

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-238

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application, including the applicant's military and medical records, on August 25, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 25, 2012, 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 [REDACTED] E-6) who was honorably discharged on November 8, 2000, asked the Board to correct her record to show that she was retired with 20 years of service.

The applicant alleged that her discharge was unjust because she had more than 19 years of service and was never told by her command that she could have requested retirement in lieu of discharge. The applicant alleged that she was never counseled about the regulations and should have received the opportunity to retire instead of being discharged.

The applicant alleged that she discovered this error and injustice in her record on January 1, 2010. She also argued that it is in the interest of justice for the Board to excuse the untimeliness of her application because granting her a retirement would be the right thing to do.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on [REDACTED] at age 26, and earned the [REDACTED] rating. At the time, she had 5 years, 10 months, and 16 days of prior active duty in the Army. The applicant's record shows that she was placed on weight probation for exceeding her maximum allowable weight (MAW) numerous times over the course of her career. Each time, she

was counseled in writing that she would be recommended for discharge if she failed to meet her MAW by the end of the probationary period. She was provided diet and exercise counseling, and each time she met her MAW by the end of the weight probationary period, except once when she was unfit for duty due to a painful abdominal condition that was ultimately corrected by surgery.

The applicant was diagnosed as a compulsive overeater in 1992 and provided inpatient rehabilitative treatment. She was given an aftercare plan, ordered to attend Overeaters Anonymous meetings, and later counseled about her failure to follow the plan.

On December 23, 1999, a doctor signed a Command Medical Referral form stating that there was no underlying medical condition causing the applicant's obesity. He particularly noted that her thyroid was normal and she did not have diabetes. The doctor also stated that it was safe for her to lose the excess weight, that she could exercise, and that she had been counseled on diet and exercise.

On February 29, 2000, the applicant signed a Page 7 on which she was counseled as follows and acknowledged that she had been "afforded the opportunity to review COMDTINST M1020.8 and fully understand the action required":

18FEB00: You have this date been determined to be 29 pounds overweight. Your measurements are: 67" (inches), Wrist size 7 – 7¼, Weight: 211 (pounds). In accordance with COMDTINST M1020.8, you are required to lose 29 pounds or drop below 35% body fat by 21SEP00. If you fail to reach compliance by the end of this probationary period, you will be recommended for separation. Furthermore, until you are in compliance with weight or body fat standards, all actions listed in Chapter 3 of COMDTINST M1020.8 will be withheld. By signature below, you acknowledge both this entry and that you have been afforded the opportunity to review COMDTINST M1020.8.

On April 6, 2000, the applicant signed a Page 7 on which she was counseled as follows by her commanding officer (CO):

00APR06: On 18Feb00, I signed [a Page 7] informing you that you had been placed on a probationary period to lose your excess weight/percent body fat. On 04Apr00, HS2 [X] as part of your weekly monitoring program weighed you. You have gained 18 pounds since your probationary period began. As of this date, you are 50 pounds above your maximum allowable weight. In accordance with COMDTINST M1020.C, during your probationary period, you are expected to demonstrate reasonable progress (i.e., lose approximately ½ the required weight or half the excess % body fat at the midpoint of your probationary period) toward attaining your maximum allowable weight. Failure to demonstrate such reasonable progress may provide sufficient grounds to process for separation under Article 12-B012(a)(6), CG PERSMAN, COMDTINST M1000.6 series. To assist you in obtaining your maximum allowable weight, this document was prepared to remind you of the progress requirement and to provide you with contact individuals that may be able to provide you information to assist you in losing weight. If you wish to contact a dietician, arrangements can be made through HS2 [X]. If you need assistance in establishing an exercise program, the unit Wellness Coordinator, SK2 [X] at extension 4812, will be able to assist you. Additionally, if you choose to exercise during your designated lunch break, your supervisor will support you in this effort. If you feel you are not being supported in this area, advise your Chain of Command.

On May 26, 2000, the Command Medical Referral Form prepared by a doctor on December 23, 1999, was re-signed and re-stamped by the same doctor.

On June 13, 2000, the applicant signed a Page 7 on which she was counseled as follows:

00JUN09: On 18Feb00, I signed [a Page 7] informing you that you had been placed on a probationary period to lose your excess weight/percent body fat. 05JUN00 marked the midpoint of your probationary period. As part of your weekly monitoring program, you were weighed on 05 JUN 00 and were found to be 39 pounds over your maximum allowable weight of 182 pounds. In accordance with COMDTINST M1020.8, you are required to be within your maximum allowable weight or drop below 35% body fat by 21SEP00. If you fail to reach compliance by the end of your probationary period, the Command will recommend you for separation under Article 12-B-12 (a)(6), CG PERSMAN, COMDTINST M1000.6 series.

