

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 7-96

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 of the United States Code. It was commenced on October 12, 1995, by the filing of an application with the Board.

This final decision, dated June 7, 1996, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, the widow of a deceased officer, asked the Board to correct her husband's military record to show that he was enrolled in the Survivor Benefit Plan (SBP). The decedent was a commander (CDR) in the Coast Guard until his death on January 9, 1995, when the right side of his heart failed during a pericardial tap. At the time of his death, the member had begun chemotherapy for end-stage adenocarcinoma, and his life expectancy was one to two years. He had served more than 17 years on active duty in the Coast Guard.

Views of the Applicant

The applicant alleged that the Coast Guard committed medical error by ignoring the member's medical test results and thus failing to diagnose his cancer prior to November 30, 1994. She also alleged that the Coast Guard's failure to convene an initial medical board between the member's first symptoms of serious illness on August 12, 1994, and his death, and its failure to conduct a death imminent procedure on January 9, 1995, constituted administrative error and injustice that deprived him of his right to be retired and to choose SBP coverage for his family.

The applicant submitted an affidavit from the member's commanding officer stating that he would have initiated a medical board or a death imminent procedure to retire the member had he "been given complete medical information."

Views of the Coast Guard

On March 22, 1996, the Coast Guard recommended that the relief sought be granted and that the Board expedite its review of the case. The Coast Guard argued

that there was no medical or administrative error, but that under the unique circumstances of this case, the failure to retire the member before his death constituted an injustice.

In denying error, the Coast Guard contended that the applicant had not presented substantial proof that Coast Guard medical personnel were negligent; that the member's cancer should have been diagnosed sooner; or even that the member died of cancer. According to the Coast Guard, the report of the member's primary physician shows that the Coast Guard responded appropriately to his symptoms and test results as they became known. In response to his numbness, slurred speech, and other neurosensory symptoms that began on August 12, 1994, he underwent cardiology, neurology, gastroenterology, radiology, and magnetic resonance imaging (MRI) studies. The results were suggestive of a cerebrovascular event, or "stroke." The applicant's primary physician found the member fit for limited duty and grounded him indefinitely. Thereafter, the member frequently reported feeling well and complained about being grounded. The physician decided to wait to convene a medical board until after a follow-up MRI, which was scheduled for November.

The Coast Guard also alleged that, on November 14, 1994, when the member sought treatment for swelling lymph nodes in his neck, appropriate tests were conducted and an internal medical examination was ordered. The member again questioned his grounding and the August diagnosis. One week later, when the number of nodes had increased, his physician ordered a biopsy and chest x-rays. After the biopsy revealed end-stage adenocarcinoma on November 30, 1994, the initial prognosis was poor, giving the member a one to two year life expectancy. However, on December 16, 1994, the member asked to be found fit for active duty so that he would not lose his flight pay. The doctor refused to find him fit for duty.

On January 5 and 6, 1995, the doctor considered convening an initial medical board but was advised to wait until after the member had completed a four-week chemotherapy trial, when the prognosis would be more definite. Subsequently, the Coast Guard agreed, at the member's insistence, to allow him to receive treatment at a non-military hospital, Sloane-Kettering in New York, even though proper treatment was allegedly available at the National Naval Regional Medical Center in Bethesda.

The member began to have congestive cardiac symptoms on January 6, 1995. The Coast Guard was not informed of the pericardial tap that was performed on January 9, 1995, during which the member died. The Coast Guard argued that, if the surgery had been performed at a military hospital, it is extremely likely that a death imminent procedure would have been conducted after the member's heart failed; that the member would have been found not fit for duty and assigned a 100 percent disability rating due to a myocardial infarction (VASRD Code 7006); and that counsel

would have been appointed and would have accepted immediate retirement and full SBP coverage for the member's family.

In summary, the Coast Guard alleged that it did not err but made reasonable efforts to accommodate the desires of the member to remain on active duty while appropriately addressing his medical conditions.

In light of the unique circumstances summarized above, the Coast Guard stated that the lack of a death imminent procedure prior to the member's death was an injustice. Accordingly, it recommended that the requested relief be granted.

