

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-137



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 completed application, including the applicant's medical records, on May 31, 2016,¹ and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 23, 2017, 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 retired [REDACTED] asked the Board to make a determination that he was not given a proper physical examination prior to his retirement and to state that had he received a proper physical, it would have noted several medical conditions. The applicant stated that he received a periodic examination on December 11, 1997, and retired from active duty on [REDACTED]. The applicant now suffers from hip bursitis and lower back pain as well as sleep apnea. The applicant has also experienced hearing loss and tinnitus, but he has received a 10% disability rating for these symptoms. He stated that the Veterans Administration (VA) denied service connection for his bursitis and back pain based on his medical records. He claimed that if he had received a physical examination within thirty days of retirement, the VA would not have denied these two disability claims.

The applicant claimed that according to COMDTINST M6000.1E, Chapter 12.B.2., a member must receive a physical examination within thirty days of his last working day. He argued that his December 11, 1997, physical examination did not meet the requirements that must be met prior to a member's discharge or retirement from the Coast Guard. In addition, he noted that the Coast Guard issued a Proceedings Safety Council Message noting that Coast Guard Marine Inspectors, a position held by the applicant while on active duty, often contract hip

¹ The applicant's DD 149 was received on July 3, 2013.

bursitis due to the physical demands. He stated that he is now in constant pain, and he is being denied disability by the VA to which he is entitled as a retiree and a veteran. Regarding timeliness, the applicant stated that he discovered on June 11, 2013, that the Coast Guard was required to give the applicant a physical prior to his retirement.²

In support of his application, he submitted his DD Form 214 and physical examination from December 11, 1997, both of which are summarized below in the Summary of the Record. He also submitted a portions of COMDTINST M6000.1E, a Statement in Support of Claim from the applicant sent to the VA, an Evaluation of Disability Results from the VA, and the Proceedings Safety Council Message.

The applicant provided portions of COMDTINST M6000.1E, the Coast Guard Medical Manual. Chapter 3.A.7.c. states that a “complete physical examination is required within 12 months for retirement, involuntary separation, or release from any active duty of 30 days or longer.” The applicant also highlighted the portion stating that “[f]or members enrolled in the Occupational Medical Surveillance and Evaluation Program (OMSEP), see Chapter 12 of this Manual for guidance.” The applicant provided portions of Chapter 12 as well, which pertains to the OMSEP. Chapter 12.B.2.d. states that exit physical examinations must be completed within thirty days of the last day of employment. The introduction to Chapter 12, which the applicant did not provide, notes that the OMSEP replaces the then-current version of this program, which was known as the Occupational Medical Monitoring Program (OMMP). COMDTINST M6000.1E became effective on April 29, 2011.

The applicant provided a form he sent to the VA in support of his application for disability compensation. The Statement in Support of Claim contains the following:

On May 21, 2012 I filed a VA claim that I had been diagnosed with Bursitis by Dr. [K, who] then sent me to Dr. [I]...Dr. [I] advised me that I had Bursitis located in both my right and left hips. This condition was aggravated when walking due to the Bursa sac becoming inflamed. When asked, I advised Dr. [I] that I had been on Anti-Inflammatory drugs twice a day for several years but the pain had become intolerable when I walked. I now had trouble sleeping at night or even sitting for long periods in a chair as the pain in both my hips was a constant pain now. [Dr. K] had placed me on Hydrocodone 7.5/750 to take as needed for pain. I gave Dr. [I] a document printed by the Marine Safety Council that research had found due to the extreme nature of my job as a Marine Inspector for the USCG, and the level of physical activity required for that job resulted in acute trauma to my hip joints causing Bursitis. As a marine inspector, which immediately followed two consecutive tours aboard two different Coast Guard cutters, I was subjected to daily activities of climbing into and out of deep cargo tanks, ballast tanks, bilges in double sided tankers and ocean going barges. This involved a constant turning and twisting of my body while wearing Steel toed boots and a Hard-Hat as well as carrying inspection tools. I was also responsible to train younger Junior Officers in steam Propulsion systems which required me to climb in and out of boilers including small openings in Steam Drums and Boiler Headers as well as climbing and inspection tubes and valves associated equipment. Additionally, as a Naval Engineer inspector, I was required at that time to set and seal Boiler Relief valves when the pressures of the boiler reached 1.25 of its maximum pressures... I can no longer do some things that I enjoyed in my life such as fishing and hunting. I can no longer shop with my wife in stores...unless I ride in an electric cart. The pain in my hips is so severe that before I got carts, she would have to leave me where I was while I sat and waited for her...I am an avid gardener, but I have to take Hydrocodone if I even spend a half hour tending my gardens...My quality of life is terrible...My hips are constantly hurting and I limp when walking from my office to the rest room. I am grateful to the Coast

