DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-014

[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 after receiving the applicant's completed application on November 3, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 16, 2016, 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 remove from his Coast Guard medical record documentation stating that he is alcohol dependent dated June 7, 2007, and from his Coast Guard military record a CG-3307[1] ("Page 7") dated March 19, 2008, which also states that he had been diagnosed as alcohol dependent. He stated that the Page 7 had been "rescinded" by another Page 7 dated May 26, 2015. The applicant explained that a "recent background investigation revealed documentation stating that I was alcohol dependent." However, following a review and consultation with subject-matter experts, his current commanding officer (CO) determined that the diagnosis was "a clerical error unsubstantiated by supporting documentation." Therefore, he alleged, the CO "superseded" the Page 7 dated March 19, 2008, with another dated May 26, 2015. In support of his allegations, the applicant submitted documents from his medical and military records, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 14, 1999. He earned the [redacted]

[1] A Page 7 ("Administrative Remarks" form CG-3307) is used to document counseling of a member about positive or negative performance or other significant information provided to the member. Page 7s are normally signed by the counselor and, to acknowledge receipt, by the member as well.

On January 26, 2004, the applicant was arrested for "public drunkenness and obstructing a public place." His command entered a Page 7 in his record dated January 30, 2004, which states that he had incurred his first "alcohol incident,"[2] that he had been counseled about the Coast Guard's alcohol policies, and that he would be processed for separation if he incurred a second alcohol incident. The applicant signed this Page 7.

On February 9, 2007, the applicant incurred his second alcohol incident. The Page 7 documenting it includes an entry dated February 25, 2007, which advises him that because he had incurred his second alcohol incident, he would be processed for separation. It also states that on the night in question, he had visited several "watering holes" while in [redacted] and had consumed "between three and six alcoholic beverages." While driving early the next morning, he was involved in a one-car accident but had not notified the police. The Page 7 states that he had broken his left ankle while [redacted] after the accident. The second entry on this Page 7, dated February 28, 2007, states that the applicant had been screened at a Coast Guard clinic, was found to meet the criteria for a diagnosis of "alcohol abuse – episodic," and had been recommended for intensive outpatient treatment. The applicant signed this Page 7 on March 22, 2007.

A Drug and Alcohol Program Advisor (DAPA) Screening Form dated February 27, 2007, and signed by an [redacted] serving as the advisor) states that the applicant had been referred for screening due to an "alcohol incident" incurred on February 9, 2007. The form states that while on temporary duty in [redacted] the applicant had consumed several alcoholic beverages and at 4:00 a.m. had crashed his government rented vehicle when he fell asleep while driving to a friend's house. He injured himself, which he attributed to [redacted] where he had sought help and called 911, back to his vehicle.

A health record, SF-600, dated February 28, 2007, and signed by a certified physician's assistant (PAC), as well as by the doctor who supervised him, indicates that the applicant had been screened, diagnosed with "alcohol abuse – episodic" and was highly recommended for intensive outpatient treatment. The PAC noted that the applicant had admitted to "three beers consumed over approx. 2½ hours, and driving the GV approx. 2 hours later." In addition, a medical consultation sheet, SF-513, dated February 28, 2007, states that the applicant admitted to having driven while under the influence of alcohol but denied that he had a significant problem. The SF-513 states that the applicant had incurred his second alcohol incident; had a diagnosis of alcohol abusive – episodic; and was highly recommended for intensive outpatient treatment.

As a result of the accident, the applicant taken to mast on April 16, 2007. The specification shows that he was charged with violating Article 92 (failure to obey an order or

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[2] Article 20.A.2.d. of the Personnel Manual in effect in 2007 and 2008, COMDTINST M1000.6A, defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." Under Article 20.B.2., alcohol incidents and the results of alcohol screening are documented in a member's record on a Page 7, and members are normally processed for discharge for unsuitability if they incur two alcohol incidents.

regulation) of the Uniform Code of Military Justice (UCMJ) for driving after consuming alcoholic beverages, driving a vehicle without a valid license, and contractually unauthorized use of a rental vehicle; Article 121 (larceny or wrongful appropriation) for unauthorized use of a government rented vehicle; and Article 132 (fraud) for deceptive conduct toward a rental car agent and the government concerning damage to a rental car vehicle."

