

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-058


SA (Former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on April 7, 2021, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 1, 2023, 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, a former Seaman Apprentice (SA/E-2), who was honorably discharged on May 22, 1991, for asthma, asked the Board to change the narrative reason for separation on his DD-214 from "Convenience of the Government" to "Hardship" or "Service-Connected Disability." The applicant alleged that he had a preservice disability made worse by his time serving in the Coast Guard. The applicant explained that he had asthma as a child, which was listed on his pre-entrance medical exam. And by the time he enlisted, he had not experienced any issues with his asthma since he was 11 years old; but when he entered basic training, his asthma returned. The applicant claimed he was seen in the infirmary for his asthma and was told that he had water in his lungs, not asthma.

According to the applicant, after leaving basic training and arriving at his duty location, he continued to suffer from his asthma and went to the emergency room as a result. The applicant stated that after his time in the emergency room, it was determined that because of his asthma, he could not continue serving in the Coast Guard. The applicant alleged that he continues to suffer from asthma and requires that he take Advair and inhalers. The applicant claimed that had he been diagnosed with asthma while at basic training, he would have been discharged and not sent to his next unit. The applicant stated that he was not able to perform his duties and should receive all of

the benefits that he would have been entitled to had he been allowed to serve out his four-year contract.

To support his claims, the applicant submitted copies of his Coast Guard personnel records, which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 10, 1990, and served for 8 months and 13 days before he was discharged due to his preexisting asthma.

On April 11, 1990, on the Coast Guard's prescreening medical form, the applicant stated that he suffered from asthma as a child and took medications to manage his asthma, but that he had not experienced any issues with his asthma since he was 11 years old.

On September 12, 1990, after arriving at basic training, the applicant listed asthma on his medical history form.

On October 1, 1990, the applicant was seen at the basic training medical clinic for asthma. Medical notes from the treating physician stated that the applicant did not want to be at basic training. The applicant reported that he had difficulty breathing every morning during calisthenics and in the evenings with the cold air. The applicant was subsequently placed on a Fit for Limited Duty for one day, until he could receive a follow-up examination.

On October 2, 1990, during the applicant's follow-up examination, medical records show that the applicant complained of wheezing and continued to express his desire to leave the Coast Guard due to his breathing problems. The applicant was asked to do 5 minutes of jumping jacks, and afterward his lungs were found clear. The applicant was then asked to run to the gym and back, which was about ¼ of a mile away. Once again, the applicant did not experience any wheezing and his lungs were clear. The physician noted, "No asthma today." The applicant was subsequently found Fit for Full Duty.

On March 8, 1991, after reporting to his first duty station, the applicant was seen by an emergency room physician who noted that the applicant had "asthma – preexisting condition. Discharge per Dr. [M] – HQ as admin." Upon examination, the applicant was found fit for separation from active duty. It was further noted that the defects listed on the medical report of examination did not disqualify the applicant from performing his duties, nor entitle him to disability benefits from the Coast Guard.

On March 14, 1991, the applicant's Commander notified him that he had initiated separation proceedings against the applicant due to his preexisting medical condition of asthma that occurred prior to accepting an enlistment into the Coast Guard.

On March 21, 1991, the applicant acknowledged receipt of his Commander's intent to discharge him through a First Endorsement and waived his right to submit a statement. The applicant stated that he did not object to his discharge.

On April 11, 1991, the district Commander issued a memorandum, wherein he requested that the applicant be separated from the Coast Guard for Convenience of the Government. The relevant portions of the memorandum are as follows:

1. I request that FA [applicant] be discharged for the convenience of the government as required by reference (a).
2. Fireman [applicant] indicated that he had asthma on the “Applicant Medical Prescreening Form” and “Report of Medical History” per enclosures (1) & (2), prior to enlisting in the Coast Guard on 10 September 1990. He experienced difficulty in breathing during basic training in [redacted], per enclosure (3), and again when he was assigned to CGC [redacted] per enclosure (4). The essential points of Fireman [applicant’s] physical condition are described in the recommendation of Dr. [B] and Dr. [N] of [redacted] Hospital, [redacted], which is attached as enclosure (5).
3. In my opinion, FA [applicant] erroneously enlisted. Also, the Coast Guard did not adequately diagnose his preexisting medical condition while he was undergoing basic training. This diagnosis would have led to discharge as required by reference (a). Dr. [M] of G-KDE concurs with my recommendation.
3. Fireman [applicant] has been serving on continuous active duty since 10 September 1990. Verified pay base date is 10 September 1990. He reported to Coast Guard Cutter [redacted] on 23 November 1990. His present expiration of enlistment is 9 September 1994.
4. No disciplinary action is pending.