On August 7, 2000, the applicant was charged with violations of the Uniform Code of Military Justice and relieved of her duties. The charges against her are not apparent in the record.

On September 9, 2000, the applicant sought treatment for anxiety. She said she had suffered from anxiety with some feelings of depression for about six months because she was under a great deal of stress. She was prescribed Zoloft and referred for a mental health consultation.

On September 26, 2000, the applicant signed the following Page 7 entry, which had also been signed by her CO:

00SEP20: On 18Feb00, you were placed on probation due to excess weight/percent body fat. On this date, your probationary period has come to an end. You weighed 222 pounds and indicated 42% body fat and you have not achieved your maximum allowable weight/body fat. In accordance with Commandant Instruction M1020.8 (series), you are hereby notified that you will be recommended for separation.

On September 26, 2000, the applicant's CO advised her in a letter that he would be recommending her discharge from the Coast Guard for weight control failure. The CO noted that when placed on weight probation on February 18, 2000, her weight had been 211 pounds and her body fat measured 43% and that at the end of her probationary period, her weight was 222 pounds and her body fat was 44%. Her maximum allowable weight was 182 pounds and her maximum allowable body fat was 35%. The CO advised her that she could submit a statement to object to the discharge and that her rebuttal would be forwarded to the Coast Guard Personnel Command (CGPC) with his recommendation.

On September 28, 2000, the applicant had an appointment with a psychologist. He reported that she was feeling sad, angry, and hopeless and could not sleep well because of her pending discharge. The applicant told the psychologist that in August 2000, a doctor at Cape May, New Jersey, had prescribed Xanax and Ambien for her anxiety and insomnia.

On October 2, 2000, the applicant submitted a rebuttal to the recommendation for discharge. She stated that discharge would not be in her best interest and that she had been under a lot of work-related stress. She noted that before August 7, 2000, she had been working very long hours as the senior crewmember of a short-staffed galley, and that after she was blindsided by

criminal charges on August 7, 2000, she was relieved of her duties and did not have any meaningful work to do. The applicant questioned the accuracy of the corpsman's measurements and suggested that her medical records might have been tampered with. The applicant asked for another chance to lose the weight or the opportunity to retire.

On October 3, 2000, the applicant's CO recommended to CGPC that she be discharged for weight control failure. The CO forwarded her military and medical records and the applicant's rebuttal to CGPC with his recommendation.

On October 11, 2000, CGPC issued orders for the applicant to be discharged for weight control failure no later than November 8, 2000. CGPC noted that the applicant was eligible for transition benefits and could request reenlistment if she lost the required weight within two years.

On October 25, 2000, the applicant underwent a pre-separation physical examination. The examination showed that she was 67½" tall, had a wrist size of 6½", and weighed 211 pounds. She was found fit for separation, but she signed a form objecting to that finding.

On November 6, 2000, the applicant wrote a letter to the Commandant objecting to her discharge. She stated that after being found fit for separation, she consulted another doctor, who found that she had suffered a relapse of her eating disorder because she had been under a great deal of stress at work. She stated that her discharge was premature and

should be held in abeyance until the charges against me are resolved and the stress I am going through is abated. Then only should I be placed back on the weight program with monitoring and counseling. If that is not possible, I request to be medically discharged and afforded my full retirement rights because of my twenty years of loyal service to the United States Coast Guard.

The applicant attached to her letter a doctor's report dated October 25, 2000, stating that the combination of the applicant's stress, compulsive overeating disorder, and treatment with Zoloft and Ambien would definitely have prevented her from achieving her weight probation goal. The doctor noted the following:

1. Patient was placed on the weight program in November 1999; in July 2000 she was relieved of all her duties and placed on report for dereliction of duty with the uncertainty that she would be facing either a Captain's Mast or Court Martial. From July to date, these charges have not been resolved. She is a single parent and is concerned for herself and her dependent child. The uncertainty concerning the outcome of these charges has exacerbated an already stressful condition (being on the weight program) and may have caused a relapse of her COMPULSIVE OVEREATING DISORDER.
2. When the patient realized that the stress was causing her to be depressed, she sought help from the clinic ... [and] was put on medication for her depression.
3. COMDTINST M1020.8C, Chapter 4, provides an exemption for members who incur illness or injury during a probationary period that may adversely affect their weight loss program. Paragraph A states that these members should be referred to a medical officer/contract physician for determination of whether it is medically safe/feasible for a member to continue [a] weight loss regimen. In [the applicant's] case, I strongly suggest that she be referred for evaluation by an Armed Forces psychiatrist or Armed Forces clinical psychologist to determine if this patient is

suffering from a relapse of COMPULSIVE OVEREATING DISORDER. Once the determination has been made as to whether this is a relapse of the above described condition and the pending charges are resolved, then and only then should she be placed back on the weight program or be medically retired.

