DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2017-152

FINAL DECISION

This proceeding was conducted under the provisions of s10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the applicant's completed application the Chair docketed the case on May 3, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 1, 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 former reservist, asked the Board to correct his record to show that he was retired due to a physical disability. He alleged that he suffered a myocardial infarction while on active duty on August 23, 1994, and on November 21, 1994, he was denied a Medical Evaluation Board (MEB), improperly taken off orders following a line of duty (LOD) inquiry, and denied a disability retirement.

The applicant attributed his myocardial infarction to exposure to phenol in August 1993 when he worked aboard a private tugboat, the [redacted], which was contracted to help clean up a hazardous spill. He stated that members assigned to Coast Guard cutters were tested for phenol exposure, but he was not. However, after completing the work, they were required to strip off their clothing and follow decontamination procedures. Their clothing was then sealed up in a 55-gallon container.

The applicant stated that on September 6, 1995, he was deemed not fit for duty (NFFD) and should have been evaluated by an MEB, but he was not because he had been improperly transferred from active duty to the Inactive Ready Reserve.

The applicant stated that on April 25, 1996, he was counseled on a Page 7 about being transferred to the Inactive Ready Reserve when, instead, he should have received evaluation by an MEB and a disability retirement. Then on July 11, 1998, he was improperly reenlisted in the Reserve for another eight years.

The applicant submitted several documents to support his claims, which are included in the summary below. He also submitted print-outs from scorecard.org stating that phenol is a "cardiovascular or blood toxicant" and that cardiovascular toxicants can adversely affect the heart and blood and contribute to hypertension, hardening of the arteries, cardiac arrhythmia, and coronary ischemia.

The applicant also compla[redacted]t Guard database shows his total military service as 14 years, 2 months, and 26 days of total military service when it should show almost 16 years because he enlisted in the Reserve on July 11, 1990, and was not separated until May 27, 2006.

SUMMARY OF THE RECORD [redacted]

The applicant enlisted in the Coast Guard Reserve in 1990. His civilian occupation was emergency medical technician (EMT) for a county fire department. In 1994, the applicant was assigned as a reservist to the [redacted] District Marine Safety Office in [redacted] As a reservist, he drilled and served short periods of active duty for training.

In 1993, the applicant served on active duty from June 14 to 27, 1993, and from August 10 to September 13, 1993. On a work log, the applicant wrote that he performed skimming operations aboard the [redacted] on August 11 and 12, 1994, and helped deploy a containment boom on August 13. An email dated August 11, 1993, states that the applicant was one of six Coast Guard members the [redacted], a tugboat. A handwritten list of members assigned to various cutters and units in [redacted], which the applicant submitted, indicates that they underwent urinalysis for exposure to phenol on August 13, 1993. The applicant's name is not on the list.

In 1994, the applicant performed active duty from May 8 to 20, 1994; June 5 to 10, 1994; and June 27 to July 1, 1994. On June 29, 1994, he received orders to perform ten days of non-consecutive days active duty between July 2 and September 2, 1994, and his record shows that he served on active duty pursuant to the orders for eight days:

- [redacted]ly 2, 1994;
- [redacted]ugust 16 to 19, 1994;
- August 20, 1994; and
- August 22 to 23, 1994.

Emergency room notes with an admission date of August 24, 1994, show that the applicant visited an emergency room at [redacted]. The doctor noted that the applicant was a

> 39-year-old EMT/Coast Guard personnel, who has experienced retrosternal chest discomfort of an epigastric and retrosternal nature intermittently over the last two weeks, but did not report this to medical personnel. He felt that this was indigestion, as he did find partial relief with TUMS on several occasions.
>
> He was doing [redacted]til today when the patient began to have more serious and severe retrosternal pain, approximately 7 on a scale of 1 to 10, and his wife phoned me and was advised immediate transport to the emergency room for further evaluation. On arrival at the emergency

> room, the patient had an initial electrocardiogram with a significant and alarming ST segment change noted, and he was immediately evaluated and the cardiac team phoned.

The doctor noted that the electrocardiogram had been conducted at "15:58 hours" (3:58 p.m. The applicant received immediate treatment and reported at about 5:00 p.m. that his discomfort had nearly ended and he felt much stronger and had no pain.

The doctor noted that [redacted] reported that he was taking medication for hypertension; smoked cigarettes; had a strong family history of hypertension and coronary artery disease; had a brother who had already undergone a "three-vessel coronary artery bypass grafting"; had no regular exercise program; worked long hours; and had previously been told to reduce his stress levels. The applicant was diagnosed with an acute inferolateral myocardial [redacted] doctor noted that the applicant was being treated and would be admitted to the coronary care unit for observation and possible intervention. He also noted that the case had been "discussed extensively with consultants, emergency room personnel and the patient's wife, as well as the patient himself." [redacted]

On August 5, 1994, the applicant was issued orders to perform 20 days of non-consecutive active duty between the dates of August 16 and September 30, 1994.