On May 1, 1991, the Commandant issued a memorandum directing that the applicant be discharged for Convenience of the Government, pursuant to Article 12.B.12 of the Personnel Manual.

VIEWS OF THE COAST GUARD

On October 4, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant failed to submit a timely application and failed to show why it was in the interest of justice to excuse the delay. Here, the JAG stated that the applicant admitted on his application for relief that he discovered the alleged error or injustice approximately 30 years ago, but provided no explanation or reasoning to justify the delay in applying for relief. The JAG explained that the applicant was discharged in May 1991 and was provided with discharge paperwork showing that the reason for his separation was “Convenience of the Government,” but the applicant now, after 30 years, alleged that the reason for his separation was erroneous. The JAG argued that because the applicant does not indicate that this issue was discovered at a later time, the applicant’s discharge date of May 22, 1991, should be the date used to start the statute of limitations. Accordingly, the JAG argued that the applicant’s request for relief is untimely.

The JAG further argued that in order for the Board to waive the statutory timeliness, the Board must first do a cursory review of the merits to determine the applicant’s likelihood of success based on the merits. Here, the JAG stated that the applicant admitted that he had a preexisting condition of asthma at a time prior to his enlistment in the Coast Guard. The JAG argued that although the applicant claimed that his time in the Coast Guard made his conditions worse, the

applicant has not provided adequate evidence to show that the Coast Guard erred or committed an injustice by separating him for Convenience of the Government. Accordingly, the JAG claimed that the applicant has not provided good cause for his failure to timely file, and it is not in the interest of justice to waive the statute of limitations in this case.

The JAG further argued that even if the Board were to find good cause to waive the statute of limitations, the Doctrine of Laches applies and bars the applicant's claims for relief. According to the JAG, the Doctrine of Laches can be raised as an affirmative defense. The JAG explained that in order for the government to prevail, the government must prove (1) that there was unreasonable and unexcused delay, and (2) that such delay prejudiced the government. Here, the JAG argued the applicant's delay has been shown in his previous arguments to be unreasonable and unexcused, therefore, he turned his attention to the prejudice the Coast Guard has encountered as a result of the applicant's delay. The JAG argued that "defense prejudice" which is a prejudice due to loss of records, destruction of evidence, fading memories, or unavailability of witnesses, applies in the applicant's case.¹ The JAG explained that because of the many years that have passed since the applicant's discharge from active duty, it is not possible for the Coast Guard to go back and reconstruct the decisions of the medical professionals regarding their diagnosis and findings. The JAG further explained that it is impossible to now go back and question the multiple medical professionals that assessed the applicant's medical records. Therefore, the JAG argued that the Coast Guard is prejudiced in its inability to fully defend itself and properly assess the legitimacy of the applicant's claims.

The JAG stated that the Board presumes administrative regularity on the part of the Coast Guard, which includes the presumption that action was properly taken to diagnose the applicant's condition and come to the conclusion that it was a preexisting condition and not service connected as the applicant asked the Board to find. In addition, the JAG argued that absent evidence to the contrary, the Board presumes that the individual's processing the applicant for discharge and preparing his discharge paperwork followed the policy regarding his medical diagnosis and accurately processed the applicant for discharge under the policy for Convenience of the Government.

The JAG argued that the applicant has failed to carry his burden of presumption and persuasion. According to the JAG, the applicant failed to offer sufficient evidence that the Coast Guard committed an error or injustice by separating him for Convenience of the Government. The JAG stated that while the applicant submitted numerous Coast Guard medical records regarding his diagnosis of asthma, the applicant himself admitted that the asthma that caused his discharge was a preexisting condition. Furthermore, the JAG explained that the applicant expressly acknowledged and agreed that his condition was not a disability. Accordingly, the JAG argued that the applicant's condition is a preexisting condition and would not be considered a service-connected disability as alleged by the applicant. The JAG further argued that the policy contained within the Personnel Manual regarding a "Hardship" discharge makes it clear that this type of discharge is not applicable to the applicant's situation and is contemplated for issues of dependency and financial issues. Accordingly, the JAG argued that the applicant failed to that the Coast Guard committed an error or injustice by separating him for Convenience of the

¹ *Roberts v. United States*, 98 Fed. Cl. 130, 142 (2011), quoting *Cornetta v. United States*, 851 F.2d 1371, 1378 (Fed. Cir. 1988).

