DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-135

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on May 16, 2019 and assigned the case to a staff member to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated August 6, 2021, 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 Chief Yeoman (YNC/E-7) who was honorably discharged in 1969, asked the Board to correct his record by providing "factual evidence" of two injuries that he sustained as an active duty Coast Guard member. Because the applicant has no medical documentation of the injuries from his time in the Coast Guard, he has been unable to receive a service-connected disability rating and benefits for them from the Department of Veterans' Affairs (DVA).

In a letter to the BCMR dated April 4, 2018, the applicant claimed that he has been attempting to locate his military records since December of 2002. He alleged that despite having applied numerous times for benefits, the reviewing entities must have never requested his records because the injuries were service-related. The applicant stated that the effects of the injuries he sustained on active duty have impacted his life significantly. Accordingly, the applicant seeks factual evidence of the injuries in order to obtain a disability rating from the VA and qualify for VA health coverage. To support his request, the applicant submitted copies of official records which are detailed in the Summary of the Record below. The applicant also included in his application two statements describing his account of the injuries, documentation from various attempts to secure VA benefits, email correspondence for assistance with an appeal of the denial of VA benefits, and a letter from the applicant to DHS OGC summarizing the applicant's injuries and experience of trying to secure his medical records and VA benefits.

The applicant described the circumstances of his injuries as follows: In the spring of 1959 while stationed at the Coast Guard Air Detachment in Kodiak, Alaska, he was injured while playing on the Coast Guard softball team after a routine day of work. The applicant stated his team played a game against the Navy softball team. During the game, he collided with a Navy player and was knocked unconscious. The Navy player's two front teeth were embedded in the applicant's forehead and pierced the sinus cavity above his left eye. After being transported to the Naval Hospital, the applicant required surgery to remove the teeth and stitch the wound closed. The applicant was also under observation for a possible concussion. Several days later, the applicant alleged, he was released back to his unit for light duty. The applicant stated that following this injury and surgery, he has experienced "excruciating headaches and sinus problems, even to this day."

In November of 1966 while stationed at the District Office in Juneau, Alaska, the applicant alleged, he sustained the second injury for which he is seeking documentation. The applicant played in the Juneau City Basketball League representing the Coast Guard. During a game in November of 1966, the applicant jumped and came down on another player's foot. The applicant suffered a severe ankle sprain that required a visit to the Emergency Room at St. Ann's Hospital in Juneau. The doctor in Juneau recommended the applicant be sent to the U.S. Public Health Hospital in Seattle. A few days later, the applicant was placed in a walking cast with orders to return to Juneau. The applicant was placed on light duty for two weeks with orders to rest and elevate the ankle as much as possible. The applicant states that since the severe sprain, he has had a lot of trouble with the ankle and experiences pain and swelling if he is "on it for any length of time." The applicant states that he still has trouble with the ankle "to this day."

Regarding his quest for VA benefits, the applicant stated that he first applied for medical benefits in December 2002. He stated that he was told by personnel at a VA Hospital to call an outpatient clinic to set up an appointment and fill out paperwork. The applicant claimed that he was told by the clinic that he was not eligible to qualify for health coverage until the first day of his birth month. Once the paperwork was processed, he was notified by VA Hospital that as a Priority Group 8 member, he was not eligible for healthcare enrollment. The applicant submitted copies of various documents pertaining to his application for VA benefits, which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 29, 1956, for five years. He reenlisted for an additional six years on May 26, 1961.

A medical record dated June 5, 1959, shows that his command sent him to a nearby Naval Hospital because of a laceration to his forehead. A Return Medical Certificate, dated June 16, 1959, states, "FRACTURE, SIMPLE, n.e.c., left frontal (8160) DNEPTE/WOUND, LACERATED, Left Forehead (8210)." It also states that the injury was an "incident of service" and not a result of misconduct or intoxication and that the applicant was not fit for duty. The doctor reported that treatment would require that the applicant be absent from duty for about 7 days.