On [redacted]4, the applicant underwent a left heart catheterization, coronary angiography, and "cine LV gram," and "PTCA of the circumflex obtuse marginal."

On Septem[redacted]994, the applicant's supervisor endorsed a "Pay Processing of Reserve Non-Consecutive Duty Orders" to certify that the applicant had served on active duty on August 22 and 23, 1994. The form indicates that he completed his workday at 5:35 p.m. on August 23, 1994.

On October 31, 1994, the applicant underwent a left heart catheterization, coronary angiography, and "cine left ventriulogram."

In a letter dated November 7, 1994, the applicant's civilian doctor informed the CO of MSO [redacted] that the applicant had suffered a heart attack on August 24, 1994, and had subsequently undergone angioplasty. The doctor reported that the applicant was exercising and "may now return to full duties in the Coast Guard Reserve."

On November 21, 1994, the District Commander informed the applicant by memorandum that his earlier orders for days of [redacted] celed because he was unable to perform the duty for medical [redacted]

On December 12, 1994, the applicant underwent a quadrennial physical examination. He reported on his Report of Medical History that he was in good health but taking some medications and that he had a history of heat trouble and high blood pressure. He advised the doctor that he had suffered a minor heart attack on August 24, 1994, but his civilian doctor had released him to full duty. He stated that he had undergone "heart cath" at [redacted] Hospital in August 1994 and at [redacted] Hospital in October 1994. The Report of Medical Examination

states that the applicant submitted a letter from his private doctor stating that he had been released from treatment and was fit for full duty. The Coast Guard examiner for him fit for duty.

In 1995, the applicant served on active duty on the following days:

- March 29 and 39, 1995;
- April 2, 1995;
- April 19 and 20, 1995;
- April 25, 1995;
- April 29, 1995;
- May 20, 1995;
- May 27, 1995; and
- June 5 to 9, 1995.

The applicant's record shows that he was admitted to a private hospital for additional treatment on June 15, 1995.

On September 6, 1995, the applicant's private doctor signed a letter stating that the applicant had been in his care and had "suffered myocardial infarction with recurrent atherosclerotic [illegible] since August/94. He has significant exercise limitation and, in my opinion, would be unable to serve in active military duty. Were the patient required to enter combat, or do heavy [illegible] he would be likely to become symptomatic." The applicant provided this memorandum to his command, and in response his CO asked the District command to transfer the applicant to the IRR based on the doctor's letter. The CO stated that based on the letter, "it is apparent [the applicant] will never be fit for duty. It should further be noted that [the applicant] has not drilled since June of 1995 because of his medical condition."

On April 25, 1996, the applicant and the Executive Officer of his unit signed a Page 7 stating that "[d]ue to medical condition member found to be not fit for full duty. As per Reserve Administration and Training Manual, COMDTINST M1001.27A, [the applicant] is transferred to the Inactive Ready Reserve. Member is not eligible for reenlistment without an approved physical examination on file prior to expiration of enlistment." The applicant performed no duty after this date.

On May 28, 1998, the applicant was sent forms to reenlist in the mail, and he reenlisted in the Reserve for eight years.

On December 15, 2001, [illegible] Support Command reviewed the applicant's medical file for completeness. He noted that the applicant's last physical examination had occurred on December 12, 1994, but the form also indicates that the applicant's status was "active duty."

On July 21, 2002, a health technician at an Integrated Support Command reviewed the applicant's medical file for completeness. She noted that the applicant's [illegible] examination had occurred on December [illegible]94, but the form also indicates that the applicant's status was "active duty."

A database print-out dated October 7, 2004, states that the applicant had 14 years, 2 months, and 26 days of total military service as of that date.

On February 22, 2005, the applicant filed a claim with the VA. On his application forms, he entered August 24, 1994, as the starting date of his disability and of the hospital records that the VA needed to request from the civilian hospitals. The applicant told the VA that on August 11, 1993, he was assigned to the [redacted], "a rented commercial vessel for the purpose of cleaning up the Hazardous chemicals spilled from the Ocean 255, Ocean 155 and Balsa 37." He wrote that his duties had exposed him to hazardous fires and direct contact with oil #6, jet fuel, gasoline, and phosphate, and they did not receive proper safety equipment for two days. He stated that personnel aboard other units had been tested, but he and the others aboard the [redacted] were overlooked. He stated that within ten months, he experienced a heart attack.

