

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction
of Coast Guard Record of:



BCMR Docket
No. 2000-055

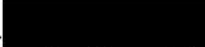
FINAL DECISION



This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on January 11, 2000, upon the BCMR's receipt of a completed application for correction.

This final decision, dated July 13, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, , asked the Board to correct his officer evaluation report (OER) for the period from December 1, 1996 to June 5, 1997 (first disputed OER). The applicant also asked the Board to remove his OER for the period June 6, 1997 to June 12, 1998 and to replace it with an OER for continuity purposes only (second disputed OER).

The applicant asked that if selected by the first lieutenant commander (LCDR) selection board to consider him following the BCMR's action, he should be given all back pay and allowances retroactive to the resulting date of rank, and that he should be given the date of rank and position on the ADPL (active duty promotion list) that would have resulted had he been selected.

APPLICANT'S ALLEGATIONS

The applicant was commissioned an ensign in 1991 through the Reserve Officer Candidate Indoctrination program. He was promoted to lieutenant junior grade and lieutenant with his peers and selected for integration into the regular Coast Guard.

Although in good health when he was commissioned, in late 1996 he began to experience medical difficulty. He sought medical treatment and was diagnosed in 1997 as suffering from pericarditis and thereafter as suffering from PVS (post-viral syndrome).

The applicant's rating chain knew of the applicant's medical condition. Despite the Personnel Manual's prohibition against adverse evaluations resulting from medical ailments, the first disputed OER contained, in § 3.h., the following comment:

occasionally required direct oversight coming up to speed in conduct of complex multi-ship military operations.

This comment, claimed the applicant, was the direct result of attributes of his illness, specifically memory and concentration problems caused by the illness. The many derogatory portions of the second disputed OER were caused by the same medical condition. Taken together, the two OERs "contained unfair and inaccurate narrative and numerical scores."

It was during his second rating period at Squadron 42 that the applicant's illness began substantially to affect his performance. The bulk of his problem involved inability to concentrate combined with failure to realize these problems were medical in nature.

VIEWS OF THE COAST GUARD

On June 2, 2000, the Chief Counsel of the Coast Guard recommended to the Board that it grant specific relief in this case.

The Chief Counsel stated that he adopted the analysis of the Commander of CGPC (Coast Guard Personnel Command) and he asked that the comments of CGPC be regarded as the advisory opinion of the Coast Guard. According to the Chief Counsel, the "Board should grant the relief articulated in enclosure (1), Recommendations, by:

"a. Redacting the following section 3.h. phrase from Applicant's 961201 to 970605 [12/1/96 to 6/5/97] OER:

"occasionally required direct oversight coming up to speed in conduct of complex multi-ship operations

"b. Expunge Applicant's 970606 to 980612 [6/6/97 - 6/12/98] and replace it with a continuity OER.

CGPC gathered together the details with respect to the applicant's illness and medical history.

The applicant was first examined and evaluated for chest pains in 1997. A medical evaluation was then made for symptoms suggestive of pericarditis, but the examination did not support this diagnosis until later when another hospital diagnosed him with Acute pericarditis. He had continuing intermittent chest pains which led to his referral for a cardiac exam. EKG and Echo Cardiogram were normal and there was no evidence of pericarditis.

On December 16, 1998, he was examined at Walter Reed Hospital complaining of chronic fatigue and depression. He was diagnosed as having Post Viral Syndrome (PVS) complicated by pericarditis.

CGPC said this medical history makes the applicant's claim of a performance-impacting condition during the period of the first disputed OER plausible. He complained, since December 1996, of chest pain and shortness of breath and an extended bout with the flu. The symptoms of PVS/CFS (chronic fatigue syndrome) are similar to those described by the applicant: fatigue, memory loss, inability to concentrate, irritability, lethargy, and eventual depression.

A person experiencing those symptoms may, according to NIH (National Institutes of Health), become depressed out of anger at inability to perform, if accustomed to excellent performance. The patient does not recognize the connection between the medical symptoms and performance problems. The depression further aggravates the physical symptoms of fatigue and difficulty in concentrating.

CGPC stated that there was no error in the diagnosis.