Response of the Applicant

On March 26, 1996, a copy of the views of the Coast Guard was sent to the applicant. On April 9, 1996, she concurred with the Coast Guard's recommendation that relief be granted and that the case be expedited.

The applicant, however, continued to assert that medical and administrative errors had occurred. She supported her contention of medical error by restating her allegations that (1) an oncologist at the Portsmouth Naval Hospital said that the cancer should have been diagnosed when the results of an August 1994 blood test showed a low level of fibrinogen and suggested additional studies, which were not done; (2) the member first complained to his primary physician about swollen lymph nodes on October 24, 1994, but was told not to worry about it; and (3) a chest x-ray made prior to the cancer diagnosis revealed an abnormality in a lung that later turned out to be the origin of the cancer.

She further contended that neither she nor the member was ever counseled about the possibility of medical retirement or about the death imminent procedure and that the full payment of the member's medical bills by the Coast Guard would not have deterred him from retiring because he had supplemental insurance that would have covered expenses not reimbursed by CHAMPUS.

Applicable Regulations

Section 3-I-1 of the Coast Guard's Physical Disability Evaluation System (PDES) Manual (COMDTINST M1850.2B) requires a member's commanding officer to convene an initial medical board if there is "doubt concerning a member's physical ability to perform their [sic] duties of office, grade, rank or rating."

Sections 3-F-2, 3-F-8-b-3, and 3-F-20 of the Coast Guard Medical Manual (COMDTINST M6000.1B) require referral to an initial medical board following the discovery of any neoplasm of lymphoid tissue or of any aneurysm that produces

"limiting symptomatic conditions which preclude satisfactory performance of duty" and which are not surgically corrected.

Section 2-A-6-h of the Coast Guard Medical Manual requires any inpatient hospitalization in a nonfederal facility to be "monitored closely" by the Maintenance and Logistics Command for the geographical area in which the facility is located.

Sections 3-K and 4-A-6 of the PDES Manual require a member's commanding officer or district commander to initiate a death imminent procedure whenever "the member's death is considered so imminent as to preclude physical disability evaluation in a routine manner."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction to determine the issues in this case pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant alleged that injustice and medical and administrative errors by the Coast Guard deprived her husband of the chance to retire and choose SBP coverage for his family.

3. The Coast Guard denied committing medical or administrative errors but agreed that, under the unique circumstances of this case, the applicant's dying without having been retired because of his disability was an injustice.

4. The Coast Guard could have, but did not, convene an initial medical board to consider retiring the member at any time after his cerebrovascular aneurysm in August 1994. The Coast Guard was trying to act in the member's best interest when it deferred convening an initial medical board both before and after he was diagnosed with end-stage adenocarcinoma in November 1994.

5. No death imminent procedure was conducted because the member had elected to undergo treatment in a private hospital with the Coast Guard's approval.

6. It would be unjust for the applicant's family to be denied benefits that would have been accorded by the Coast Guard had the applicant been treated in a military hospital instead of a private facility.

7. The Coast Guard did not object to a finding of injustice warranting correction of the member's record to show that a death imminent procedure was held on January 9, 1995; that counsel was appointed for the member; and that the

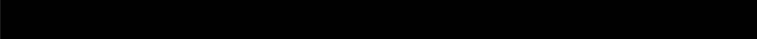
appointed counsel accepted retirement and elected full SBP coverage for his wife and two children.

8. To remove that injustice, the applicant's record should be corrected to show that a death imminent procedure was conducted on January 9, 1995, and that the counsel appointed for the applicant accepted immediate retirement and full SBP coverage on his behalf.

9. In light of this conclusion, it is not necessary for the Board to address any other issues in this case.

[ORDER AND SIGNATURES FOLLOW ON THE NEXT PAGE]

ORDER

The military record of the  shall be corrected to show that: (1) a death imminent procedure was held on January 9, 1995; (2) counsel was appointed for the member; and (3) appointed counsel acted on his behalf to accept retirement and to elect full Survivor Benefit Plan coverage for his wife and two children.

The Coast Guard shall pay the applicant the amount due as a result of these corrections to the member's record.