In addition, a Final Medical Certificate dated June 16, 1959, was completed by a Naval Hospital in Seattle, Washington. This certificate states that the applicant had been treated from May 28, 1059, to June 4, 1959, for a simple fracture, n.e.c., of his left frontal bone and a lacerated wound to his left forehead. The doctor in Seattle reported that the applicant was fit for duty.

The records before the BCMR do not include any medical records from 1966. On February 14, 1969, the applicant was discharged from the Coast Guard with an honorable characterization of service due to expiration of enlistment. The military record received by the BCMR from the National Personnel Records Center contains an empty folder for his medical records.

Although the original application is not in the record, the applicant stated that he began the application process for enrollment in VA benefits through a Veterans Affairs Medical Center in December 2002.

On January 17, 2003, notice was placed in the Federal Register (Vol. 68, No.12, pages 2670-2673) of the decision to suspend enrollment of Priority Group 8 veterans who apply for care on or after January 17, 2003. The applicant was determined to be in Priority Group 8 based on his lack of diagnosed service-connected disability and household income.

The applicant's original application to the VA and the VA's original decision are not in the record before the BCMR but a VA decision on the applicant's appeal of the VA's denial of his application for benefits, signed on July 11, 2003, states that the applicant had applied for enrollment on April 11, 2003. It further states that he "is a (non-service-connected) veteran, has no other special eligibility attributes that might qualify him for an improved priority group enrollment and has provided financial information that places him in Priority Group 8g. [He] is not eligible for enrollment at this time." The decision states that his statement about being able to enroll after his 65th birthday indicates that he was confusing veterans' benefits with the Social Security Medicare System. The decision noted that the VA did not have sufficient resources to provide medical care benefits to all of the veterans seeking enrollment and that as of January 17, 2003, enrollment had been suspended for Priority Group 8 veterans to ensure that the VA could continue to provide medical care "to high priority service-connected, indigent and special category veterans." On this document, the applicant added a

handwritten note stating, "Reason for decision proves they never requested Coast Guard files on injuries. The injuries were certainly service related!"

On August 7, 2003, the applicant filed an appeal to the Board of Veterans' Appeals regarding the denial of enrollment for healthcare benefits. In his appeal, the applicant claimed that at the time of his discharge, the evaluating doctor told the applicant that he should apply for partial disability because of his ankle injury. The applicant stated that he did not apply at the time of his discharge from the Coast Guard because he felt others needed the money more than he did. However, the applicant stated his disappointment in the VA to deny the applicant "what is rightfully [his]." The applicant further stated that he did not ask for the benefit before he needed it and was willing to pay any co-pay requirements.

On November 26, 2013, a Veterans Service Officer from the County Health and Human Services & Veterans Services sent the applicant a letter stating that the records of former patients are archived at the National Personnel Records Center in St. Louis, MO. The VSO completed and attached a SF 180 (Request Pertaining to Military Records) for the applicant's review. On December 16, 2013, the National Personnel Records Center sent a letter to the applicant stating that the records he requested were not stored at the NPRC's Military Personnel Records facility. The NPRC forwarded the request to the Civilian Personnel Records facility for a further search.

On March 7, 2018, the VA issued a rating decision denying the applicant's claim for benefits for sinus headaches stemming from the applicant's head collision in 1959. The VA stated that "service connection for sinus headaches from head collision is denied since this condition neither occurred in nor was caused by service." The VA further reasoned that the medical evidence available did not support the conclusion that a persistent disability was present during service. The VA decision references another separate VA Administrative Decision for degenerative joint disease, right ankle, dated March 7, 2018. However, that decision is not in the record before the BCMR.

The applicant submitted an email from the VA dated March 26, 2018, which states that the applicant was very upset that the evidence used to deny VA benefits made no mention of the two hospitals that the applicant was treated at following injuries in 1959 and 1966, respectively. The email requests that the applicant's medical records be requested and used as evidence for reconsideration.

