

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2015-055**



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**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 and military records on February 27, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 18, 2015, 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 is a World War II veteran who was honorably discharged from the Coast Guard on May 2, 1944. He asked the Board to correct his record to show that he was discharged due to a disability that he sustained in the line of duty, instead of a disability that pre-existed his enlistment. The applicant alleged that he sustained the injury that caused his discharge while abandoning ship when his ship, the USS [REDACTED] burned. The applicant stated that he was treated for this injury for an extended period in a hospital on Staten Island until March 1944, just before he was discharged.

The applicant, who was represented by his son, stated that he discovered the alleged error on June 23, 2014, when he was applying for veterans' benefits at the Department of Veterans' Affairs (DVA) and was advised to seek this correction to maximize his benefits.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard Reserve as an apprentice seaman on April 6, 1942, and was immediately called to active duty. He was 18 years old. Upon completing initial training, he was assigned to the USS [REDACTED] a transport ship, and reported aboard on May 5, 1942. On July 9, 1942, he advanced to seaman second class.



[REDACTED] was returning to New York after completing a convoy to Great Britain when a fire broke out aboard ship. The fire spread rapidly and the crew and passengers were taken aboard two other ships that were also returning to New York. As the fire continued to burn, the [REDACTED] where the fires were finally extinguished. The crew and passengers returned to New York on the other ships.

On October 5, 1942, the applicant was reassigned to the Captain of the Port of New York. He advanced to seaman first class on May 5, 1942, and to coxswain on July 31, 1943.

From November 22 to 24, 1943, the applicant was treated for "Myositis, Lumbosacral Region."<sup>1</sup> He told the doctor he had had pain in his back for six months, but there was no history of injury. The applicant stated that he was unable to sit down because of the pain." The doctor ordered an xray of the applicant's lumbosacral spine and reported that the result was negative. The applicant had a full range of motion in his spine, good muscle control, and no difficulty with squatting. The doctor recommended "Deep Therapy. Static Sparks to lumbosacral region."

Hospital records dated January 31, 1944, state that the applicant had been admitted and was "under observation for sciatic neuropathy, left" and "psychoneurosis, anxiety state." Xrays of the lumbosacral spine and pelvis were negative. The medical notes state that the applicant was admitted with complaints of

shooting pains in back. Terrific cramping in calf of left leg. Lost 8 lbs. in last 2 weeks. Fainted twice during the last week. ... Pt first noticed pain in back about 7 months ago. Pain came on gradually and he can't recall any one incident which precipitated it. It has just become progressively worse, so the last 3 - 4 days the pt. has had to limp. Pain originally started in left hip and went down into left calf where "cramp" developed—muscles didn't get hard as in ordinary cramp but felt like a hard strain. Has had no pain in or down right calf, but area over right side of sacrum has bothered him. Pain is constant ache and give pt much pain. Sometimes it shoots like a knife. Just over sacral area, not in leg. Pt. has had a "cramp" here in right leg. Exam. Showed no muscle cramp or spasm but some tenderness over popliteal nerve. Pain made much worse by coughing or sneezing. Pain is worse when pt. gets out of bed in morning, often takes him 5 minutes to get up, the pain is so bad. Pain is worse when pt is sitting - pain over left sacral area. Pt. changes from left to right buttock when he must sit for any length of time. Last few days it has bothered him while walking. Up until 3 - 4 days ago terrific pain pt. got when sitting down was relieved by getting up and walking. Doesn't believe he had any pain until 4 - 5 days ago when walking. ...

Pt. never fainted before in his life until last Saturday (2:30 PM) when standing in mess hall, he got dizzy and made for the door to get out and get air staggering, falling to knees outside door. Didn't pass out completely. Regained feet and felt dizzy for about an hour. Went to sick-bay and legs collapsed again and he crawled into the sick-bay. In sick-bay mate gave him water and ammonia and took B.P. (127/?). Walked out of sick-bay in about 15 minutes and felt dizzy for

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<sup>1</sup> Myositis is inflammation of the muscle.

about an hour. Pt. then felt O.K. and stayed on pier for weekend. No more dizzy spells or feeling faint. ...

Pt. states he has few worries and doesn't mind his work in the CG. His father has had sciatica for 6 or 7 yrs. Going through all kinds of unsuccessful treatments. ... Pt. walks with a slight limp favoring left side. No ataxia.

The applicant was diagnosed with sciatica neuralgia. He was treated with "sedation, epidural injection, typhoid fever therapy, and physiotherapy with infra-red and massage. Hot box therapy was also used. Condition unimproved." The doctor noted that the applicant had "reacted badly to each and every type of therapy given" and recommended "indefinite sick leave pending Board of Survey and Medical Discharge."

According to the report of a Medical Board of Survey dated March 27, 1944, the applicant was admitted to the hospital on January 31, 1944, "with complaint of pain radiating from the left hip down the left lower extremity to the ankle with pain being worse on sitting. There is history of dizziness and fainting feeling with legs collapsing under him few days prior to entry to this hospital. Father had sciatic syndrome for six to seven years, going through many unsuccessful types of treatment. ... X-ray of the lumbosacral spine and pelvis were negative. Patient has been given a course of epidurals, typhoid and hot box, with only temporary improvement." The board stated that the applicant's condition had existed prior to his enlistment and was not incurred in the line of duty and recommended that the applicant be discharged.