"Applicant's assertion that the two OERs in dispute were prepared without properly taking his medical condition into account is, in retrospect, correct. However, in fairness to the rating chain, a conclusive diagnosis of PVS had not been made at the time the OERs were prepared. . . . Once the doctors at Walter Reed had made a conclusive diagnosis of PVS/CFS in December 1998, the root cause and effects of the events that had occurred over the past two years (from the initial flu virus) become clear. While the disputed OERs faithfully document the events as they were known to exist by the rating chain at the time, the subsequent diagnosis of PVS suggests that a significantly different approach would have been taken had the diagnosis been made at the outset."

The submission of two OERs without properly taking his medical condition into account and the lack of understanding of his medical condition "led to the creation of an inaccurate and official Military Record." The record is replete with affidavits by officers attesting to the quality of the applicant's performance. "[T]his record of high performance extends throughout his more than [18] years of service to the U.S. Coast Guard. The logical conclusion is that any perceived shortcoming in his performance was an aberration caused by his illness."

The Coast Guard advisory opinion drew a relation between the applicant's illness and the applicant's performance. "[A] strong enough linkage exists, both in chronology and symptoms, to conclude that Applicant was substantially hampered in his ability to perform by the medical condition he was suffering during the period from early 1997 through late 1998."

APPLICANT'S RESPONSE TO THE COAST GUARD VIEWS

On June 5, 2000, the Board sent a copy of the views of the Coast Guard to the applicant with an invitation to comment thereon in 15 days.

On June 16, 2000, the attorney for the applicant submitted a response noting that the Coast Guard agreed the applicant merited the requested relief. He stated that the Coast Guard called for an expedited decision and stated that if the BCMR will grant the relief requested, the applicant will submit no further rebuttal.

APPLICABLE REGULATION

Article 10.A.2.b.2.i. of the Personnel Manual provides that Commanding Officers shall "Apply the following guidelines to officers who are unable to fully perform due to illness, injury, pregnancy, etc."

Subparagraph (1) of this provision provides that "Periodically, officers may experience circumstances due to a temporary condition which result in a limited opportunity to perform. . . . While no preferential treatment shall be given, commanding officers shall ensure that these individuals do not receive **below standard** evaluations strictly as a consequence of these circumstances."

Subparagraph (2) provides in part that "When considering reassignment or restructuring of duties, commanding officers should strive to identify service needs which complement the temporary limited ability of the officer."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the applicant, and applicable law:

1. The Board has jurisdiction to determine the issues in this proceeding under section 1552 of title 10, United States Code. The application was timely.
2. The applicant requested an oral hearing. The Chairman, pursuant to § 52.31 of the Board's rules, recommended disposition on the merits without a hearing. The Board concurred.
3. The applicant asked the Board to remove a negative clause from one OER and to remove a second OER in its entirety and to replace it by an OER for continuity purposes only.
4. From 1996 to 1998, the applicant was examined in at least seven different medical centers. Two OERs were prepared during this period without adequately taking the applicant's medical condition into account. The applicant has not failed of selection for promotion to LCDR, but the disputed OERs contained negative observations. He was having problems concentrating and performing his duties. It is likely that his illness, rather than any innate ability to perform, caused his difficulties with performing his duties.

5. The fact that the applicant did not have his duties restructured and reassigned and the fact that his rating chain did not change his evaluations are violations of Article 10.A.2.b.2.i. of the Personnel Manual.

6. The Chief Counsel of the Coast Guard and the Commander of CGPC recommended that the disputed phrase be deleted from the first disputed OER and the second disputed OER be removed from the applicant's record and replaced by a continuity purposes only.

7. There is no evidence that the applicant has failed of selection for promotion to LCDR. Therefore, the applicant's request with respect to adjusting his date of rank is premature.

8. The recommendations of the Coast Guard should be followed.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

ORDER

The application to correct the military record of _____, is granted as follows:

1. The comment in section 3.h. of the OER for the period from December 1, 1996 to June 5, 1997 which states "occasionally required direct oversight coming up to speed in conduct of complex multi-ship military operations" shall be removed from his record.
2. The OER from June 6, 1997 to June 12, 1998 shall be removed and replaced by an OER "for continuity purposes only."
3. All other relief is denied.

