

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-082



FINAL DECISION

This proceeding was conducted according to 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 April 10, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 5, 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 correct her record to show that she received a medical separation in 1990, instead of an administrative separation due to a diagnosed personality disorder. She stated that while in the Service she had a procedure performed on her cervix to remove pre-cancerous tumors. She was advised that it was preventive surgery to prevent cervical cancer. The day after this surgery, her command advised her that she was being discharged for unsuitability, although she was still under her doctor's care. The applicant stated that in 2000, ten years after her discharge, she was diagnosed with cervical cancer, and her condition has left her unable to provide for her family. The applicant alleged that her preventive surgery in 1990 actually caused her cancer in 2000, when she had to have a hysterectomy.

The applicant stated that she discovered the alleged error in February 2000 and argued that it is in the interest of justice for the Board to consider her application because the injustice has affected her and her family and left her jobless and unable to provide for her family.

SUMMARY OF THE RECORD

In January 1988, the applicant enlisted on active duty. She was discharged ten days later when the Coast Guard found that she had been erroneously enlisted because she was a single parent of three without a child guardianship arrangement.

On May 23, 1988, the applicant reenlisted on active duty after her mother was granted custody of her children. She completed recruit training and was assigned to a support unit in [REDACTED]

On June 28, 1989, the applicant was counseled on a Page 7 about financial responsibility and advised that how she handled her financial affairs “provides a reliable indication of your general character and trustworthiness, and reflects on the U.S. Coast Guard.”

On July 18, 1989, the applicant was again counseled on a Page 7 about repeated financial problems and “indebtedness with no indication of satisfactory progress” in paying her debts. The applicant stated that her financial problems were due to her husband’s temporary unemployment and would end because he had started a new job.

On October 16, 1989, the applicant’s command was notified that she had bounced a check for \$66.69 at the commissary. On October 19, 1989, the applicant was again counseled on a Page 7 about her repeated failure to pay debts and about her checks being dishonored. She was advised that bouncing checks could result in her being discharged for misconduct or for unsuitability due to her financial irresponsibility.

On November 22, 1989, the applicant had a pap smear with abnormal results. She was referred for a biopsy.

On February 26, 1990, the applicant was counseled about not reporting for duty on time because of family problems and failing to notify her supervisor when she would be late.

On February 28, 1990, the applicant underwent a cervical biopsy and was diagnosed with mild dysplasia, a condition that may become cancerous if not treated, and squamous metaplasia, a benign condition. She was advised to make an appointment for cryosurgery or laser surgery to remove the dysplasia on her cervix.

On March 24, 1990, the applicant was arrested and charged with “assault (domestic) involving dependent spouse.” She was referred for marriage counseling.

On April 18, 1990, the applicant underwent a psychiatric examination at the Naval Medical Center in Bethesda, Maryland. The psychiatrist reported that the applicant provided vague responses to questions about her personal history or stated that she could not remember the answers. However, he noted, she “has had a career marked by administrative and interpersonal difficulties.” The psychiatrist reported that during basic training, she had trouble passing the swimming test and “was held back from graduation twice.” She had reported for duty at her first unit in July 1988 and, after remarrying, “had problems with marital discord which resulted in police intervention.” The psychiatrist stated that the applicant had separated from her husband and had been repeatedly counseled about financial problems. Her performance evaluations were below average. The applicant had regained custody of her children and wanted to advance in the Coast Guard but stated that she disliked the “authoritarian aspects” of the military and “doesn’t understand the reason for its many rules and regulations.” The psychiatrist reported that the applicant saw her many personal problems as the result of her being “the victim of circum-

stances.” The applicant complained that she “had difficulty in getting people to understand her problems and that her problems were different from those of most people in the military.”