² The applicant’s application package was received on July 3, 2013.

Guard for identifying my High Blood pressure...I feel bad about submitted a claim and this is why I ended up doing it now.

The applicant provided pages from VA determination documents. One document states that the applicant was assigned a 10% disability rating for tinnitus because it was determined to be related to his military service. The VA determined that the applicant's bilateral hip bursitis was not related to military service; therefore service connection was not granted. The VA did find that the applicant's bilateral hearing loss was service related, but assigned a 0% disability rating. The applicant's overall combined rating is 10%. Under Reasons for Decision section, the document states that the applicant's bilateral hip bursitis request was not granted because his "service records do not contain complaints, treatment, or diagnosis for this condition... The evidence does not show an event, disease or injury in service. Service connection for bilateral hip bursitis is denied since this condition neither occurred in nor was caused by service."

The Proceedings Safety Council Message was published on December 8, 2009. The title is "Mortality Among United States Coast Guard Marine Inspectors: A Follow Up." The article states, "daily activities of climbing into and out of numerous deep cargo ballast, or bilge tanks on a given inspection or transiting via staircase between numerous decks (levels) on a large ship require a considerable amount of exercise and energy expenditure...The general level of physical activity in marine inspectors might have been higher than that experienced by other officers in the Coast Guard." The applicant also stated that in a 1999 Proceedings Newsletter of the Marine Safety Council, Volume 56, No. 2, an article stated that "Ergonomics, a relative new field of health and safety, is also under appreciated. Ergonomics are basically hazards caused by human interaction with tools and equipment resulting from awkward postures, contact stresses, forceful exertions and repetition, that can result in cumulative or acute trauma to joints...that can cause permanent disorders (tennis elbow, bursitis, trick knees)." One example that was observed by the author was "lifting with the back and/or while twisting the torso excessively."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 28, 1976. He retired as [REDACTED]. The applicant's DD 214 has a separation code of "RBD," a narrative reason for separation of "sufficient service for retirement," and an Honorable characterization of service.

Below is a chronological summary of documents found in the applicant's military and medical files. Only documents relevant to the issues brought up by the applicant are summarized here.

- April 17, 1985: A Report of Medical History documents a triannual physical examination performed this date. Next to number 20, which asks "Have you ever had any illness or injury other than those already noted?" the applicant marked yes. In the comment section, the applicant wrote "2 Nov 1981 MSO [REDACTED] I fell 40 feet landing on washing machine & fiberglass sink. Broke 1 rib & fractured 1 rib left side."
- May 1, 1987: In the applicant's Chronological Record of Medical Care, a note from this date states "Pt has pain below and between shoulder blades: Onset x2 weeks ago pt fell

backwards off of ladder striking his head and back on floor. Pt states did not have back problem on onset but several days ago back ache started – discomfort on turning head.”

- October 5, 1989: The applicant received a decision from the Board regarding a Selective Reenlistment Bonus. He had applied to the Board three times regarding this issue.
- May 13, 1997: A medical chart entry states the applicant “was in MVA [motor vehicle accident] last week – still having back & neck pain – did not have xrays.”
- May 13, 1997: A radiology report contains interpretation of outside films and states “No fractures are seen. The soft tissue planes are normal. There is normal range of motion in the flexion and extension views...IMPRESSION: Normal cervical spine... No bony abnormalities are demonstrated in the thoracic vertebra. The intervertebral spaces are well maintained. No fractures are seen. IMPRESSION: Normal Thoracic spine.”
- June 5, 1997: A medical record states the following:

