DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-160

FINAL DECISION

ANDREWS, Attorney-Advisor:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on July 12, 2000, upon receipt of the applicant's completed application.

This final decision, dated July 26, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant, a former xxxxxxxxxxx in the Coast Guard, asked the Board to set aside his honorable discharge of June 6, 1998, and correct his record to "show that he has been on active duty pending his right to a fair disability evaluation and, further, that he be allowed his right to medical care and physical therapy until such time as an evaluation has been made and his disability resolved or stabilized." In the alternative, he asked that the Board correct his record to show that he was discharged with a 10-percent disability rating and is entitled to severance pay.

APPLICANT'S ALLEGATIONS

The applicant alleged that at the time of his discharge, he was still undergoing extensive therapy and regular orthopedic treatment for a disabling injury. He alleged that he protested his fitness for discharge at the time, but the Coast Guard ignored his protest and failed to follow proper procedures. He alleged that he "was on 'restricted duty' by orders of his physician at the time of separation and his fitness status was indeterminable." He alleged that the Coast Guard

violated its regulations by discharging him before properly evaluating and resolving his disabling injury.

The applicant alleged that his injury was the result of a vicious attack on him at a bar/restaurant on XXXXXXXX. He alleged that an investigation had proved that the injury was incurred in the line of duty and was not the result of any misconduct on his part. The attack resulted in a rupture of his anterior cruciate ligament, a torn medial collateral ligament, microtrabecular injury (bone bruise) of the lateral femoral condyle and postlateral tibial plateau, and joint effusion. He had to undergo surgery to repair his knee on XXXXXXXXX. He alleged that he was told at that time that he would require between 6 and 18 months of physical therapy to recover but was discharged less than 4 months after the surgery. He alleged that his knee "continues to be unstable to this date because of incomplete therapy and treatment."

The applicant alleged that his command decided to separate him because the incident was considered to be "alcohol related," which he alleged was unfair. He alleged that prior to the attack at the bar, his service in the Coast Guard was excellent and he was named xxxxxxxxxx. He alleged that on Friday, June 5, 1998, he was informed that he was going to be discharged. He alleged that on Monday, June 8th, 1998, he was given his DD 214, which separated him as of Saturday, June 6, 1998; he was advised that he had no right to legal representation; and he was asked to sign his discharge physical. He alleged that he signed his DD 214 and formally objected to the findings of fitness on his discharge physical on June 15, 1998. He alleged that on July 5, 1998, a yeoman at his unit told him that a chief petty officer "was the ring leader behind [the nature of the applicant's discharge]. He felt that because you had been drinking that you didn't deserve any type of benefits."

SUMMARY OF THE APPLICANT'S RECORDS

On December 7, 1993, the applicant enlisted in the Coast Guard for four years, through December 6, 1997. After completing boot camp, he was assigned to a cutter. On August 30, 1994, he was counseled about loaning his identification card to another member who used it for an unauthorized purpose.

After completing a two-year tour on the cutter, he was assigned to another cutter. On August 15, 1996, he was formally counseled about arriving late for work and slacking off when he should have been working. On October 12, 1996, his commanding officer (CO) formally counseled him about his ongoing unsatisfactory performance since July 1, 1996. The CO wrote in the applicant's record that he had been "counseled informally on several different occasions for [his]

lack of effort, lack of concern for fellow shipmates and overall poor attitude towards [his] duties on [the cutter]." He was warned to work harder.

On April 3, 1997, the applicant was named his cutter's xxxxxxxxx for improving his professional knowledge. The citation for the award states that he "performed admirably in a listing of tasks that would have overwhelmed his contemporaries" by training for and serving as the cutter's emergency medical technician and by consistently working extended hours to accomplish an extensive list of projects, such as painting the entire mess deck, anchor locker, and ship's mast, while the cutter was in dry dock. However, on August 8, 1997, the he was again formally counseled about arriving late for work.