The psychiatrist found that the applicant’s mood was good and her cognitive function was intact, with no evidence of psychosis or thought disorder, but her insight was minimal and her judgment and impulse control were poor. The psychiatrist diagnosed her with a “Personality Disorder Not Otherwise Specified with Borderline, Histrionic and Narcissistic Features,” which is not a physical disability, but recommended that she be administratively discharged because her personality disorder would likely cause continued interpersonal problems and adversely affect “her ability to function on active duty.”

On May 21, 1990, the applicant missed her appointment at the Naval Medical Center for laser surgery to remove her dysplasia.

On May 22, 1990, the applicant was counseled on a Page 7 about “her extensive personal use of the telephones in the facilities engineering log office.” In addition, she was counseled on another Page 7 about missing her appointment for surgery.

On May 31, 1990, the applicant received a performance evaluation with low marks, including a very low mark for “conduct.” She was counseled in writing on a CG-3307 (“Page 7”) that Army authorities had reported that two civil disturbances had been “ruled against her” and that her attitude towards her colleagues was poor and disrespectful. Her supervisor reported that she “tends to hear what she wants to and does what she thinks should be done. Also, she does not work well with others and must be assigned jobs whereby she works by herself.” She was spending too much time on the phone on personal calls. In addition, one morning, when asked about her children, she reported that they were “fine,” when in fact she had not been home the night before, one child had been arrested for stealing a vehicle, and the younger two were in police custody. The applicant wrote a note on this Page 7 claiming that she had been helping her abusive spouse move out of her quarters the night before and had asked her neighbors to keep an eye on her children.

On June 4, 1990, the applicant underwent laser surgery to remove the dysplasia from her cervix.

On June 7, 1990, the applicant’s commanding officer (CO) advised her on a Page 7 that the Army housing authority had requested her immediate removal from Base housing because the police had been called to her quarters for a violent domestic disturbance on January 6, 1990, and again on March 24, 1990. In both cases, the Base military police had charged her with assault, and she had been directed to undergo counseling. Then after her son was arrested for vehicle theft on April 2, 1990, the police investigation had revealed that she had left her three children, aged 4, 6, and 15, unsupervised overnight. The applicant was again referred for counseling.

Also on June 7, 1990, the applicant’s CO advised her that he was initiating her discharge from the Coast Guard for unsuitability based on her diagnosed personality disorder, her domestic disturbances and lack of judgment in leaving her children alone overnight, her financial irrespon-

sibility, and her repeated failure to keep medical appointments and to show up for work on time. The CO advised her that she had a right to legal counsel, to disagree with the proposed discharge, and to submit a statement. In response, the applicant signed a statement acknowledging the notification and requesting a consultation with legal counsel. She submitted a statement, dated June 8, 1990, in which she requested retention, attributed her financial problems to her husband losing his job, and denied that her children were ever left alone overnight. She stated that she had hired a babysitter. She also denied intentionally skipping medical appointments and failing to notify her supervisor when she would be late.

The CO sent the Commandant a memorandum recommending that the applicant be discharged for “unsuitability.” The CO stated that the applicant had been involved in domestic disturbances in which the Base police were called to her house. In one case, she had left her minor children unattended overnight, her son was arrested for car theft, and her younger children were taken into temporary police custody. The CO noted that the applicant had also been counseled about personal financial problems three times, about skipping medical appointments, about not showing up for work, and about making personal calls on Government phones. Because of the domestic disturbances, the CO stated, the Base housing authority had requested her immediate removal from Base housing, and the applicant was referred for a psychiatric evaluation. On April 18, 1990, a psychiatrist had diagnosed her with a “Personality Disorder Not Otherwise Specified with Borderline, Histrionic and Narcissistic Features.” The CO noted that the psychiatrist had reported that the applicant’s “personality disorder will continue to adversely impact [her] ability to function on active duty and recommended she be separated from the Coast Guard.”

On June 14, 1990, the Commandant ordered the applicant’s command to discharge her for “unsuitability” pursuant to Article 12.B.16. of the Personnel Manual.

