

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-121

[REDACTED]
[REDACTED] (Retired)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on March 22, 2017, 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 June 22, 2018, 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 correct his record by adding documentation of benzene exposure during his time in the Coast Guard. The applicant retired on [REDACTED] and stated that his exposure occurred while aboard the USCGC [REDACTED] in 1995. He stated that at the time, the boat was dry docked and the water tanks had been painted but the paint did not dry properly. He alleged that the water tanks were filled again and that water was used as the boat's water supply. The applicant claimed that the "crew was assured the exposure would be documented in their personnel files as exposure to benzene is toxic and a known cause of cancer."

The applicant stated that he was diagnosed with prostate cancer in 2014. He alleged that due to his "age, lack of family history and the extensive amount of cancer and the aggressiveness of the cancer, [his] doctor believes [the] exposure to benzene is a contributing factor" to his diagnosis. He stated that he discovered the alleged error in his record on September 20, 2016, when the Department of Veterans Affairs (VA) denied his claim related to his cancer diagnosis because there was no record of benzene exposure in his file.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in August 1987. Upon completing recruit training, he was assigned to [REDACTED] from October 1987 to August 1989. He

was then transferred to Station [REDACTED] from August 1989 until he was sent to [REDACTED] "A" School in the spring of 1990. Upon completing [REDACTED] "A" School, he was transferred to the CGC [REDACTED] and he served aboard the [REDACTED] which was homeported in [REDACTED] through 1992.

In early 1993, the applicant attended [REDACTED] "A" School in [REDACTED]. When he failed to complete the school, he was transferred to the CGC [REDACTED] in April 1993. He served aboard the [REDACTED] for less than two years before being transferred to Group [REDACTED] in March 1995. However, he subsequently returned to the [REDACTED] (the date of transfer is unclear in the record) and served another three-year tour aboard the cutter through spring 2001. Subsequently, the applicant served tours aboard [REDACTED] GC [REDACTED] Group [REDACTED] and the CGC [REDACTED] before retiring with more than 21 years of service on [REDACTED].

VIEWS OF THE COAST GUARD

On August 17, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG argued that the applicant's delay in filing his application was understandable, even though he claimed that he was exposed to benzene in 1995, because he was not diagnosed with cancer until 2014. However, the JAG noted that the applicant provided no corroborating evidence that he was exposed to benzene in the Coast Guard or that any other members of the crew became ill or developed cancer. The JAG argued that even if the applicant had provided evidence, the Coast Guard is prejudiced "due to loss of records, fading memories, and unavailability of witnesses due to the passing of time." With the advisory opinion, the JAG also adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC recommended that the Board deny relief because the applicant did not provide evidence of benzene exposure. PSC stated that a thorough review of the applicant's record was completed and no documentation was located of any incident that the applicant had described. Therefore, no relief was recommended.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 1, 2017, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The applicant replied on September 22, 2017, and stated that he disagreed with the advisory opinion.

The applicant stated that while he was stationed aboard the USCGC [REDACTED] in 1995, it was in dry dock while work was being performed. He again alleged that "the entire crew was exposed to benzene as the water supply was tainted due to faulty work in the ship yard. Crew members became ill as the water supply was used for bathing, cooking, cleaning and drinking." He claimed that the crew was told that the exposure would be listed in their personnel files because benzene was a "known carcinogen to humans and federal regulation limits exposure to benzene in the workplace." He stated that he was unaware the exposure was not documented in his military file until he was diagnosed with cancer in 2014.

The applicant stated that [REDACTED] 45 years old and he had no family history of cancer. He stated that his doctor had told him that the “size and aggressiveness of the cancer [REDACTED] indicative that] this most likely [REDACTED] caused by environmental exposure [REDACTED] most likely the exposure to benzene while stationed about the USCG [REDACTED]” The applicant noted that his doctor had submitted a letter to this effect to the VA. He also stated that he had had difficulty finding his old shipmate [REDACTED] but he had found [REDACTED] an active Coast Guard member. He provided the Board with a letter from [REDACTED] member whom the applicant stated had [REDACTED] nosed with cancer. [REDACTED]

The applicant submitted a letter from a man who stated that he had been stationed with the applicant aboard the USCGC [REDACTED] during [REDACTED] period in [REDACTED] on. He stated that [REDACTED] boat was undergoing repairs and the “entire crew was [REDACTED] because as the ship’s water supply was tainted due to faulty work. Crew members became ill as the water supply was used for bathing, cooking, cleaning, and was also consumed.” This man stated that the crew had been assured that the exposure to benzene would be documented in their personnel files because benzene was “a known carcinogen to humans and federal regulation limits exposure to benzene in the workplace.” He claimed that the exposure was not documented in the files of the crew. He also stated that he was aware that the applicant was diagnosed with cancer and he added that he, too, had been diagnosed with cancer since the alleged exposure.