According to a health form, SF-600, completed by a physician at a Naval Medical Center (NMC) on June 7, 2007, the applicant was diagnosed with "alcohol dependence (alcoholism)." The doctor noted that the applicant was unable to begin treatment because of a fracture in his left foot and that he was "wearing protective boot and using cane to ambulate." This condition left him "unable to safely walk up and down three flights of stairs or to walk the distance required to get to the Dining Facility. He has two Physical Therapy appointments per week. [He] can return to treatment after [the fracture] has resolved and is able to ambulate three flights of stairs without the aid of a cane." The notes indicate that the doctor discussed the diagnosis with the applicant and that the appointment lasted 20 minutes of which more than 50% was spent counseling the applicant or coordinating his care. The applicant had reported that he had last drunk alcohol on the night of his second alcohol incident. The doctor also noted that his blood alcohol content was zero upon check-in.A printout from the applicant's medical record shows that the Navy physician enter

> Last drink 8 Feb 07. BAC on check-in 0.00. Smokes 1 PPD for 15 years. Medication reconciled. PPD Convertor. Denied CAGE. [He] denies suicidal/homicidal plans thoughts ideas or intent. He is responsible for his actions and is not suicidal or homicidal at this time.

The applicant was not separated following his second alcohol incident. On January 9, 2008, he reported for a one-year substance evaluation consultation at a health center's outpatient services department. According to the counselor's notes, he stated that on February 9, 2007, after having several drinks at home, he had decided to drive to a friend's house in the middle of the night and had fallen asleep behind the wheel and run into a tree. The counselor noted that his command learned about the accident because he was using a rental vehicle. The counselor wrote that his problem as "alcohol abuse" and that in light of the information he had provided during the "intake," he would benefit from attending treatment groups to "encourage maintenance of sobriety, improve coping skills, identify stressors, improve relaxation skills, monitor recurrence of symptoms and treat as needed."

A Page 7 dated March 19, 2008, titled "Alcohol Incident Treatment Completed," and signed by the Executive Officer of the applicant's unit, states that the applicant had been screened on June 7, 2007, and that "it was determined that you meet the criteria for a diagnosis of Alcohol Dependent (Alcoholism); you have been highly recommended for an Intensive Treatment program." The Page 7 states that on March 7, 2008, the applicant had completed a "Level III (Intermediate Level of Care)" program[3] at the same health center he had visited on January 9, 2007, and was required to abstain from alcohol indefinitely, to meet monthly with the

[3] An undated NMC Substance Abuse Rehabilitation Program (SARP) Patient Registration form that the applicant submitted shows that Level III treatment is residential treatment (the most intensive), whereas intensive outpatient treatment is Level II.

Command Drug and Alcohol Representative (CDAR), and to attend at least two support group meetings per week for a year. The Page 7 states that failing to comply would result in separation proceedings. The applicant signed this Page 7 in acknowledgement the same day.

On May 26, 2015, the applicant's CO signed a Page 7 for his record stating the following that, after reviewing his records and consulting with experts, she—

> consider[s] the reported diagnosis given by [the screener] on 07 JUN 2007 to be a clerical error, unsubstantiated by supporting documentation. There appears to have been no screening process completed during your visit …, nor was there any form of official documentation supporting the CG-3307 you signed on 19 MAR 2008 designating you to be Alcohol Dependent. This 26 MAY 2015 entry supersedes the aforementioned erroneous CG-3307 you signed on 19 MAR 2008.
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> The diagnosis given by … [another screener] determined that you met the criteria for Alcohol Abuse – Episodic, 305.02 per the ICD-9. On 09 JAN 2008, the original diagnosis of Alcohol Abusive was confirmed – Unspecified, 305.00 per the ICD-9, by …, a Certified Substance Abuse Counselor, at … . You successfully completed command-directed outpatient therapy at … on 07 MAR 2008.
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> You were diagnosed as alcohol abusive by a proper medical authority, you successfully completed the appropriate course of treatment, and you are able to resume responsible consumption of alcohol. However, per chapter 2 of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST 1000.10, you are notified that your involvement in another alcohol incident will result in you being processed for separation from the Coast Guard under Article 1.B.15.b(5), Military Separations, COMDTINST M1000.4.