This patient was initially seen...on June 5, 1997. He reports that on May 6, 1997 he was involved in an automobile accident in which the patient was driving. He had impact with a car trying to turn in front of him. He went to the hospital with his son but was not seen himself that day. The following day patient had significant pain ranging from the neck down to the sacrum. Patient alternated heat and cold treatments and the following week was seen [again]. At that time he had complaint of pain involving the neck and lower back and was given anti-inflammatory medication. Patient reports that neck and mid thoracic pain is much better, now has only minimal discomfort of the right upper trapezius at times. However, the lower back is continued to be quite painful and patient is continuing to work at this time in part time capacity, but has extreme back pain and is unable to find a position of comfort... At this time patient reports having lower back pain involving the upper and lower spine bilaterally. Patient states that pain worsens with activity, especially forward bending and prolonged periods of walking. Pain improves somewhat with rest, but patient does have a disturbed sleep pattern...Patient denies any previous back pain of this nature... Hip joints: within normal limits.

- June 26, 1997: A status report regarding the applicant’s back pain stated the applicant had been using hot packs and therapeutic exercises and receiving ultrasound/electrical stimulation and massages for his back pains in the lumbar and cervical areas. The report noted that he had been participating in an exercise program designed to facilitate increased mobility and strength in those areas. The doctor stated that the applicant would continue to benefit from further physical therapy, as his range of motion had been increasing. On a diagram of a back, the applicant circled the left shoulder, the middle of the back between the lower shoulder blades, and the middle of the lower back. In a comments section, the applicant wrote “left upper shoulder, middle lower shoulder blades only hurt after a lot of work activity – crawling around small tight spaces on vessels and barges in heat. Lower back has discomfort feeling almost every night.”
- December 11, 1997: The applicant received an OMMP Periodic Examination. Under “Specialty Currently Performing,” the report states ~~Foundation Inspection~~. The audiogram notes “slight high frequency loss” regarding the applicant’s hearing. The examination provides results from many tests performed on the applicant, including blood, urine, heart, and other medical testing results.

- December 11, 1997: The applicant requested an appointment to be seen for “chronic neck & back pain since MVA May 97.”
- December 11, 1997: A medical chart entry states “PT also complains of neck and back. Had pain since MVA in May 1997. PT first seen for this May 13, 1997, condition not getting any better.”³
- January 6, 1998: The applicant was scheduled to be seen for “neck & back pain – moderate pain – still able to walk.”
- January 15, 1998: A note from the applicant’s doctor states “This gentleman is active duty Coast Guard. He has pain in the upper back and lower back. Both of these he relates to a motor vehicle accident in May 1997. His work activities involve crawling in and out of ships and that aggravates it... Exam reveals normal cervical spine exam. His upper back reveals tenderness in the midthoracic spine and in scapular area, particularly on the left side... Lumbar spine exam reveals tenderness midline of the lumbar spine...There is mild discomfort with left lateral bending.” Regarding X-rays taken, the notes state “Outside films of the cervical and thoracic spines taken last year at the time of the accident show minimal degenerative changes in the thoracic spine, which were preexisting.” The impressions state chronic thoracic strain and shoulder strain, and chronic lumbar strain.
- August 17, 1998: The applicant was sent a “Letter of Notification Regarding Results of Your Occupational Medical Monitoring Program (OMMP) Examination.” The letter states that his examination from December 11, 1997, had been comprehensively evaluated. The only comment is “From an occupational health standpoint, you are medically cleared to perform the duties of your job.” The applicant retired on August 31, 1998.
- July 9, 2013: A note from the applicant’s primary care physician states that the applicant reported having had “bilateral hip bursitis since 1998.”
- March 4, 2014: A document containing doctor’s notes in the applicant’s medical file states “Patients worse pain is both hips...The pain moves to the left shoulder, but the right is worse. Walking aggravates the patient’s pain... Patient states it seems like it is getting worse every week. Low back pain has been there for 2-3 years.”
- June 3, 2014: The applicant’s medical record contains a copy of a letter he sent to the VA regarding his disability claims. Many of the points echo what the applicant stated in his Statement in Support of Claim, summarized above. He also added that “since the day [he] retired from the USCG [he has] been behind a desk, no physical labor employment what-so-ever.”