4. In my opinion her discharge for failure to comply with the weight program is premature based on Chapter 4 of COMDTINST M1020.8C.

A. Adjustment disorder with depressed mood
Compulsive overeating disorder, relapse

P. Psychiatric evaluation for eating disorder upon return to CG GP Philadelphia

On November 8, 2000, CGPC notified the applicant's command that the applicant's letter dated November 6, 2000, had been carefully reviewed by CGPC's medical staff, who found that she was "physically qualified for separation." CGPC told the command to discharge her that same day. The applicant was honorably discharged due to weight control failure pursuant to Article 12-B-12 of the Personnel Manual.

VIEWS OF THE COAST GUARD

On October 28, 2011, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief.

The JAG stated that the application should be denied for untimeliness because the applicant failed to submit any evidence of error or injustice or "any relevant documentation or rationale to support her position." Therefore, the applicant should be denied because it is untimely and lacks merit."

The JAG further argued that it is well settled that the Coast Guard "is entitled to enforce its weight control policy on service members with more than 19 years of service," citing BCMR Docket No. 2006-054, in which the Board upheld the discharge of a member with more than 19 years of active duty for weight control failure. The JAG noted that members discharged for weight control failure may be reenlisted if they comply with the Coast Guard's weight standards within 2 years of their discharge, but the applicant apparently did not do so. Therefore, he argued, the applicant is entitled to no relief.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC stated that the applicant was discharged due to weight control failure when she had 19 years, 2 months, and 5 days of active duty. The PSC stated that retirement is only authorized for those with more than 20 years of service or for those who are 62 years of age. Because the applicant met neither of those criteria, PSC stated, her administrative discharge was proper. PSC stated that the applicant has failed to substantiate an error or injustice in the record and her application is untimely, so no relief should be granted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 25, 2012, the applicant responded to the views of the Coast Guard. The applicant stated that she was blindsided in November 2000, when she was called into the command's board room and told that it was her last day on active duty and that she had to sign a lot of papers. She alleged that she was given no warning that she would be kicked out, and her enlistment was not due to expire for more than a year. She had written a letter to a board but never received a response.

The applicant stated that it was unjust for the Coast Guard to discharge her after she had sacrificed so much during her 19 years of service by, for example, serving away from her daughter on shipboard. She stated that she is still estranged from her daughter because she was home so infrequently when she was on active duty. In addition, she was very depressed after her discharge and had no veterans' points and so could only get work in places like fast food restaurants, check-cashing establishments, and grocery stores. The applicant stated that she provided top-rated service for more than 19 years and it is an injustice that she was not retired.

APPLICABLE REGULATIONS

COMDTINST M1020.8 (series) provided the Coast Guard's weight and fitness standards and regulations in 2000. Article 2.D.1. states that all military personnel will be weighed each October and April, but COs may screen members against standards anytime they deem it necessary. Article 2.D.4. states that members who are found to be overweight will not be advanced, transferred to a new unit, assigned to training, or paid bonus installations until they are in compliance with regulations.

Article 2.E.1. states that members not in compliance with MAW and body fat standards "shall be referred to a medical officer or local physician, who shall make a recommendation to the command as to the member's health, whether or not weight and/or body fat loss would be detrimental to the member's health, and the member's ability to participate in each component of the monthly fitness assessment." Article 2.E.3. states that a "member with any underlying medical condition that limits or prohibits his/her participation in a specific portion of the fitness assessment will be excused from only that portion of the fitness assessment, but must continue to participate in weekly fitness enhancing activities outlined in his/her detailed fitness plan. The physician will document his or her finding in the member's health record." Article 2.E.4. states that a "member found to have an underlying medical condition that would make fitness activities detrimental to his/her health is still responsible for meeting MAW standards within the timeline specified by the probationary period."

Article 2.F.1. states that "overweight members who also exceed their maximum body fat percentage shall be placed on probation, during which they must lose their excess weight or body fat." Article 2.F.4. states that the probation period "shall equal the amount of time it would take the member to lose all excess weight at an average of one pound per week or one percent body fat per month, whichever is greater." Article 2.F.5. states that "[m]embers whose probationary period has been determined to be equal to or greater than 36 weeks both by weight calculations and by body fat calculations ... shall be processed for separation. If the situation exists in which

one of the two calculations results in a period in excess of 36 weeks, and one less than 36 weeks, the member shall be assigned a probationary period based upon the calculated period which is less than 36 weeks.”

Article 2.F.3. states that if a doctor determines that the member has a medical condition that prevents her from losing weight or body fat at the required rate, the CO may request permission from Headquarters to hold the probation in abeyance.