VIEWS OF THE COAST GUARD

On March 17, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant alternative relief in this case and adopting the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the applicant "has not demonstrated with sufficient documentation that the diagnosis he received on 07 June 2007 was in error or unjust, and absent evidence to the contrary, the medical officer is presumed to have performed his evaluation correctly, lawfully, and in good faith in determining that the applicant was alcohol dependent. Therefore, this diagnosis should remain in the applicant's medical record as relevant medical history."

PSC further stated that the Page 7 dated March 19, 2008, documenting the applicant's diagnosis as alcohol dependent was prepared in accordance with policy. However, PSC stated, because the applicant's CO has prepared the Page 7 dated May 26, 2015, to "supersede" the March 19, 2008, Page 7 and "is in complete conflict regarding his diagnosis," PSC recommended removing both of these Page 7s and "that any diagnosis regarding the applicant's relationship with alcohol be obtained from the applicant's medical record."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 30, 2016, the applicant responded to the views of the Coast Guard. He submitted the same documents he had previously submitted and stated that he thought they must be missing because PSC did not mention them in its advisory opinion. He attributed the Coast Guard's recommendation to not having seen his evidence. He alleged that his evidence clearly shows that he was diagnosed as alcohol abusive, rather than dependent, by Coast Guard medical personnel. He alleged that he completed outpatient therapy on March 7, 2008, and that the SF-600 dated June 7, 2007, "reflects a 20 minute conversation with a Navy Chief Hospital Corpsman," who worked at a Level III inpatient substance abuse clinic, which the applicant did not attend. He alleged that "the need to attend was overruled by higher medical authority," as shown in the other documents he submitted.

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 under 10 U.S.C. § 1552. Although the applicant presumably knew of the alleged error in 2008, when he signed a Page 7 acknowledging the diagnosis and the requirement that he abstain from alcohol indefinitely, the application is considered to be timely filed because the applicant has remained on active duty.[4]

2. The applicant alleged that documentation in his medical and military records stating that he is alcohol dependent is erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed documents in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the documents are erroneous or unjust.[5] Absent specific evidence to the contrary, the Board presumes that Coast Guard officers and other Government officials have carried out their duties "correctly, lawfully, and in good faith."[6]

3. The applicant's records show that after his second alcohol incident in February 2007, he was screened and, based on his answers to the questionnaire, diagnosed as "alcohol abusive – episodic." He had broken a bone in his left foot during the incident, which required long-term medical treatment. The alcohol incident and screening results are documented on a Page 7 with entries dated February 25 and 28, 2007. On April 16, 2007, the applicant was taken to mast due to the alcohol incident. On June 7, 2007, following a 20-minute consultation at the NMC, a physician diagnosed the applicant as alcohol dependent but noted that he could not begin rehabilitation treatment because he was still wearing a protective boot on his left foot and was not mobile enough to access certain areas at the treatment facility.

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[4] *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

[5] 33 C.F.R. § 52.24(b).

[6] *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 argued that his screening results in February 2007 and the intake form dated January 9, 2007, show that he was diagnosed as alcohol abusive, and so the diagnosis of alcohol dependent is erroneous and unjust. However, such diagnoses depend primarily upon a member's answers to questions, and the fact that the applicant responded to the screener's questions in February 2007 in a way that resulted in a diagnosis of alcohol abusive does not prove that the physician's diagnosis on June 7, 2007, was erroneous. The applicant may have provided different answers to the physician's questions on June 7, 2007, or the physician's professional assessment of his answers may have differed from that of the screener. Nor does the fact that the applicant entered an outpatient treatment program—according to the intake form dated January 9, 2008—persuade the Board that the physician's diagnosis on June 7, 2007, was erroneous or unjust. The Board finds that the applicant has not proven by a preponderance of the evidence that the SF-600 dated June 7, 2007, with the diagnosis of "alcohol dependence (alcoholism)" should be removed from his medical record.