On XXXXX, the applicant sought treatment at a hospital emergency room for pain in his right knee. He told the hospital that he had been in a "fight/dispute" with a bouncer who, when he raised hands up to walk out, grabbed his hands, put them behind his back, "ran him out 30 ft.," and threw him out of the night club. He stated that when they pushed him out, he fell over a planter and heard his knee "pop." The police were called.

On September 29, 1997, the applicant underwent an MRI of his knee, foot, and ankle at the hospital. It showed an anterior cruciate ligament rupture, a torn medial collateral ligament, a microtrabecular injury (bone bruise) involving the later femoral condyle and posterolateral tibial plateau, and joint fusion.

On October 7, 1997, the applicant's CO made the following entry in his record:

> On XXXXXX [the applicant] was involved in an alcohol situation at the XXXXX Night Club in which consumption of alcohol may have impaired his judgment concerning a statement made to a Night Club Bouncer. He was subsequently ejected from the club causing injuries to his right knee.
>
> On 07 Oct 97 member was counseled by unit's Command Drug and Alcohol Representative (CDAR) concerning the use of alcohol and conduct expected of Coast Guard members.
>
> This is NOT considered an alcohol incident, but is entered for documentation purposes only as an alcohol situation as outlined in Chapter 20 of the Personnel Manual.

On October 17, 1997, an orthopedist recommended that he have his anterior cruciate ligament reconstructed. On October 23, 1997, the applicant consulted another orthopedist for a second opinion. This doctor also recommended surgery.

On November 11, 1997, the applicant's command sent the Coast Guard Personnel Command (CGPC) a request for authorization to retain the member on active duty for six months so that he could undergo knee surgery. CGPC apparently extended the applicant's enlistment for three months, through March 6, 1998. The applicant began physical therapy for his right knee, but it did not improve, and he agreed to undergo arthroscopic surgery on his knee. He continued to undergo physical therapy, but his knee did not improve.

On the applicant's performance evaluation for the period ending November 30, 1997, he received mostly marks of 4 and 5 (out of 7), a satisfactory conduct mark, and a recommendation for advancement from each of the three members of his rating chain. This evaluation was very similar to his five previous evaluations.

On January 22, 1998, the Coast Guard authorized knee surgery for the applicant. On February 5, 1998, he was issued transfer orders to leave the cutter and serve in an onshore billet because he was scheduled to undergo surgery to repair his knee. On February 12, 1998, CGPC extended the applicant's enlistment another three months, through June 6, 1998.

On XXXXXX, the applicant underwent the knee surgery. The surgeon reconstructed his anterior cruciate ligament and reported no complications. On February 25, 1998, the applicant began physical therapy. An evaluating therapist noted that he needed therapy for four to six weeks and that he might need eight weeks or more for full recovery. His rehabilitation potential was deemed "excellent." On March 4, 1998, he reported no pain, moderate swelling, but limited motion, strength, and stability. On April 1, 1998, his therapist noted that he was "progressing well per protocol" and that four more weeks of therapy were recommended. On April 28, 1998, his therapist reported that he was "quickly progressing," had increased mobility and strength, and was limited only in squatting, pivoting, climbing stairs, running, and jumping. He recommended another four weeks of therapy.

On May 11, 1998, the applicant completed a Report of Medical History for his physical examination prior to discharge. He stated that he was in good health except for his knee and ringing in his ears and planned to get a medical board for both conditions. On the Report of Medical Examination, his physician wrote that he had undergone surgery of his knee and that "pending release tentative date 01 Aug. 98/Per discussion [with] his orthopedic surgeon, he anticipates full recovery and return to FFD [fit for duty]." He referred the applicant to the DVA for post-discharge therapy for his knee and treatment for his tinnitus. He marked the applicant as qualified for discharge.

On May 28, 1998, the applicant consulted his orthopedic surgeon, who assigned him to restricted duty, with no climbing, bending, squatting, kneeling, or lifting more than 20 pounds.