On June 28, 1990, the applicant underwent a physical examination pursuant to her pending discharge and was found fit for duty. On her Report of Medical History, the applicant wrote, “I am in perfect health and aren’t taking any medication. Pending post-op care only. I need a follow-up on laser surgery for CIN of cervix.” The doctor reported that the applicant was fit for duty, for sea duty, and for separation.

On July 5, 1990, the applicant underwent a post-operative follow-up examination. No problems were noted. She was advised to have another pap smear in three months.

On July 13, 1990, the applicant signed a form disagreeing with the finding that she was fit for duty and noting that she would submit a statement, but no statement is in the record.

On July 13, 1990, the applicant received an honorable discharge for “unsuitability” with an RE-4 reentry code, meaning that she was ineligible to reenlist, and a JMB separation code, meaning that she was involuntarily discharged due to a diagnosed personality disorder pursuant to Article 12.B.16. of the Personnel Manual.

In 1996, the applicant applied for disability benefits from the Department of Veterans Affairs (DVA) based on her abnormal pap test and surgery for dysplasia. The DVA denied bene-

fits, noting that the applicant had undergone a pap test following her discharge in 1994 with normal results.

In 2001, the applicant underwent a partial hysterectomy after being diagnosed with cancer. In February 2006, she applied to the DVA for disability benefits for her past cervical cancer. In November 2006, the DVA denied service-connection. The DVA noted that she had been diagnosed with cervical dysplasia while on active duty, “which is not the same as cervical cancer.” The DVA noted that dysplasia may or may not develop into cancer, that the applicant did not have a current diagnosis of cancer, and that the applicant had “no diagnosis of a chronic disabling condition.”

The applicant refiled her claim in 2008, but the DVA again denied her request. The DVA further explained that “[c]ervical dysplasia is neither a disease nor injury, but a cellular abnormality of the cervix revealed by a PAP smear. It is an essentially non-disabling laboratory finding.” The DVA also noted that the applicant had “a history of normal pap smears to include one from February 27, 2006.”

VIEWS OF THE COAST GUARD

On September 11, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief and adopting the findings and recommendations provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the application is not timely and “therefore should not be considered by the Board beyond a cursory review.” PSC argued that the applicant had not justified her long delay in applying to the Board.

PSC stated that under the Physical Disability Evaluation System (PDES) Manual, “the sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank, or rating because of disease or injury incurred or aggravated through military service.” In addition, continued performance of duty until separation for reasons other than physical disability creates a presumption of fitness for duty that may only be overcome if (a) a member, because of a disability is physically unable to perform her duties adequately or (b) an acute, grave illness or injury occurs immediately prior to or coincident with processing for separation for reasons other than physical disability. PSC stated that the applicant’s records do not support her claim that she was unfit for duty and should have been medically separated.

PSC stated that under the Medical Manual and the Personnel Manual, a diagnosis of personality disorder is grounds for an administrative separation for unsuitability, not for a medical separation. Therefore, PSC argued, the applicant was eligible for an unsuitability discharge after she was diagnosed with a personality disorder. PSC noted that the applicant received due process because she was notified of the reasons for her discharge, of her right to consult counsel, and of her right to object and to submit a statement, which she did.

PSC stated that although the applicant was diagnosed with and treated for dysplasia while on active duty, she continued to perform her duties and even noted on her Report of Medical History for her separation examination that she was in good health. PSC stated that the records do not show that the applicant's condition was unfitting for military service and so she was not entitled to a medical discharge. Instead, PSC concluded, she was properly discharged for unsuitability and received all due process.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 17, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to submit a written response within thirty days. No response was received.

APPLICABLE REGULATIONS

Medical Manual (COMDTINST M6000.1B)

The Medical Manual in effect in 1990, COMDTINST M6000.1B, governed the disposition of members with medical conditions. According to Article 3.B.3.a., during the medical examination a member must undergo prior to separation, "the examiner shall consult the appropriate standards of this chapter to determine if any of the defects noted are disqualifying for the purpose of the physical examination."