5. The record shows that on March 19, 2008, the applicant and his Executive Officer signed a Page 7 stating that the applicant had met the criteria for a diagnosis of alcohol dependence and so was required to abstain from alcohol indefinitely. The applicant did not contest or object to this Page 7 until 2015, which is very strong evidence that he considered it to be accurate and fair when he signed it. He did not contest the Page 7 until it was mentioned during his screening for his security clearance. In response, his current CO has signed another Page 7, dated May 26, 2015, stating that she considers the physician's diagnosis dated June 7, 2007, to be a clerical error and the March 19, 2008, Page 7, which mentions that diagnosis, to be superseded by her own Page 7. Because the applicant did not contest the diagnosis and order prohibiting him from drinking alcohol for approximately seven years, the Board is not persuaded that the diagnosis and order on this Page 7 are erroneous or unjust despite his CO's opinion of the diagnosis and rescission of the abstinence order.

6. The applicant complained that the March 19, 2008, Page 7 states that he had completed the "Level III (Intermediate Level of Care)." He alleged that he attended a Level II intensive outpatient treatment program instead, and the intake form dated January 9, 2008, indicates that he entered an outpatient treatment program. Level III, while intermediate (there is a Level IV), is inpatient, residential care. Therefore, the reference to Level III, instead of Level II, on the March 18, 2008, Page 7 appears to be a typographical error, as the applicant claimed. However, the fact that the applicant underwent Level II intensive outpatient treatment, instead of Level III residential treatment, does not prove that the physician's June 7, 2007, diagnosis of alcohol dependence is erroneous because, according to the policy then in effect, while members diagnosed as alcohol dependent were "normally" referred for Level III treatment, it was not a requirement, and intensive outpatient treatment for alcoholism has become more common.[7] However, the reference to Level III treatment should be corrected to Level II.

7. The CO's Page 7 dated May 26, 2015, supersedes the March 19, 2008, Page 7 by rescinding the order to abstain, and it states that the CO considers the diagnosis dated June 7,

[7]U.S. Coast Guard, Health Promotions Manual, COMDTINST M6200.1A, Chap. 2.H.2.c. Under the current Health Promotions Manual, COMDTINST M62000.1C, the language has been changed to provide that alcohol dependent members "may" be referred Level III treatment.

2007, in the applicant's medical record to be a clerical error. Because of this contradiction, the Coast Guard recommended removing both Page 7s. However, except for the typographical error regarding Level III treatment, the Board is not persuaded that the March 19, 2008, Page 7 is erroneous or unjust. Likewise, the May 26, 2015, Page 7 appears to be factual in that the CO has expressed her opinion about the diagnosis and has rescinded the abstinence order. Therefore, although the Coast Guard recommended removing both Page 7s, the Board is not persuaded that—except for the typographical error—either Page 7 is erroneous or unjust. Therefore, the Board will correct the typographical error but will not remove either Page 7 from the applicant's record.

8. The Board notes that in his response to the advisory opinion, the applicant claimed that the Coast Guard's advisory opinion must be based on incomplete evidence, and he resubmitted documents that he had previously submitted with his application. Every document that the applicant submitted with his response to the advisory opinion was included in his application as submitted to the Coast Guard by the Board's staff. The fact that the Coast Guard did not mention some of the applicant's evidence in the advisory opinion does not prove that they did not review and consider it.

9. Accordingly, the applicant's request should be denied because he has not overcome the presumption of regularity or proven by a preponderance of the evidence that the physician did not diagnosis him as alcohol dependent on June 7, 2007. However, the reference to Level III treatment in the March 19, 2008, Page 7 should be corrected to Level II.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [redacted], USCG, for correction of his military record is denied, except that the reference to "Level III" treatment on the CG-3307 dated March 19, 2008, in his record shall be corrected to "Level II." This correction may be made by hand.

September 16, 2016

[redacted]