Also on May 28, 1998, the applicant's command asked CGPC to retain him for an additional 30 days pending the completion and approval of his discharge physical. On June 1, 1998, CGPC responded, stating that no further extension was authorized and that the command was to expedite the applicant's physical examination.

On June 4, 1998, the applicant's command asked CGPC to retain the applicant for an additional 45 days. The message stated that the applicant had undergone surgery in March, was progressing well, and was expected by his orthopedic surgeon to have recovered fully and be fit for full duty by mid July. The request stated that the extension was also needed to allow the applicant time "to review and make an informed decision on the finding of the [discharge physical examination]." On June 5, 1998, CGPC responded, denying the request and stating that the applicant should be referred to the Department of Veterans Affairs (DVA) for any further treatment necessary.

The applicant's DD 214 indicates that he was released from active duty on XXXXX. It shows that his character of service was "honorable," that he was released because he had completed his enlistment (separation code MBK), and that he was eligible to reenlist (reenlistment code RE-1). His medical record indicates that it was closed on XXXXXXX.

On June 8, 1998, the clinic administrator at the applicant's command approved the report of his physical examination for discharge and found him physically qualified for discharge. A copy of this approved discharge physical is in the applicant's medical record.

On June 10, 1998, the applicant again consulted his orthopedic surgeon. He was still wearing a knee brace and complained of weakness that caused him to walk downstairs sideways and pain after sitting for more than 20 minutes. The doctor advised him to avoid repetitive climbing, bending, squatting, or kneeling and not to lift more than 50 pounds. He wrote that "with additional [physical therapy], [the patient] will be back to [fit for duty]." The doctor also wrote a letter at the applicant's request, in which he stated that the applicant was progressing "quite well" and had "excellent stability but significant muscle atrophy." In the letter, he stated that "[a]fter completion of the patient's physical therapy, I feel the patient will be essentially 100% without restrictions."

On June 12, 1998, the applicant was asked to sign an old form, CG-4057 (Rev. 11-84), indicating whether he agree or disagreed with his doctor's finding that he was physically qualified for separation. The form notes that the applicant refused to sign it or to indicate whether he agree or disagreed with the finding and stated that he wanted to consult a legal officer.

On June 15, 1998, the applicant signed a new copy of the CG-4057 (Rev. 7-93), which is similar but not identical to the one he had been asked to sign on June 8, 1998. The form indicated that he did not agree that he was fit for duty or that he had a "high expectation of recovery in the near term from illness, injury, or surgical procedure such that [he] would again be able to perform [his] usual duties." He attached a letter to the form, stating that he was not physically qualified for discharge because he was not fit for duty.

The copy of the second CG-4057 in the applicant's military records contains a note dated June 18, 1998, by the clinic administrator who had approved the discharge physical on June 8, 1998. He wrote that "[p]atient has been out of the Coast Guard since [xxxxxxx]. Please see original 4057.

VIEWS OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On January 26, 2001, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief for lack of merit.

The Chief Counsel argued that the applicant had failed to prove by a preponderance of the evidence that the Coast Guard was required to convene a an Initial Medical Board (IMB) to evaluate him and process him through the Physical Disability Evaluation System (PDES). He alleged that the applicant had failed to overcome the presumption that Coast Guard officers had acted correctly, lawfully, and in good faith in finding him fit for duty and thus for discharge. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel argued that at the time of his discharge, the applicant was expected to make a full recovery from his knee injury and surgery. He alleged that because the applicant was expected to be completely rehabilitated, there was no reason to refer him to an IMB. He alleged that under Article 2.C.2.e. of the PDES Manual, the fact that the applicant was still undergoing rehabilitation therapy and restricted to limited duty did not render him unqualified for discharge. He argued that members who are convalescing but expected to

recover and be fit for duty in the near future may be found fit for duty and discharged.