Article 3.F. lists medical conditions that "are normally disqualifying" for administrative discharge in the Service. Dysplasia is not listed as a disqualifying condition, but malignant tumors are. Article 3.F.16.c. states that personality disorders "render an individual administratively unfit, rather than unfit because of a physical impairment. Interference with performance of effective duty will be dealt with through appropriate administrative channels (see Section 5-B)." Article 5.B.2. states that members with diagnosed personality disorders "should be processed per Article 12-B-16, Personnel Manual."

According to Article 3.B.6., which is entitled "Separation Not Appropriate by Reason of Physical Disability," "[w]hen a member has an impairment (in accordance with section 3-F of this manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation."

According to Article 3.F.1.c., "[m]embers are ordinarily considered fit for duty unless they have a physical impairment (or impairments) which interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties."

PDES Manual (COMDTINST M18050.2B)

The PDES Manual in effect in 1990, COMDTINST M18050.2B, governed the separation of members due to physical disability. Article 2-C-2 of the PDES Manual states the following:

- b. The law that provides for disability retirement or separation (Chapter 61, Title 10, U.S. Code) is designed to compensate members whose military service is terminated due to a physical

disability that has rendered the member unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply.

(1) Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the service member, because of disability, was physically unable to perform adequately the duties of office, grade, rank or rating; or

(b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty.

(2) Service members who are being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating.

c. If the evidence establishes that service members adequately performed the duties of their office, grade, rank or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments.

Personnel Manual (COMDTINST M1000.6A)

Article 12.B.16. of the Personnel Manual in effect in 1990 authorizes enlisted personnel with diagnosed personality disorders to be discharged by reason of unsuitability at the direction of the Commandant. Article 12.B.16.d. provides that every member discharged for unsuitability with less than eight years of military service shall be notified of the reason she is being considered for discharge and shall be allowed to submit a statement on her own behalf.

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 section 1552 of title 10 of the United States Code.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in her record. 10 U.S.C. § 1552(b). The applicant was administratively discharged for unsuitability in 1990 and was diagnosed with cervical cancer in 2000. Therefore, her application is untimely.

4. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further instructed 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." *Id.* at 164, 165. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

5. The applicant argued that it is in the interest of justice for the Board to excuse the untimeliness of her application because of the effect her lack of a medical separation has had on herself and her family. The Board finds that this argument is not compelling because she has not shown that anything prevented her from pursuing her claim promptly.

6. The Board's cursory review of this case shows that the applicant's claims cannot prevail. While she underwent laser surgery to remove her dysplasia on June 4, 1990, there is no evidence that she was physically unfit for duty at the time of her discharge on July 13, 1990, and she wrote on her Report of Medical History for her pre-separation physical examination on June 28, 1990, that she was "in perfect health." The only legal basis for a medical discharge or retirement is having a disability that renders one unfit to perform one's military duties, and there is no evidence that in 1990, the applicant was disabled and unfit to perform her duties. The record shows that she was discharged for unsuitability because she had been diagnosed with a personality disorder after multiple instances of domestic disturbance and financial irresponsibility and after she had repeatedly been late to work and missed an appointment for surgery. The psychiatrist reported that her personality disorder was interfering with her performance of duty, and under Article 5.B. of the Medical Manual and Article 12.B.16. of the Personnel Manual, members with diagnosed with a personality disorder that interferes with their performance of duty should be administratively discharged. The record further shows that the applicant received due process under Article 12.B.16. of the Personnel Manual because she was notified of the basis for her discharge and afforded an opportunity to consult counsel and to submit a statement objecting to her discharge, which she did. The record contains no evidence supporting the applicant's claim of error or injustice, and she was not diagnosed with cancer until a decade after her discharge from the Coast Guard.

7. Accordingly, the Board will not excuse the untimeliness of the application or waive the statute of limitations. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

February 5, 2016

