable.”

On [REDACTED], he went to an ophthalmologist who advised him that his intra-ocular pressures were 17/26 in both eyes, which was outside the Coast Guard standard, and who attributed the problem to his recent discontinuation of the Econopred drops.

On [REDACTED], his eyes were tested again and his vision was found to be stable. On [REDACTED], he submitted his final waiver requests for a commission: One request concerned his eyesight and successful PRK surgery; the other was a request for a temporary waiver for his intra-ocular pressures. Both waivers were granted and he was commissioned on [REDACTED]. At a follow-up eye examination on [REDACTED] his intra-ocular pressures were down to 11/13.

In support of his allegations, the applicant submitted copies of his medical records, waiver requests, and official documents concerning his waivers.

VIEWS OF THE COAST GUARD

On October 14, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion adopting the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant was unable to receive a commission on [REDACTED] because he had not completed all of the required physical evaluations to substantiate his fitness for commissioning, as required by 14 U.S.C. § 211(b), which states that the fitness standards for commissioning are determined by the Secretary. CGPC further stated that Chapter 3.D.2.c.(2)(c) of the Medical Manual states that a

history of refractive surgery including, but not limit to: photorefractive keratectomy (PRK), is disqualifying [for commissioning] if any of the following conditions are met:

- a. Pre-surgical refractive error in either eye exceeded +8.00 to -8.00 diopters.
- b. At least 6 months recovery period has not occurred between the last refractive surgery or augmenting procedure and accession medical examination.
- c. There have been complications and/or need for ophthalmic medications.
- d. Post-surgical refraction in each eye is not stable as demonstrated by:
 - i. At least two separate refraction at least one month apart, the most recent of which demonstrates more than +/- 0.50 diopters difference for spherical vision and/or more than +/- 0.25 diopters for cylinder vision; and
 - ii. At least 3 months recovery has not occurred between last refractive surgery or augmenting procedure and one of the comparison refractions.

CGPC stated that on [REDACTED] the applicant was counseled about the risks of PRK surgery and advised that it was disqualifying and required a waiver for commission. CGPC stated that following the applicant's PRK surgery on [REDACTED] he "failed to adhere to post-surgical procedures for PRK, to wit, the use of lubricant eye drops for three weeks following surgery. Subsequently, he developed corneal abrasions which are disqualifying for commissioning [under Chapter 3.D.3. of the Medical Manual] without a waiver. His civilian medical provider prescribed ECONOPRED ... steroidal eye drops to treat the abrasions, specifying a requirement for twice daily treatment with the steroid drops through [REDACTED], and once per day until mid-June."

CGPC stated that the applicant underwent eye examinations on [REDACTED], and the tests results of his visual acuity and refraction were satisfactory for commissioning. However, the applicant's request for a waiver was denied because the examinations were conducted while he was still using the steroidal eye drops, which invalidated the test results. Therefore, after the applicant was weaned from the eye drops, he underwent another examination on [REDACTED], but his intra-ocular pressures were disqualifying for commissioning, so he was instructed to wait another 30 days. On [REDACTED] the applicant underwent another examination, which "showed satisfactory stability of his visual acuity and refraction, as well as satisfactory intra-ocular pressures." Therefore, his subsequent request for a waiver for PRK surgery and a temporary waiver for intra-ocular pressures were approved on [REDACTED] by the Chief of CGPC's Officer Personnel Management Division.

CGPC stated that "[h]ad the applicant followed the post-operative procedures, it is unlikely that he would have required the steroidal treatment for corneal abrasions." His pre-graduation eye examinations test results were invalidated because he was still using the steroidal eye drops until [REDACTED]. CGPC stated that the applicant did not demonstrate full physical qualification for commissioning until [REDACTED], and then his request for a waiver for his PRK surgery had to be processed and approved, which occurred on [REDACTED].

CGPC argued that the applicant's allegation that his commissioning was delayed because of an error by the Academy medical clinic staff "is without merit." His "lack of medical fitness to commission on [REDACTED] was a direct consequence of his own failure to adhere to post-operative instructions to apply lubricating drops to his eyes. All other delays in commissioning stem from this initial action, and the consequences of that action are the applicant's to bear."

CGPC stated, however, that there was a delay in the communication between CGPC and the Academy concerning his fitness for commissioning, and so CGPC recommended that partial relief be granted by adjusting the applicant's date of rank from [REDACTED] and that he receive corresponding back pay and allowances because of the adjustment. In support of these allegations and recommendation, CGPC submitted copies of the applicant's eye test results and the following documents:

A captain and doctor serving as the Chief of the Health Service Division at the Academy signed a sworn declaration stating that after the applicant "failed to use lubricant drops as prescribed after his [PRK] surgery. Due to improper lubrication of the eyes he developed lesions of the cornea. At this point in time use of steroid drops was not optional ... to ensure healing of the corneas. This regimen of medication as prescribed by the ophthalmologist was necessary to ensure proper healing. As a side effect of steroid drops, [the applicant] developed an increase of intraocular pressure. ... After the drops were discontinued in a safe manner, a waiting period was required for the intraocular pressures to normalize. On [REDACTED], [he] was granted a temporary medical waiver [of his intraocular pressure] for one year." The doctor submitted a copy of a fax he had sent to CGPC in [REDACTED], in which he wrote that the applicant "is currently using Prednisone acetate solution 1%. The temporary need for these drops was not due to a problem directly related to the surgical procedure but due to the patient not using his lubricant drops for several weeks post-op."