On April 12, 2005, the applicant's Coast Guard medical file was closed out and the reason cited was "retired with pay." [redacted]

During a VA physical examination in June 2005, the examiner noted that the applicant claimed that he had been on active duty when he suffered a heart attack in August 1994 and that his work in helping to clean up hazardous chemicals ten months earlier may have contributed to the heart at [redacted]

On Decemb[redacted]xaminer for the VA stated that the applicant's coronary artery disease "is the sa[redacted]he condition (myocardial infarction) that the patient had in military service" and that his "exposure to chemical in 1993 cannot be causally related to his myocardial infarction without speculation."

On December 28, 2005, the VA issued a decision awarding the applicant had a 60% disability rating for service-connected coronary artery disease as of August 31, 2004. The VA noted that "service medical records are negative for any complaints or treatment of a heart related condition. However, the records do show that you were discharged from the military due to a heart condition." The VA also stated that its examiner had "opined that the condition was due to your military [redacted]ce." The VA also awarded the applicant a 10% disability rating for service-connected "recurrent left leg cellulitis as secondary to the service-connected disability of coronary artery disease."

A discharge certificate shows that the applicant received an honorable discharge from the Reserve when his enlistment ex[redacted]

VIEWS OF THE COAST GUARD

On November 3, 2017, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG st[redacted]pplicant was not actually serv[redacted]e day of his heart attack and was [redacted]leared for duty and continued drilling. The JAG stated that the

medical records show that the applicant suffered his heart attack on August 24, 1994, not August 23, 1994. The JAG noted that the applicant himself reported during a quadrennial physical examination on December 12, 1994, that he was in good health but that he had "suffered a heart attack 24 Aug 94. This was a minor heat attack and [the doctor] has released me back to full duty." The JAG stated that the applicant had performed two days of active duty on August 22 and 23, 1994, and that these records show that he was not on duty when he suffered his heart attack and so, as a reservist, was not entitled to a Medical Evaluation Board. The JAG stated that even if the applicant had suffered his heart a[redacted]uty on August 23, 1994, there would have been no grounds to convene a Medical Evaluation Board because the applicant was medically cleared for duty in December 1994 and continued performing weekend drills until June 1995.

The JAG also argued, in 1994, section 402 of the Career Compensati[redacted] codified at 10 U.S.C. § 1204, was in effect and provided that a reservist had to have been on active duty for a period of at least thirty days to be entitled to a disability retirement due to an illness. When a reservist was serving on duty for a period of less than thirty days, only physical disability resulting from an injury coul[redacted]n a disability retirement, and the [redacted]er had to show that his performance of duty was the "proximate cause" of the injury. The JAG noted that in *Canderlaria v. United States*, 5 Cl. Ct. 266, 272 (1984), the court states that "Congress clearly did not intend that military personnel on short tours of duty be entitled to disability pay benefits when they become disabled by disease. Section 1204, therefore, unambiguously requires that a member of the arme[redacted]o duty for thirty days or less must be permanently disabled as a result of a service related *injury*." (Emphasis in original.) Moreover, the JAG argued, a myocardial infarction was deem[redacted]not an injury with regard to medical retirement benefits, citing *Gwin v. United Sta[redacted]7 F. Supp. 737, 753 (1956), and *Brooks v. Brown*, 5 Vet. App. 484, 486 (1993) (finding that a sailor who suffered a heart attack while serving on inactive duty was not entitled to "service connection" for his heart condition because a myocardial infarction is a disease, rather than an injury).

Therefore, the JAG concluded that relief should be denied because the applicant was not on active duty when he suffered his heart attack and was not entitled to a disability separation. The JAG also adopted the findings and analysis provided in a memorandum submitted by the Comm[redacted] Officer, Coast Guard Personnel Service Center (PSC).

PSC stated that the application should be denied as untimely because the applicant suffered his heart attack in 1994 and was discharged in 2006. PSC noted that the applicant was not on active or inactive duty when he suffered his heart attack and that he reported factors such as hypertension, smoking, and lack of exercise that might have caused his heart attack.

[redacted]

PSC cited Chapters 11.B.3. and 11.B.5. of the Reserve Administration and Training Manual (RATMAN) as stating that a member's condition had to be incurred or aggravated while performing duty to be entitled to medical care for the condition.

PSC noted that the applicant reenlisted in 1998 without having undergone another physical examination even though he had been counseled in writing that he was not allowed to reenlist without receiving an approved physical examination. PSC stat[redacted]as honorably discharged when th[redacted]expired.

PSC noted that given his medical history, attributing the applicant's heart attack to his military service would be speculative. PSC recommended that the Board deny relief based on the application's untimeliness; the fact that he was not on duty when he suffered the heart attack on August 24, 1994; the lack of evidence that his military service caused his heart attack; and his lack of legal eligibility for medical benefits at the time.