Government, instead of for hardship. Moreover, the JAG explained that the Personnel Manual provided that the applicant could be processed for separation for Convenience of the Government due to a “condition that, though not a physical disability, interferes with performance of duty.” The JAG claimed that the applicant acknowledged that his condition was not a disability, and his command believed that the applicant’s condition interfered with his performance of duty as evidenced by the specific authority cited in the request for discharge. Therefore, the JAG argued that the applicant failed to meet his burden to show that the Coast Guard erred or committed an injustice by separating him for Convenience of the Government.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 6, 2021, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. The Chair received the applicant response on November 1, 2021.

Regarding the applicant’s untimeliness, the applicant stated that he left the Coast Guard under duress. He claimed that he was afflicted with severe asthma and the weight of not succeeding in his lifelong dream of serving his country. The applicant alleged that he took his discharge paperwork and returned home, putting the paperwork in a trunk and forgetting about it until after speaking with a relative about the military. The applicant claimed the relative told him that he should try getting a VA loan to try and purchase a home. The applicant stated that he contacted the VA benefits hotline and was told that the Convenience of the Government narrative precluded him from obtaining a VA loan. At that point, the applicant alleged, he explained the situation to the VA representative, who told him he should apply for a change to his DD-214. The applicant claimed that after he gathered all of the information, he believed that this Board would see that the injustice and errors committed by Coast Guard physicians shocks the sense of justice and requires a correction.

The applicant stated that his Commander’s memorandum, dated March 23, 1991, stated that the applicant’s preexisting condition was not adequately diagnosed during basic training, and that the applicant should have been separated while at basic training. According to the applicant, while he was undergoing medical treatment in basic training, a pulmonary function test should have been performed, but was not, and giving him a fit for duty status without such a test was erroneous. The applicant alleged that the physicians at the training center failed to carry out their duties correctly, lawfully, and in good faith.

The applicant claimed that none of the prescribed policies for detecting and diagnosing asthma in a service member, laid out in Article 3.C. of the Coast Guard Medical Manual, were followed when it came to evaluating and diagnosing his preexisting asthma. The applicant alleged that there is no record of any procedural asthma tests performed prior to his entry, which according to the policies in Article 3.C. of the Medical Manual should have occurred. The applicant claimed that had the proper policies been followed, the applicant would have been found not fit for duty and a discharge would have been initiated in basic training, and he never would have been sent to his first duty station. The applicant alleged that he should have been medically discharged from his first duty station and given a disability aggravated discharge, but was erroneously denied a medical discharge.

The applicant alleged that pursuant to information found on the Mayo Clinic's website, there are multiple triggers that can aggravate asthma, including exercise, strong emotions and stress, cold air, head colds, and allergies, all of which he experienced while at basic training. As medical records indicate, the applicant stated that he clearly stated many times at the basic training infirmary that exercise was causing him to have shortness of breath and wheezing. The applicant claimed that asthma was the cause of his breathing problems but was never addressed or treated by the attending physicians as required by policy.² In addition, the applicant claimed that strong emotions and stress can contribute to the aggravation of asthma. The applicant claimed he received a second opinion from a board-certified allergy and immunology specialist, Dr. P, who stated that the protocols of the American Thoracic Society for exercise or post-exercise were not followed and that the tests the physician performed could not be relied upon to diagnose asthma. The applicant alleged that not following the protocols set forth in the American Thoracic Society for the diagnosis and treatment of asthma shows that the attending physicians failed to carry out their duties correctly, lawfully, and in good faith. The applicant argued that the Board should rely on the second opinion from Dr. P and concluded that the preexisting condition of asthma was retriggered and aggravated during basic training and was not diagnosed and treated properly.

Regarding the error in his discharge, the applicant alleged that he had been suffering from asthma for seven months at the time he signed his First Endorsement. The applicant stated that articles and research show that individuals who suffer from asthma, their cognitive ability is affected. Given this research, the applicant argued that he was unable to discern or indicate that his asthma was a disability. The applicant claimed that because of his asthma his mental and cognitive abilities were affected and he did not understand that he was signing paperwork agreeing that asthma is not a physical disability, nor did he understand that he was waiving his rights to make a statement of rebuttal. The applicant alleged that under the Americans with Disabilities Act, asthma is considered a disability. The applicant claimed that evidence shows that when he waived his rights and failed to contest his discharge he was suffering from impaired cognitive ability and was under extreme duress. Accordingly, the applicant argued that the Board should recognize that the applicant's Convenience of the Government discharge was erroneous due to his physical and mental disabilities as a result of his asthma.