A lieutenant, now retired, serving as the Clinic Administrator at the Academy stated that the applicant "was properly counseled on PRK procedures IAW Coast Guard regulations. ... [He] failed to inform the clinic's staff that he had not completely followed the instructions of his surgeon which included the use of lubrication drops daily. Subsequently, he developed lesions of the cornea which required steroid drops to heal. I only learned that he was using steroid drops after receiving an email from [a chief petty officer] at HQ dated [REDACTED]. Once [the applicant] confirmed the use of the drops he was advised of it disqualification [sic] for commissioning and advised of the waiver process. ... In addition, [he] was disqualified for commissioning due to having trouble with obtaining two stable eye examinations at least 30 days apart; as well as having very high intraocular pressure (IOP) which was believed to be from the steroid use."

A Page 7 (form CG-3307) dated [REDACTED], signed by the Clinic Administrator and the applicant, who acknowledged the information on the form and that he had read and understood Chapter 2.A.7. of the Medical Manual and ALCOAST 285/05. The Page 7 states that the decision to undergo PRK "has an impact on the command, your commissioning, and possibly on your access to the Physical Disability Evaluation System (PDES). ... Furthermore, you must comply with all requirements of ALCOAST 285/05. I have listed a copy here in that you must produce documentation of refractive stability over two separate examinations at least three months apart. The PRK is disqualifying for commissioning. Therefore, a waiver request must be completed by you no sooner than one year after the procedure was completed."

An email from CGPC dated [REDACTED], stating that the applicant was using steroidal eye drops because he had not used lubricating eye drops in the weeks after his surgery and that under Chapter 3.D.8.c.(2)(d) of the Medical Manual, he could not be commissioned without two

eye examination, performed at least one month apart, showing stability after he was weaned off the eye drops.

An email from the Chief of the Officer Personnel Management Division of CGPC, dated [REDACTED] in which he reported to Commander, CGPC that he had “approved a temporary waiver [for the applicant] subject to medical conditions/follow-up to allow his commissioning today.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 29, 2008, the applicant responded to the views of the Coast Guard. The applicant objected to CGPC’s implication that he had willfully failed to use lubricant eye drops following his PRK surgery. He stated that his post-operative therapy included a mild steroidal drop as a lubrication fluid and that he followed the regimen. However, in the summer of [REDACTED], while he was deployed on the [REDACTED], he ran out of drops and “unfortunately assumed my healing therapy was complete. Ultimately, it was not, and as my surgeon later explained to me, suddenly stopping the steroidal drops accelerated the growth of lesions on my cornea, which the steroids were prescribed to heal.” When he left the [REDACTED] in late [REDACTED], he went to the surgeon because he realized his vision was worsening, and the surgeon prescribed the stronger steroidal eye drops. The applicant stated that the cause of his need for long-term use of the stronger drops “may very well have been ignorance, but it was not willful negligence.”

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 applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available procedure provided by the Coast Guard for correcting the alleged error or injustice.

2. The application is timely because it was filed within three years of the applicant’s discovery of the alleged error or injustice in his record, as required under 10 U.S.C. § 1552(b).

3. Under 33 C.F.R. § 52.24(b), the Board begins its analysis in every case by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. 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.” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. The applicant alleged that he was unfairly denied commissioning on the day of his graduation from the Academy, [REDACTED], because the staff at the Academy medical clinic failed to warn him that steroidal eye drops he had been prescribed were disqualifying. However, the Clinic Administrator has stated that the applicant did not timely inform the staff of the clinic

that he was still using steroidal eye drops. The Clinic Administrator learned about the prescription on [REDACTED], by which time it was too late to wean the applicant off the drops and have him undergo two eye examinations a month apart so that he could receive a commission with his classmates.

5. The applicant has admitted that he ran out of eye drops while aboard the EAGLE in the summer of [REDACTED]; mistakenly thought that he did not need them any more; and did not understand the danger of suddenly stopping his use of the eye drops. When he left the EAGLE, he apparently consulted his private eye surgeon because he thought his eyesight was worsening. The surgeon diagnosed corneal abrasions and prescribed long-term use of stronger steroidal eye drops. There is no evidence that the Academy's clinical staff knew of this prescription or had any reason to think that someone who underwent PRK surgery on [REDACTED], would still be using steroidal eye drops in the spring of [REDACTED].

6. The record indicates that the eye drops were unexpectedly, medically necessary and could not be stopped suddenly without causing adverse effects. Moreover, the applicant has not proved that if he had been warned that the eye drops were disqualifying and had asked the surgeon if he could stop using them, the surgeon would have authorized weaning him off the eye drops early enough that the applicant's eyes could have stabilized and allowed him to pass the two eye examinations in time to receive a commission with his classmates. Therefore, the applicant has not shown that he was unfairly denied a commission on [REDACTED], even if someone on the Academy's clinical staff knew about the prescription prior to [REDACTED].

7. The Board finds that the applicant has not proved by a preponderance of the evidence that he was erroneously or unfairly denied his commission on [REDACTED], since he had not been physically qualified for a commission in accordance with the regulations in the Medical Manual by that date. Physical qualification is a fundamental requirement for an officer's commission. CGPC has admitted, however, that the applicant's commissioning was authorized as of [REDACTED]; that the Chief of the Officer Personnel Management Division intended the commissioning to occur on that date; and that a delay in communications delayed the commissioning from [REDACTED].

8. Accordingly, the Board agrees with CGPC that partial relief is warranted in that the applicant's date of commissioning should be backdated to [REDACTED], and that he should receive corresponding back pay and allowances and an adjusted signal number and position on the ADPL if necessitated by the change in his date of rank.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED], USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his record to show that he received his commission as an ensign on [REDACTED]. The Coast Guard shall also make a corresponding correction to his signal number and position on the ADPL, if warranted by his new date of rank.

The Coast Guard shall pay him any back pay and allowances he may be due as a result of these corrections.