The Chief Counsel alleged that the applicant has not proved that he had a disability that entitled him to a physical disability separation. He alleged that the law is designed to compensate members who are separated because of physical disabilities. Therefore, disability benefits may not be bestowed on members who are being separated for other reasons, unless they are physically unable to perform their assigned duties or an acute injury or illness arises while they are being processed for separation. Article 2.C.2.b.(1), PDES Manual. The Chief Counsel alleged that the applicant was being separated for a reason other than his injury and that, if he had been allowed to remain in service, he would soon have been fit for full duty.

The Chief Counsel alleged that the applicant's "limited duty" status at the time of his discharge was immaterial to his right to PDES processing or separation pay. He alleged that, to be entitled to relief, the applicant would have to prove "that he would never have been able to perform adequately in his assigned duties had he remained in the service"—i.e., that his disability was permanent. He alleged that the applicant had submitted no evidence to indicate that the predictions of his physicians regarding his recovery at the time of his discharge were unreasonable. Therefore, he argued, the applicant has not proved that there was any legal requirement to retain him on active duty or process him through the PDES.

Memorandum of the Chief of the PDES Branch

The Chief Counsel included with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that on the night of XXXXXXX, the applicant was involved in an "alcohol situation" at the xxxxxxx Night Club. CGPC stated that an investigation revealed that the he "may have become intoxicated and then made some negative statements to a bouncer at this establishment. The bouncer took umbrage at this remark and 'ejected' the applicant from the establishment," thereby injuring his right knee.

CGPC stated that the physical evaluation undergone by the applicant prior to his discharge showed that he was qualified for separation and was not entitled to an IMB. CGPC stated that the applicant was discharged upon the completion of his enlistment and is eligible to reenlist. CGPC concluded that the applicant "was given due process" and recommended denial of relief.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On January 29, 2001, the Chairman sent copies of the Chief Counsel's advisory opinion and CGPC's memorandum to the applicant and invited him to respond within 15 days. The applicant was granted an extension of 61 days and responded on April 16, 2001.

The applicant stated that the Coast Guard wrongly denied him a medical retirement and due process because he was the victim of a violent attack at a bar. He alleged that the location of the attack was used to discredit him and that the location is irrelevant to the merits of his case. He alleged that the police investigated the incident as an assault and battery by five bouncers against him. He stated that the "uncontroverted fact is that [he] was found to be 'in the Line of Duty and the injury was not due to misconduct.'"

The applicant alleged that he did not know when he underwent a physical examination on May 11, 1998, that it was his discharge physical and that he did not see the report until June 12, 1998,[1] after he had already been discharged. He pointed out that the approving authority did not even find him fit for discharge until June 8, 1998. Therefore, when he was discharged on XXXXXX, he had not been found fit for duty and had not been given the opportunity to object to the finding of fit for duty. He alleged that the Coast Guard thus violated his due process rights under the Medical and PDES Manuals regarding his physical examination.

The applicant alleged that at the time of his discharge he was on approved annual leave in the Midwest, far from his unit. He submitted his objection to the discharge physical on June 15, 1998, just three days after he received it. He alleged that there is no record that the Coast Guard processed his objection.

Moreover, the applicant alleged, the reports of his orthopedist dated May 28, June 10, and June 18, 1998, prove that he was unfit for duty at that time, still had significant muscle atrophy, wore a knee brace, and needed continued physical therapy. He alleged that his orthopedist's statement that he "will" be fit for duty in the future proves that he was not fit for duty at that time. Therefore, he argued, he clearly met the requirements for a Medical Board under Article 3.D.8. of the PDES Manual.

The applicant further alleged that the Coast Guard did not make any arrangement for him to continue to receive physical therapy from the DVA and

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[1] In his original application, the applicant indicated that this meeting occurred on June 8, 1998. However, in the response, he revised the date of this meeting to June 12, 1998, which is consistent with the date on the form he was asked to sign.

that DVA refused to provide him physical therapy because of insufficient resources. Therefore, he alleged, he was deprived of his statutory right to medical care under 10 U.S.C. § 1074 and had to pay for approximately 30 sessions of care himself. He submitted copies of records indicating that he continued to receive physical therapy until at least December 1999.