FURTHER PROCEEDINGS

On September 22, 2017, the Chair replied to the applicant via email. The Chair requested a copy of the letter from the applicant’s doctor he had referenced in his reply. She noted that the letter he provided with his response to the advisory opinion was thus far the only piece of evidence he had provided. On the same date, the applicant replied and stated that he had not provided the letter from his crew mate with his initial application because he had difficulty locating any of his old crew mates. He stated that he was still in the process of attempting to locate additional crew members in order to corroborate the existence of the benzene exposure. He added that he would send in the letter from his doctor the following week. The applicant apologized for sending in incomplete or missing information, but stated that he was not aware that exposure was missing from his record until recently.

On the same date, the Chair stated that she would enter a 60-day extension in his record in order to provide him with time to provide the additional evidence. On October 11, 2017, the applicant replied and attached a letter from his doctor written to the VA on April 1, 2015. The doctor stated that the applicant was diagnosed with cancer on December 10, 2014. He stated that the main risk factors for the type of cancer the applicant had were old age and [REDACTED] story, both of which were not present with the applicant. He went on to state that “given the high volume aggressive diseases in the absence of risk factors, I would state that his main determinant factor (>50%) for development of ... cancer was environmental, particularly exposure to undefined chemicals during his Veteran’s service.”

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.¹ The applicant retired from the Coast Guard in [REDACTED] and presumably knew the contents of his military and medical records at that time, including the lack of documentation of exposure to benzene. Although he alleged that he discovered the error only after he was diagnosed with cancer in 2014, the Board finds that the preponderance of the evidence shows that the applicant knew of the alleged error in his record no later than [REDACTED] 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.² 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”³ 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.”⁴
4. The applicant did not explain why he did not complain about the lack of documentation of benzene exposure in his military or medical record earlier. Presumably he did not complain earlier because he did not expect to get cancer. Despite the lack of a compelling excuse for his delay, however, the Board will conduct the cursory review of the merits required by *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
5. The Board's review shows that the applicant's request to have benzene exposure documented in his record cannot prevail. First, the applicant has failed to show that the Coast Guard was using paint containing benzene to paint the inside of cutter water tanks in 1995 despite the fact that benzene was a known carcinogen that had been regulated for decades.⁵ Second, the only evidence he provided was an unnotarized letter from a crewmate who agreed with the applicant that the crew had been exposed to benzene and who has been diagnosed with cancer, as well as a letter from his doctor, who opined that the applicant's prostate cancer presumably

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

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁴ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁵ See, e.g., *The Benefits and Costs of Regulating Benzene*, Journal of the Air Pollution Control Association, Ralph H. Luken & Stephen G. Miller, Volume 31, No. 12. (December 1981) (noting that the Food and Drug Administration has regulated benzene exposure since 1964; that in April 1977 the Environmental Protection Agency determined that benzene was a “hazardous air pollutant”; that the Occupational Safety and Health Administration has been regulating benzene since 1971, when it began limiting workplace exposure to benzene; that when the Consumer Product Safety Commission proposed to ban all consumer products having benzene content in 1978, benzene was being used by only 2 of 49 paint remover manufacturers; and that by the end of 1978 there would be no manufacturers still producing products containing benzene as an intentional ingredient).

developed from an environmental source in light of the applicant's age and family medical history. The doctor's letter shows that it is possible that the applicant's cancer was caused by environmental exposure to carcinogenic chemicals. However, the evidence provided by the applicant does not overcome the presumption of regularity⁶ accorded the Coast Guard that such exposure to benzene in 1995 would have been properly documented in the crew's medical records.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

⁶ 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 retired [REDACTED], USCG, for correction of his military record is denied.

June 22, 2018