Article 2.F.6. states that “[d]uring probation, members should demonstrate reasonable and consistent progress toward attaining their MAW (i.e., lose approximately half of the required weight or half the excess percentage of body fat by the midpoint of the probationary period). Failure to demonstrate such reasonable and consistent progress may provide sufficient grounds for commanding officers to [initiate discharge] before the probationary period expires.”

Article 2.G.1. states that “[m]embers who exceed their MAW and body fat percentage to such an extent that they would be placed in a probationary period of 36 weeks or more, fail to demonstrate reasonable and consistent progress during probation, or fail to attain their MAW or body fat by the end of their probation ... shall be processed for separation.”

Article 3.A.1. states that a “[m]ember who incurs an injury or illness during a probationary period that may adversely affect their weight loss should be referred to a medical officer or contract physician to determine whether it is medically safe and feasible for the member to continue the weight loss program.” Article 3.A.2. states that if such members are found to have a medical condition that precludes weight loss, their probationary periods should be held in abeyance.

Article 2.H.2. states that “[a]ctive duty enlistment members discharged for exceeding MAW or body fat standards, and now seeking to re-enter the service, may request reenlistment to their former rate provided they comply with MAW or maximum percent body fat, meet appearance standards and have been out of the Service no more than 24 months. Commander (CGPC-epm) will evaluate requests based on Service needs and the member’s past performance.”

Article 12.B.12.a.10. of the Personnel Manual states that a member may be discharged for the convenience of the Government due to “[o]besity, provided a medical officer certifies a proximate cause of the obesity is excessive voluntary intake of food or drink, rather than organic or other similar causes apparently beyond the member’s control.”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s 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. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant alleged that she

discovered the error in her record in 2010. However, the preponderance of the evidence shows that she knew in November 2000 that she was being discharged due to weight control failure instead of being retired. Therefore, the Board finds that the application is untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed 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.” *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant provided no reason for her delay in contesting her lack of retirement.

5. The Board’s cursory review indicates that the applicant’s case cannot prevail on the merits. In this regard, the Board notes that the Coast Guard followed its regulations when she exceeded her MAW in 2000 by granting her a probationary period, counseling her repeatedly, and offering her the opportunity to object in writing to the discharge and to the doctor’s finding that she was fit for separation. The record shows that her objections and a different doctor’s report she submitted were forwarded to CGPC for review as required by regulation, but her CO’s recommendation for discharge was approved. These records are presumptively correct under 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.”). The applicant has submitted insufficient evidence to overcome this presumption. In particular, the Board notes that although the October 25, 2000, doctor’s report that the applicant submitted with her objection to her discharge states that taking Zoloft and Ambien would have made it difficult for her to lose weight, there is no evidence that the applicant was taking those medications throughout her probationary period. And although the doctor’s report recommended that she be evaluated to determine whether it was safe and feasible for her to lose weight, during the probationary period, a doctor had already twice certified on a Command Medical Referral Form that she could safely diet and exercise to lose the weight and had no underlying medical condition that made it unsafe or impossible for her to do so.

6. The Board notes that the applicant alleged that she qualified for and could have requested retirement in 2000 even though she had not accumulated 20 years of active duty. However, the Coast Guard’s Temporary Early Retirement Authority (TERA) under Public Laws 102-484 and 103-337 expired in September 1999, and there was no TERA in effect when the applicant failed weight probation in 2000.

7. Furthermore, the Board notes that the applicant’s case is very similar to that of the plaintiff in *Chapman v. United States*, 92 Fed. Cl. 570 (2010), *aff’d*, 427 Fed. Appx. 897 (Fed. Cir. 2011), in which a Coast Guard veteran challenged a BCMR decision upholding his discharge for weight control failure even though he had served more than 19 years on active duty.

Like the applicant in this case, ██████████ had been on weight probation numerous times during his career, had been diagnosed as a compulsive overeater, and had undergone treatment for compulsive overeating. Also as in this case, a doctor certified on a Command Medical Referral Form that it was safe for ██████████ to lose the weight by diet and exercise and that he had no underlying medical condition that made it unsafe or impossible for him to do so. ██████████'s CO initiated his discharge at the midpoint of his probationary period because he was not making consistent progress toward meeting his MAW. In this case, the applicant's CO waited until she failed to meet her MAW by the end of her probationary period to initiate her discharge even though the applicant had not made reasonable progress by the midpoint in June 2000. The Court of Federal Claims upheld this Board's decision denying relief in the *Chapman* case, noting that even though the consequences to the plaintiff were severe, the Board's decision was supported by substantial evidence and was neither arbitrary nor capricious, and on appeal the Federal Circuit Court of Appeals affirmed that decision. Given the similarity between this case and the *Chapman* case, the Board finds that the applicant's claim lacks potential merit.

8. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case because the applicant long delayed applying to the Board and her claim cannot prevail on the merits. The application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