The applicant argued that in violating its own regulations, the Coast Guard violated federal law under *Meinhold v. United States Dep't of Defense*, 123 F.3d 1275, 1283 (9th Cir. 1997); *Lauritzen v. Secretary of the Navy (Lehman)*, 736 F.2d 550 (9th Cir. 1985); *Fairchild v. Lehman*, 814 F.2d 1555 (Fed. Cir. 1987); *Yang v. Shalala*, 22 F.3d 213, 217 (9th Cir. 1994). He argued that because the Coast Guard's violations deprived him of proper medical care and a Medical Board evaluation, "the only just correction is a disability severance at 10% with credit for active duty time until August 1998." He also asked to be reimbursed for his medical expenses.

APPLICABLE REGULATIONS

Provisions of the Personnel Manual (COMDTINST M1000.6A)

Article 12-B-6.a. requires members to undergo a physical examination no later than six months prior to being discharged if they have not had one during the previous year. Article 12-B-6.b. provides that when the examination is complete and the member is found fit for separation, he shall be advised and "required to make a signed statement as to agreement or disagreement with the findings ... [on a] CG-4057."

Article 12-B-6.c. provides that when the member objects to the finding of fitness, the report of the physical examination and the member's written objections will be forwarded immediately for review. If necessary, the member may be retained in service beyond the expiration of his enlistment.

Disability Retirement Statutes

Title 10 U.S.C. § 1203 provides the following for members who are on active duty for more than 30 continuous days:

> (a) Separation. Upon a determination by the Secretary concerned that a member described in subsection 1201(c) of this title is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay …, the member may be separated from the member's armed force, with severance pay computed under section 1212 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

(b) Required Determinations of Disability. Determinations referred to in subsection (a) are determinations by the Secretary that—

(1) the member has less than 20 years of service computed under section 1208 of this title;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence;

(3) based upon accepted medical principles, the disability is or may be of a permanent nature; and

(4) either—

(A) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, and the disability was (i) the proximate result of performing active duty, (ii) incurred in line of duty in time of war or national emergency, or (iii) incurred in line of duty after September 14, 1978;

(B) the disability is less than 30 percent ... at the time of the determination and the member has at least eight years of service computed under section 1208 of this title; or

(C) the disability is at least 30 percent ... at the time of the determination, the disability was neither (i) the proximate result of performing active duty, (ii) incurred in line of duty in time of war or national emergency, nor (iii) incurred in line of duty after September 14, 1978, and the member has less than eight years of service computed under section 1208 of this title ... .

Provisions of the PDES Manual (COMDTINST M1850.2B)

The PDES Manual governs the separation or retirement of members due to physical disability. Article 2.C.2. of the PDES Manual states the following general policies:

a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. ... In addition, before separation or permanent retirement may be ordered:

(1) There must be findings that the disability:
(a) is of a permanent nature and stable, and
(b) was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.

(2) To warrant retirement, the length of service and degree of disability requirements prescribed in clause (3) of 10 U.S.C. § 1201 must be satisfied. [Eight years of active service and 30-percent disability.]

(3) To warrant separation, the degree of disability requirements prescribed in clause (4) of 10 U.S.C. § 1203 must be satisfied and the evaluee must have less than 20 years of qualifying service, under the criteria of 10 U.S.C. § 1208.

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered the him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply:

(1) Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or

(b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty.

(2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.

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e. An evaluee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found "unfit for continued duty" even though the member is currently physically capable of performing all assigned duties. Conversely, an evaluee convalescing from a disease or injury which reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found "Fit for Duty." In this instance, the evaluee will continue in an interim duty status until convalescence is complete, at which time he or she will be returned to full duty status.