³ It does not appear that the doctor who entered this note also conducted the OMMP Periodic Examination. It is unclear if the applicant received his OMMP Examination and went to a different doctor on the same day.

- March 17, 2015: An ear, nose, and throat specialist wrote a letter on behalf of the applicant. The letter stated that the applicant had “relatively severe obstructive sleep apnea.” The doctor found that the patient had “an enlarged palate and uvula, which is likely the cause of his severe sleep apnea. There is a high probability that this condition has been present for a long period of time inclusive of his active duty in the US Coast Guard prior to retirement.”
- July 7, 2015: The VA received a letter from the applicant regarding the VA’s decision on the applicant’s claim for disability from obstructive sleep apnea. The applicant stated that because sleep apnea is a physical deformity, he suffered from this condition when he enlisted in 1976, and had it during his 23 years of service. He stated that while on active duty, he was assigned his own stateroom due to his loud snoring. The applicant requested re-consideration of the VA’s decision for his disability claim regarding sleep apnea.
- December 11, 2015: The applicant submitted an appeal to the VA Board regarding his disability claims. He stated that he was updating his claim to include “bilateral arthritis, ruptured spinal discs, and arthritis in right shoulder.” He stated that he included the medical record from April 17, 1985 regarding his 40 foot fall. He also stated that he included “all medical documents from an auto accident while departing MSO Port Arthur and all the treatment [he] received as a result.” There is no additional documentation regarding the automobile accident in his record other than what has been summarized here. (The results of his appeal are not in the record.)

VIEWS OF THE COAST GUARD

On November 17, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request, in accordance with a memorandum from the Personnel Service Center (PSC).

PSC stated that the application is not timely, as it was not filed within three years of discharge, and should therefore not be considered beyond a cursory review.⁴ The applicant retired in 1998, and did not provide sufficient justification for the untimeliness of his application, PSC argued. Due to the applicant’s untimeliness, the Coast Guard is prejudiced in their ability to locate documents and obtain declarations. PSC claimed that for this reason alone the application should be denied.

PSC further argued that according to COMDTINST 1000.6A, the Coast Guard Personnel Manual, Article 12.A.10.b., an officer leaving the Coast Guard shall schedule any necessary physical examinations so they are completed at least 60 days prior to the separation effective date; however, the Commander will not delay in separation solely because an officer failed to complete a scheduled physical examination. According To Article 12.A.10.c., if an officer had a physical examination within one year of separation, a physical examination is not required. The applicant received an OMPP Period Examination on December 11, 1997, and it was determined

⁴ 10 U.S.C. 1552.

that “from an occupational health standpoint, [the applicant] is medically cleared to perform the duties of [his] job.” PSC argued that, because the OMPP examination was within one year of retirement, an examination was not necessary. PSC therefore stated that the applicant has not shown by a preponderance of the evidence that his retirement or physical examination were erroneous or unjust.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 12, 2016, the Board received the applicant’s response to the views of the Coast Guard. The applicant disagreed with the advisory opinion. Regarding COMDTINST M1000.6A, the applicant claimed that the section requiring a member to schedule necessary physical examinations to be completed 60 days prior to separation may be in effect now, but was not at the time of his separation.⁵ The applicant alleged that COMDTINST M6000.1E, the applicable policy at the time of his retirement, states that an exit examination must be completed within 30 days of the last day of employment.

The applicant stated that he is currently suffering from “chronic lower back pain caused by 4 bulging discs in [his] lower back, arthritis in 50% of [his] spine, arthritis in both hips, right knee, and shoulder.” He reiterated that he believes his pain is caused by his position of Marine Inspector while in the Coast Guard on active duty. The applicant also clarified that he is not seeking any back pay regarding his conditions; he is seeking for the Board to acknowledge that he should have received a physical examination at the time of his retirement.

APPLICABLE REGULATIONS

The PDES Manual, COMDTINST M1850.2C, governs 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...

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.