The applicant claimed that evidence shows that he had no current asthma symptoms when he entered the Coast Guard and had not experienced any since he was 11 years old. Accordingly, the applicant argued that his asthma should be considered aggravated by his time in the Coast Guard. In addition, the applicant argued that his asthma was not properly diagnosed or treated. The applicant alleged that instead of treating his symptoms the treating physicians decided instead to question his motives, who has proved that was suffering from the side effects of asthma at the time. Accordingly, the applicant argued that the Board should take the evidence presented, namely that he had a preexisting condition, and his condition was aggravated by his time in the Coast

² The applicant relied heavily on the medical procedures found on the Mayo Clinic and Asthma and Allergy Foundation of America's (AAFA) website. However, the Coast Guard is not bound nor is it required to follow those procedures recommended by these organizations but has its own policies and procedures that govern. Accordingly, his arguments regarding the Mayo Clinic and the AAFA will not be summarized here.

Guard. Finally, the applicant argued that the Coast Guard failed to recognize that his asthma was a disability.³

In conclusion, the applicant stated that he was discharged from the Coast Guard on May 22, 1991, due to his aggravated severe asthma. He explained that he returned to his home where he sought medical treatment. The applicant claimed that returning to a desert climate after his asthma had gone into remission at age 11 did not help and remained a problem and uncontrolled until 2001. The applicant claimed he has to continue using medication to control his asthma and that since his time in the Coast Guard, his asthma has not gone into remission and should be considered a disability.

To support his application, the applicant submitted a letter by his current physician, who confirmed the applicant had asthma and a letter from Dr. P who provided a second opinion on the Coast Guard's handling of the applicant's asthma. Dr. P wrote the following:

I reviewed the documents you submitted including the description of your concerns/complaints and scanned health record (2 pages plus pre- and post-exercise spirometry results). To summarize, you report a diagnosis of asthma pre-existing to entering the Coast Guard in 1990 with asthma symptoms re-emerging during basic training. According to your Second Opinion questionnaire and the medical record documentation you submitted, you experienced difficulty breathing with wheezing. Triggers included exercise, exposure to cold air, and possibly a viral upper respiratory infection (URI), described as a "head cold." Wheezing was documented by a provider you saw post-exercise during one exam, but no wheezing was detected on another day you were seen. The spirometry tests show normal baseline lung function with a 9.5% decrease in FEV1 after exercise, which is suggestive but not diagnostic of exercise-induced asthma. However, it should be noted that, based on what was documented of your exercise challenge, it appears the American Thoracic Society's recommended protocol was not followed for either intensity of exercise or post-exercise serial spirometry measurements, so I cannot say that the spirometry results prove or disprove an acute asthma episode at that time. Note also that normal spirometry results do not rule out asthma.

Asthma is defined as airway hyperresponsiveness, airflow limitation, respiratory symptoms, and disease chronicity. The airway hyperresponsiveness and airflow limitation produce wheezing and the sensation of difficulty breathing. Exercise, cold air, and URIs are common triggers for asthma symptoms. According to the Expert Panel Review-3 (EPR-3), asthma and its persistence begin early in life. In other words, it's common for asthma to develop early and to continue into adulthood. It may seem to resolve if one's triggers are removed, but if the triggers are re-introduced (or change), asthma symptoms recur since the underlying asthma never went away. It is not unusual for an individual's asthma course to wax and wane over a lifetime.

Recommendations:

I recommend you continue under the care of your current medical team who is directing your asthma management.

Answers to patient's questions:

³ The applicant repeated many of his arguments, claims and evidence throughout his response to the Coast Guard's advisory opinion. Namely that the proper tests were not completed when he reported his symptoms in basic training, that he did not receive the proper treatments, that his asthma was preexisting and aggravated by his time in the Coast Guard, and that his asthma should have been considered a disability. With these claims the applicant repeated many of his arguments and evidence and therefore, those arguments considered redundant and adequately addressed in other sections of the applicant's response will not be summarized.

Based on the information you provided, it is not my opinion that your asthma “came back” but rather your underlying, pre-existing asthma was re-triggered by the exercise, cold air, and URI you experienced at basic training. Your asthma has presumably continued to be triggered if you require a regular controller medication (Advair). I do not believe that any treatment (or lack of) at that time contribute to your current state.