Article 3.D.3.8. provides that an IMB must be initiated for a member "in any situation where fitness for continuation of active duty is in question."

Article 8.A.3. provides that the requirements for placement on the Temporary Disability Retired List (TDRL) are "the same as for permanent disability retirement, except that the disability is not stable. The disability must render the member unfit to perform the duties of his or her office, grade and rank or rating,

and the disability must be rated at a minimum of 30 percent or higher, unless the member has 20 years of active service for retirement purposes."

Provisions of the Medical Manual (COMDTINST M6000.1B)

According to Article 3.B.6., which is entitled "Separation Not Appropriate by Reason of Physical Disability,"

> [w]hen a member has an impairment (in accordance with section 3-F of this manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation.

Article 4.B.27.c. provides that "[m]embers not already in the physical disability evaluation system, who disagree with the assumption of fitness for duty at separation shall indicate on the reverse of form CG-4057. They shall then proceed as indicated in paragraph 3-B-5. of this manual."

According to Article 3.B.5., which is entitled "Objection to Assumption of Fitness for Duty at Separation,"

> [a]ny member undergoing separation from the service who disagrees with the assumption of fitness for duty and claims to have a physical disability as defined in section 2-A-38 of COMDTINST M1850.2 (series), Physical Disability Evaluation System, shall submit written objections, within 10 days of signing the Chronological Record of Service (CG-4057), to Commander [Military Personnel Command]. . . .
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> . . . Commander [Military Personnel Command] will evaluate each case and, based upon information submitted, take one of the following actions:
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> (1) find separation appropriate, in which case the individual will be so notified and the normal separation process completed:
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> (2) find separation inappropriate, in which case the entire record will be returned and appropriate action recommended; or
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> (3) request additional documentation before making a determination.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant alleged that he was wrongfully denied PDES processing since he was unfit for full duty at the time of his discharge. Therefore, he asked the Board to void his discharge and either (a) return him to active duty until such time as the Coast Guard properly evaluates his medical condition or (b) return him to active duty until August 1998 and award him a 10 percent disability rating and severance pay. He also asked to be reimbursed for certain medical expenses.

3. The record indicates that toward the end of his enlistment in the fall of 1997, the applicant injured his knee when he was ejected from a night club by one or more bouncers. The incident was not proven to have been a result of misconduct and so was presumed to have occurred in the line of duty.

4. The record indicates that because of his injury, the Coast Guard twice extended his enlistment for a total of six months, from XXXXXXX, 1997, through XXXXX, 1998, to allow time for him to undergo reconstructive surgery and rehabilitation.[2]

5. Upon the expiration of the applicant's enlistment on XXXX, 1998, he had completed more than three months of physical therapy but needed more to be wholly recuperated. His orthopedic surgeon reported that he was still supposed to avoid repetitive climbing, bending, squatting, or kneeling and should not lift anything that weighed more than 50 pounds. The doctor also reported that with further physical therapy, the applicant would be fit for duty, that he was progressing "quite well," and that upon completing physical therapy, he would be "essentially 100% without restrictions."

6. The applicant has not proved by a preponderance of the evidence that he was entitled to a disability rating or severance pay. Under 10 U.S.C. § 1203, members may only receive severance pay if they have a disability that "based upon accepted medical principles, ... is or may be of a permanent nature." All of the evidence in the record indicates that the condition of the applicant's knee at the time of his discharge was not considered permanent by either his orthopedic surgeon, his physical therapist, or the physician who conducted his discharge examination. He was expected to be completely healed within a few weeks and fit for full duty. Therefore, the Board finds that the applicant is not

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[2] The record is somewhat unclear as to whether the applicant ever wanted to reenlist in the Coast Guard. There is no statement in his record concerning his eligibility or intentions. However, on his November 30, 1997, performance evaluation, he was recommended for advancement by his entire rating chain, and his DD 214 shows that he was assigned an RE-1 reenlistment code, making him eligible to reenlist. Therefore, the preponderance of the evidence suggests that the extensions were necessary because the applicant did not want to reenlist.

entitled to a disability rating or severance pay under 10 U.S.C. § 1203 or its implementing regulations.