On April 4, 1944, the medical board report was forwarded to the Commandant with a recommendation that the applicant be discharged. On April 12, 1944, the Coast Guard issued separation orders for the applicant to be discharged "with an ordinary discharge under honorable conditions by reason of physical disability, existing prior to enlistment." The orders noted that the "discharge certificate shall bear the following notation: 'Discharged by reason of physical disability, existing prior to enlistment.'"

On May 2, 1944, the applicant was discharged. Various documents in his record state that he was discharged "by reason of physical disability, existing prior to enlistment." He had served 2 years, 27 days on active duty.

On May 3, 1944, the Coast Guard forwarded the applicant's request for a pension to the Veterans' Administration along with copies of his medical records and the Medical Board of Survey. The letter states that the applicant "has been issued a certificate of discharge, under honorable conditions, by reason of physical disability, existing prior to his enlistment."

### **VIEWS OF THE COAST GUARD**

On August 20, 2015, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG stated that the application was not timely filed and so should receive only a cursory review. In addition, the JAG argued that the applicant "has failed to meet his burden of proving by a preponderance of the evidence that there is an error or injustice in the characterization of his father's discharge." The



JAG stated that although the applicant claimed that he incurred his injury when abandoning ship when the USS Wakefield burned, there is no evidence supporting this claim, and “[t]he competent medical authorities conducted a medical board and determined that the member’s disability was not incurred in the line of duty.” The JAG noted that the applicant failed to prove that the board was conducted improperly, and the Coast Guard is entitled to a presumption of regularity. Therefore, the JAG recommended denying relief.<sup>2</sup>

### APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 31, 2015, the applicant disagreed with the Coast Guard’s recommendation and argued that he would have been enlisted if [REDACTED] any evidence of a pre-existing medical condition. He alleged that the records show that he [REDACTED] extensively treated for almost two months at the hospital “starting immediately after the fire on the [REDACTED] when there was never any evidence of a condition or injury before.”

[REDACTED]

The applicant stated that the JAG’s proposed denial of his request is preposterous. He stated that he has suffered increasing chronic pain as he has aged and is now bed-bound and barely able to stand. He stated that he may need additional medical treatment or an extended care facility, which he cannot afford in part due to the erroneous characterization of his injury.

The applicant stated that he never knew that his injury was characterized as pre-existing until recently when his son was going through his papers and told him. He alleged that it was his unawareness of the characterization of his injury that caused the delay of his application.

### 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.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record.<sup>3</sup> Although the applicant claimed that he only recently discovered that his injury was characterized as pre-existing, numerous documents in his record and the discharge certificate he was issued state that his disability was pre-existing. After more than 70 years, he may have forgotten the contents of his records, but the Board is not convinced that the applicant failed to read his discharge papers either when he received them or during the subsequent years. Therefore, the Board finds that his application is not timely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>4</sup> In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the

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<sup>2</sup> The JAG also noted that the applicant’s son, who signed the application, had not submitted a copy of his Power of Attorney with the application, but a Power of Attorney was submitted with the applicant’s response to the advisory opinion.

<sup>3</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>4</sup> 10 U.S.C. § 1552(b).



Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”<sup>5</sup> 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.”<sup>6</sup>

4. The applicant provided no justification for not challenging the characterization of his disability sooner.

5. The Board’s cursory review of the merits shows that the applicant was a crew-member of the USS [REDACTED] when it burned in [REDACTED] and its crew was transferred to two other ships that were returning to New York with the [REDACTED]. The applicant’s medical records contain no documentation of an injury at or near the time the [REDACTED] burned. The first medical records of the applicant’s disability are dated November 22 to 24, 1943, more than fourteen months after the [REDACTED] burned. He complained of having had back pain for about six months. He did not attribute his back pain to a specific injury or incident but told his doctors that his father had suffered from this condition for six or seven years and received no relief from available treatments. The applicant was then hospitalized from January 31 to March 27, 1944. His diagnosis upon discharge was sciatica, which was not amenable to treatment.

6. The doctors on the Board of Medical Survey ruled that the applicant’s disability had pre-existed his enlistment. Their reasoning is not in the record, but they specifically noted that the applicant did not attribute his pain to any specific incident and that his father had suffered from the same disability for six or seven years. Therefore, it appears that they considered his sciatica to be an inevitable, congenital condition, not caused by his military service but inherited from his father, and it may be that congenital conditions were by policy considered to be pre-existing. The Board does not have the medical policies in effect in 1944, but under current policies in Article 2.C.5. of the Physical Disability Evaluation System Manual, a congenital condition may be characterized as pre-existing.

7. Under the Board’s regulations at 33 C.F.R. § 52.24(b), the Board “begins its consideration of each case presuming administratively regularity on the part of Coast Guard and other Government officials. The applicant has the burden of proving the existence of an error or injustice by a preponderance of the evidence.” In light of this rule and the lack of evidence clearly showing that the Board of Medical Survey erred in making the determination that the applicant’s disability was “pre-existing”<sup>7</sup> under the policies in effect at the time, the Board finds that the applicant’s claim cannot prevail.

8. Therefore, the Board finds that it is not in the interest of justice to excuse the applicant’s very long delay and waive the statute of limitations. The applicant’s request should be denied.

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<sup>5</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>6</sup> *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

<sup>7</sup> The Board notes that if the applicant’s benefits have been limited by the DVA because of the Board of Medical Survey’s determination that his sciatica was pre-existing, the applicant may be able to appeal that determination through the Board of Veterans’ Appeals. 38 U.S.C. § 7104.

**ORDER**

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

December 18, 2015

Date