APPLICANT'S RESP[redacted]E VIEWS OF THE COAST GUARD

On November 27, 2017, the applicant responded to the views of the Coast Guard. He argued that his application is timely because he was told that he had been retired and would receive Tri-Care upon attaining age 60. Only when he turned age 60 did he learn th[redacted] improperly discharged and he filed his application within three years of this discovery. The applicant repeated many of his original arguments and also stated the following:

- The applicant alleged [redacted]emergency room record reports t[redacted]he was admitted to the coronary care unit of the hospital, rather than the date he arrived at the emergency room. He also alleged that the report shows that he was still in uniform when he arrived at the emergency room.

- The [redacted]ained that he was never paid for performing duty on August 24, 1994, but he was not worried about it because he was fighting for his life and taking "heavy drugs." He [redacted]as asked about where he was stationed and that two officers of his unit c[redacted] the emergency room to visit him.

- The applicant alleged that during his quadrennial examination in December 1994, he was told to claim that he was in good health so that he could remain in the Coast Guard. He noted that he continued to drill until June 1995 but stated that this was "light duty" only.

- The applicant stated that he should not be blamed for reenlisting in 1998 because when he questioned it, the recruiter told him that it had been approved by the District. The applicant [redacted]d that the medical records dated December 15, 2001, and July 21, 2002, show that a Medical Evaluation Board was held and that he was on active duty at the time. He also noted that the coversheet for his medical file shows that he was retired with pay and that he first saw these medical records after his Senator contacted the Coast Guard and the VA to get his records.

- The applicant argued th[redacted] current laws, instead of the laws in effect in 1994. He also noted that he had been on active duty for more than thirty days in 1993, when he helped clean up a hazardous spill. He stated that a cardiologist told him that any exposure of this nature would have exacerbated his heart condition, but because the Coast Guard failed to test him for phenol exposure, his doctors can only speculate.

[redacted]

[redacted]

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.[1] Although the applicant alleged that he only recently discovered that he had not been retired, the Board finds that he knew that he had not been retired no later than 2006, when his enlistment expired, he was not reenlisted, and he received a discharge certificate from the Coast Guard Reserve. The Board notes that the applicant could not have been misled in this regard because he never underwent medical board processing for a disability retirement and was never issued a twenty-year letter certifying his eligibility for retirement based on twenty years of satisfactory service. Although a coversheet on his medical record erroneously states that he had been retired with pay, the applicant admitted that he did not see this coversheet until recently. The Board finds that the preponderance of the evidence shows that the applicant knew no later than 2006 that he had not been retired from the Reserve, and so 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. Regarding the delay of his application, the applicant explained that he recently discovered some medical records stating that he was in an active duty status on dates when personnel at the Integrated Support Command certified that they had reviewed his record for accuracy and completeness and that he had been retired with pay. The Board finds that the applicant's discovery of these medical records, which are clearly erroneous, does not excuse his delay in complaining about his lack of retirement. He has not shown that anything prevented him from applying to this Board for retirement more promptly, just as he applied to the VA.

5. A cursory review of the merits of this case indicates that the applicant's claim cannot prevail. The record shows that the applicant was admitted to the emergency room of a civilian hospital on August 24, 1994, when he was not on active duty or inactive duty. According to the doctor, the applicant's wife had called the doctor and was told to get the applicant to the hospital right away. The doctor's report shows that the applicant was admitted to the emergency room on August 24, 1994; that an electrocardiogram was conducted immediately upon his arrival;

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[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).

and that the electrocardiogram was conducted at 3:58 in the afternoon. Moreover, on November 7, 1994, the applicant's doctor informed the Coast Guard in a letter that the heart attack had occurred on August 24, 1994, and that the applicant was fit for duty. Contrary to the applicant's claim, the doctor did not state that the applicant was in uniform; he just noted that the applicant earned his living as an EMT and Coast Guard member. The applicant has submitted nothing that satisfactorily rebuts these medical records. He has not submitted evidence showing that he ever suffered a heart attack while performing active duty or inactive duty. The fact that more than ten years later the VA misinterpreted [redacted] oncluded that he was on active duty on the day of his heart attack is not evidence that he was actually on duty that day. The applicant has submitted nothing to show that he was entitled to medical board evaluation toward a disability separation or retirement because he did not suffer either an illness or injury while on active or inactive duty that left him not fit for duty. Therefore, the Board finds that the applicant's claim l[redacted] prevail on the merits.

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

(ORDER AND SIGNATURES APPEAR ON NEXT PAGE)

[redacted]

ORDER

The application of form [redacted], USCGR, for correction of his military record is denied.

June 1, 2018

[redacted]