In COMDTINST M1000.6A, the Personnel Manual in effect in 1998 Article 12.A.10. states the following about an officer’s separation and physical examination:

b. An officer being separated shall schedule any necessary physical examination so it is completed at least 60 days before the effective date of separation or release, although Commander, (CGPC-opm) will not delay a separation or release date solely because the officer failed to complete a scheduled physical examination...

⁵ COMDTINST M1000.6A came into effect on January 8, 1988, and was in effect when the applicant retired.

c. If an officer has had a physical examination within one year of separation or release, a physical examination is not required before separation (e.g., retirement, resignation, or discharge) or release to inactive duty.

The Medical Manual that was in effect at the time of the applicant's retirement, COMDTINST M6000.1B, states the following in Article 3.A.7.c.: "Separation from Active Duty: A complete physical examination (SF-88/93) is required within 12 months for retirement, involuntary separation, or release from active duty." Chapter 12, entitled Occupational Medical Monitoring Program (OMMP), contains a section entitled Periodic and Termination Examinations. Article 12.D.4.b. states, "The following are required ANNUALLY and on separation or termination: (1) physical examination and pulmonary function test as required for preplacement/initial examination; (2) chest xray (PA) with "B reader" interpretation according to the...schedule; and (3) OSHA Respiratory Disease Questionnaire, Part 2, shall be administered." (Emphasis in original).

According to the introduction to Chapter 12 of COMDTINST M6000.1B, regarding the OMMP:

A person is considered occupationally exposed for medical monitoring purposes if:

b. Actively engaged for 30 or more days per calendar year as a resident inspector, pollution investigator, marine safety (general), port safety (general), vessel inspector or marine investigator unless an industrial hygiene evaluation shows that the individual is not being overexposed.

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 submission 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.⁶ The applicant retired in 1998. The record shows that he was sent a Letter of Notification regarding the results of his OMMP Examination on August 17, 1998. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1998, 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.⁷ 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 "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"⁸ 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."⁹

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

⁷ 10 U.S.C. § 1552(b).

⁸ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁹ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. Regarding the delay of his application, the applicant explained that he became aware that the Coast Guard had not given him the proper physical prior to his retirement a few weeks prior to applying to the Board in June 2013. The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly. It is notable in this regard that the applicant has filed a complaint with the Board previously.

5. A cursory review of the merits of this case indicates that the applicant received the required physical examination prior to retirement. While COMDTINST 6000.1B, Article 12.D.4.b., states that a physical examination is required at separation, there is no timeline given regarding "on separation." Article 12.A.10 of COMDTINST 1000.6A, on the other hand, specifically states that if "an officer has had a physical examination within one year of separation or release, a physical examination is not required before separation." Moreover, the Letter of Notification regarding the results of his OMMP Examination indicates that the examination in December 1997 fulfilled the requirements for a pre-separation physical examination at the time. The manual that the applicant relied on did not go into effect until 2011 and so is inapplicable. The record therefore contains no evidence that substantiates the applicant's allegations of error or injustice in his official military record, which is presumptively correct.¹⁰

6. Despite the fact that the applicant received the proper physical examination prior to retirement, the Board agrees with the applicant that his medical records contain ample evidence that he received serious injuries while on active duty that could cause continuing physical impairments:

- A fall onto a washing machine and fiberglass sink in 1981, as evidenced by:
 - April 17, 1985 Medical History Report, stating the applicant broke 1 rib and fractured 1 rib;
- A fall backwards off of a ladder in 1987, as evidenced by:
 - May 1, 1987 Medical Care Record, stating that applicant fell backwards off a ladder hitting his head and back on the floor; and
- Motor vehicle accident in 1997 while leaving base, as evidenced by:
 - Medical records from May 13, 1997; June 5, 1997; June 26, 1997; December 11, 1997; January 6, 1998; and January 15, 1998. Records state that the applicant had been in a motor vehicle accident while leaving base, and reveal the treatment the applicant sought to relieve his back and neck pains prior to retirement.

The applicant suffered injuries on all of these occasions, and the information that he is asking the Board to enter in his medical record is already documented in his medical record in several places. It is unclear to the Board how the VA came to the conclusion that his service record did not contain "complaints, treatment, or diagnosis" for his back and hip conditions.

¹⁰ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

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

March 23, 2017