VIEWS OF THE COAST GUARD

On October 23, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board grant alternative relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC began its analysis by noting that the applicant's request is not an "appeal." Although the applicant indicated in his application that his request was for reconsideration of a prior appeal, the applicant had not applied to the BCMR before. PSC noted that the BCMR does not have jurisdiction to review claims decided by the Department of Veteran's Affairs.

In its memorandum, PSC recommended denying relief to the applicant based upon the information that was available to it at the time. To begin its analysis, the PSC noted that the application was not timely. The applicant stated numerous times in his application that he has been seeking correction to his military record since 2002. Because it has been approximately 60 years since the applicant was discharged and 15 years since the applicant became aware of the error, PSC stated that the Doctrine of Laches should apply and preclude the requested relief. PSC also emphasized the dangerous precedent that would be set if the Board granted relief to an applicant when the Coast Guard is unable to corroborate the applicant's testimony with other witnesses or records due to the extreme passage of time.

PSC next discussed the applicant's failure to meet his evidentiary burden to establish that the injuries occurred or medical records existed. PSC stated that Coast Guard policy limits the creation of new records to the replacement of records already known to exist. The applicant did not provide any corroborating evidence to show that the medical records were in existence or that the injuries did in fact occur, such as witness testimony, hospital records, etc. Without the records in the applicant's Health Record or evidence corroborating the applicant's testimony of the injuries, the PSC found that the applicant did not establish by a preponderance of the evidence that the Coast Guard had committed an error or injustice.

The JAG reiterated PSC's findings that no medical records existed within the applicant's "Medical Record" portion of his personal data record (PDR) and that the application was untimely. However, following an in-depth review of the applicant's PDR, three documents were found that address the head and sinus injury described by the applicant. Two of the documents were dated, official documents created contemporaneously with the injury. The third document was not an official government record, nor was it dated. The JAG agreed with PSC's findings that new records could not be created in the absence of evidence or documentation but noted that PSC's memorandum did not consider the medical documents found by the JAG. Taking into consideration the previously unknown evidence, the Coast Guard recommended granting alternative relief and designating "Excerpt of Records from Applicant's Official PDR" as the applicant's "Medical Records" for purposes of documenting his 1959 injury.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 30, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received by the Board.

APPLICABLE LAW AND POLICY

Chapter 4 of the current COMDTINST M6000.1F manual provides guidance on Health Records and Forms created or maintained by the Coast Guard.

Chapter 4.A.1.a. defines a health record as the chronological medical and dental record of an individual while a member of the Coast Guard or Coast Guard Reserve. Chapter 4.A.1.a.2. states that one of the primary reasons for compiling a health record is "to facilitate appraisal of the physical fitness or eligibility for benefits by making selected, necessary information contained in the health record available to CG selection boards, disability evaluation system, Board of Correction of Military Records, for income tax purposes, and for claims to the Department of Veterans Affairs." The section further states that the value of an individual's health record increases to both the Government and the individual as time goes on, and thus, accuracy of the

record is of the utmost importance in making entries. All entries, whether minor or trivial at the time, should be recorded with accuracy to protect the Government and the individual.

Chapter 4.A.2. outlines what the Health Record shall consist of and how each section of medical or dental records shall be arranged. Within each sub-category of records, each form should be arranged from top to bottom, with the most recent form on top.

Chapter 4.A.8.a. 4 states that if a health record is lost or destroyed, a complete new health record shall be opened by the unit health record custodian. The new record shall be marked or stamped with "REPLACEMENT" on the cover. If the missing health record is recovered, any additional information or entries in the replacement record shall be inserted in the original record.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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 began applying for VA healthcare benefits in December of 2002 and did not apply to the BCMR until March of 2018. While the exact date of discovery is unclear, the preponderance of the evidence shows that a sixteen-year delay between commencement of seeking benefits and applying to the BCMR is not timely.