APPLICABLE LAW AND POLICY

Under Article 12.B.15. of the Personnel Manual, COMDTINST M1000.6A (September 2000), provides the following guidance on separating a service member separated due to a disability:

12.b.15.a. Medical Board. A medical board shall be held in the case of an enlisted member when any condition listed in Article 17.B.4. exists or competent authority directs. Chapter 17.B. contains procedures for the medical board’s report. If a member has remained in the Service with his or her written consent beyond the enlistment expiration under Article 12.B.11.f., the report shall clearly indicate the following:

1. Patient’s status (held beyond normal enlistment expiration date or not).
2. Date of admission to sick list.
3. Whether the member concerned is physically qualified for discharge.

12.B.15.b. Discharge for Physical Disability. Commander, (CGPC-epm-1) may direct or authorize a discharge for physical disability not incurred in or aggravated by a period of active military service through final action on a physical evaluation board under the following conditions:

Article 12.B.15.c.

1. A medical board has expressed the opinion that:
 - a. The member does not meet the minimum standards for retention on active duty,
 - b. The member is unfit for further Coast Guard service by reason of physical disability, and
 - c. The physical disability was neither incurred in nor aggravated by a period of active military service.
2. The member’s commanding officer and district commander concur in the board’s opinion.
3. The member has been fully informed of his or her right to a full, fair hearing and the member states in writing he or she does not demand such a hearing.

With regard to the correct separation code to be entered in Block 26 (Separation Code) of members’ DD 214, the Coast Guard Separation Program Designator (SPD) Handbook states that the separation code “JFM”—Disability, Existed Prior to Service—is assigned to members who are involuntarily discharged directed by established directive (no board entitlement) for physical disability which existed prior to entry on active duty and was established by a physical evaluation board. In addition, the only reenlistment code authorized for members discharged to physical disability that existed prior to service is RE-3.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application filed by the applicant was not timely. To be timely, an application for the correction of a military record must be submitted to the Board within three years after the alleged error or injustice was discovered.⁴ The record shows that the applicant received and signed the CPEB's findings on February 26, 2002. The record further shows that the applicant signed and received his DD-214 on April 22, 2002, and it states that his disability had pre-existed his enlistment. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record as early as February 26, 2002, and no later than April 22, 2002, and his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁵ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyzing both the reasons for the delay and the potential merits of the claim based on a cursory review"⁶ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."⁷ Pursuant to these requirements, the Board finds the following:

a. Regarding his delay in filing his application, the applicant explained that he threw his discharge paperwork in a trunk and only pulled it out in 2020 after learning that he might qualify for a VA home loan. After learning his narrative reason for separation prevented him from obtaining a VA home loan the applicant was prompted to apply for a correction to his record in order to qualify for a VA home loan. The Board finds that the applicant's request for consideration is not persuasive because he has failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly or that it is in the interest of justice to waive the statute of limitations.

b. A cursory review of the merits of this case shows that the applicant's claim lacks potential merit. Not only has the applicant failed to submit evidence sufficient to overcome the presumption of regularity afforded to the Coast Guard's records and its officials, but the record shows that the applicant accepted the Coast Guard's discharge on

⁴ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁵ 10 U.S.C. § 1552(b).

⁶ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁷ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

March 21, 1991, waived his rights to a submit a statement, and specifically stated that he did not object to his separation from the Coast Guard. Furthermore, medical records from the applicant's time at basic training, provided by different medical professionals, indicated that the applicant expressed a strong desire to leave the Coast Guard because of his breathing problems. The Board also notes that most of the medical information that resulted in the applicant's discharge was reported by the applicant himself to his doctors, and at no time during the applicant's medical evaluations did he object to or contest the information that was recorded by the medical professionals. Moreover, the applicant admitted to having a preexisting asthma condition prior to his entry into the Coast Guard and yet enlisted in the Coast Guard knowing that military service would require rigorous and frequent exercise, likely retriggering his asthma. This is supported by the second opinion obtained by the applicant from Dr. P, who stated that the applicant's asthma did not "come back" when he was in the Coast Guard but was only retriggered when the applicant introduced rigorous activity back into his life. Dr. P did not believe that any treatment, or lack thereof, while the applicant was in the Coast Guard contributed to his current state as alleged by the applicant.

5. Accordingly, the Board will not excuse the applicant's untimeliness or waive the statute of limitations to conduct a more thorough review of the merits. The applicant's request should therefore be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former SA [REDACTED] [REDACTED] USCG, for the correction of his military record is denied.

September 1, 2023

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
Date: 2023.09.29 17:10:22 -04'00'

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
Date: 2023.10.02 13:40:28 -04'00'

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
Date: 2023.09.29 17:46:39 -04'00'

[REDACTED] [REDACTED]