7. The applicant has not proved by a preponderance of the evidence that the Coast Guard erred in finding him fit for duty and thus qualified for an administrative discharge. Under Article 2.C.2.e. of the PDES Manual, members who are convalescing from surgery but are expected to make a full recovery in the near future may properly be found fit for duty. The Board finds that the reports made by the applicant's physicians and physical therapist in May and June 2000 prove that, though still undergoing physical therapy, he was expected to make a full recovery within a few weeks. Based on the report of his orthopedic surgeon, the doctor who conducted his discharge physical examination could properly find him fit for duty and qualified for discharge. Moreover, the applicant has not proved that the doctors' expectations were false. The fact that he continued to undergo physical therapy past August 2000 does not prove that he was not fit to perform the duties of his rating within a few weeks of his discharge.

8. The applicant was properly found fit for duty and qualified for discharge, within the meaning of the regulations, by the doctor who conducted his physical examination. In addition, the orthopedic surgeon's reports show that he was completely confident that the applicant would fully recuperate. Therefore, the Board finds that the applicant's convalescence did not constitute a "situation where fitness for continuation of active duty is in question," and he was not entitled to an IMB or PDES processing under Articles 2.C.2.b. and 3.D.8. of the PDES Manual because of his condition.

9. The applicant alleged that the Coast Guard should have retained him on active duty until he had completed rehabilitation. However, there is no statute or regulation requiring the retention of members undergoing physical therapy following surgery when their full recovery is confidently expected. Only members who are 30 percent or more disabled may be placed on the TDRL. PDES Manual, Article 8.A.3. The medical treatment of members who have service-connected injuries but who are discharged for reasons other than physical disability is the responsibility of the DVA, not the military. The record indicates that the applicant was properly advised by the Coast Guard to seek further medical treatment from the DVA. Although the DVA allegedly refused to treat him, that does not mean that the Coast Guard erred or committed any injustice in discharging him before he had completed rehabilitation.

10. The record indicates that the clinic administrator failed to approve the applicant's discharge physical until after he had been discharged. In addition, the applicant was not shown the report of the examination or able to file his

objection to it on a form CG-4057 until after he was discharged. The record indicates that the clinic administrator reviewed his objection but dismissed it. In doing so, he referred to the fact that the applicant had initially refused to sign a CG-4057 (reasonably requiring more than a few minutes to make the decision) and to the fact that the applicant had already been discharged. There is no evidence to indicate that the applicant's objection received the same review and consideration that it would have if he had still been serving on active duty. Therefore, the Board finds that the applicant has proved by the preponderance of the evidence that he was denied due process in this respect. However, the Board also finds that the applicant was not harmed by this error. Though convalescing, the applicant was properly found fit for duty and discharge and had no permanent disability that could have qualified him for a permanent disability rating, severance pay, or a medical retirement. If he had to pay for his post-service physical therapy, the fault lies with the DVA, not with the Coast Guard.

11. The applicant alleged that he was unjustly discharged in secret while he was out of town. However, the record indicates that he knew or should have known that his enlistment's original termination date was XXXXXX, 1997, and that it had been extended twice for a total of six months, through XXXXX, 1998. Although he may have been surprised that the Coast Guard did not authorize a third extension, this does not mean his discharge was erroneous or unjust. Moreover, the applicant admitted that he was informed on June 5, 1998, that he was being discharged because no further extension had been authorized.

12. Accordingly, the applicant's request should be denied.

ORDER

The application of XXXXXXXXX, for correction of his military record is denied.

Terence W. Carlson

Harold C. Davis, M. D.

John A. Kern