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]Although the applicant in this case did delay filing the application and failed to provide a reason for this delay, it is not clear to the Board when the applicant discovered the error in his record. The evidence of record reveals a prejudicial, potentially significant error in the applicant's record, as explained below, and so the Board finds that it is in the interest of justice to excuse the untimeliness of the application and waive the statute of limitations.

4. The applicant alleged that the lack of medical records documenting two injuries that he incurred during active duty service in his military record is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record,

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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 the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[5] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[6]

5. In his request, the applicant seeks "factual evidence" of two injuries he sustained during active duty service. When the Board and Coast Guard received the applicant's military record from the National Personnel Records Center, the medical records folder in the PDR was empty. The applicant was discharged in 1969, and it is unknown whether his medical records were not entered at the time or whether the VA or another entity has removed them in the interim. However, after an in-depth review of the applicant's PDR by the JAG, three documents were found that supportthe applicant's account of his head and sinus injury. The JAG recommended partial relief be granted by designating the documents as the applicant's "Medical Record" for purposes of documenting his 1959 injury, and the Board agrees. The applicant has been denied enrollment for VA healthcare benefits on multiple occasions, apparently because he was erroneously found not to have incurred a service-connected injury to his head. The Board finds that as the JAG recommended, the documents supporting the applicant's account of the injury should be properly designated as the applicant's "Medical Records" for purposes of documenting the 1959 injury.

6. PSC stated that the doctrine of laches should bar the applicant's claim because his long delay in filing his application has prejudiced the Coast Guard's ability to submit evidence because relevant records are no longer available, memories have faded, and members with knowledge of the events have separated from the Service. The doctrine of laches applies when an applicant's delay in applying to the Board has prejudiced the Coast Guard's ability to produce evidence to show that the disputed military record is correct and just.[7] Even when the Board's statute of limitations is tolled, "the doctrine of laches remains available to the government to protect itself from stale claims."[8] "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them."[9] Although the Board has decided to waive the statute of limitations in the interest of justice, the Board finds that the doctrine of laches bars the applicant's claim for evidence of the alleged 1966 injury because his excessive delay in filing the application has prejudiced the Coast Guard's ability to produce important evidence that mightd have been available had the applicant submitted the application more promptly. While the Board will grant partial relief regarding the 1959 injury, the Board cannot do so regarding the 1966 injury. The Board has the authority to correct an error or injustice in a Coast Guard member's record when appropriate. The Board does not, however, have the authority to conduct investigations and it would be inappropriate for the Board to order the Coast Guard to create new medical records dated in 1966. The burden is on the applicant to show, by a preponderance of the evidence, that the lack of documentation of the injuries is erroneous. While the applicant provided his account of the 1966 injury, he provided no evidence, other than his word, to substantiate the claim. Without evidence

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[5] 33 C.F.R. § 52.24(b).
[6] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).
[7] *See Lebrun v. England*, 212 F. Supp. 2d 5, 13 (D.D.C. 2002).
[8] *Detweiler v. Pena*, 38 F.3d 591, 595 (D.C. Cir. 1994) (citing *Deering v. United States,* 223 Ct. Cl. 342 (1980)).
[9] *Bliss v. Bliss*, 50 F.2d 1002, 1004-05 (D.C. Cir. 1931), citing *Speidel v. Henrici*, 120 U.S. 377, 387 (1887).

or official records from the Coast Guard, the Board will not simply instruct the Coast Guard to create new records on the applicant's behalf. Therefore, the Board will not grant relief for the 1966 injury by ordering the Coast Guard to produce evidence of an injury that it has no record of. However, a copy of this decision may be entered into the applicant's military record for consideration by the VA.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [redacted] for correction of his military record is granted in part and denied in part as follows:

Regarding the 1959 injury, the Coast Guard shall designate the two official documents found in his PDR as his "Medical Record" for purposes of documenting his 1959 injury.

Regarding the 1966 injury, his request for factual evidence is denied. However, a copy of this decision may be entered into this military record for consideration by the DVA.

August 6, 2021