

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-071

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FINAL DECISION

AUTHOR: Andrews, J.

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. The Chair docketed the case on March 17, 2006, upon receipt of the application.

This final decision, dated January 31, 2007, is 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 asked the Board to correct her military record to show that she was evaluated by a medical board, processed under the Coast Guard's Physical Disability Evaluation System (PDES), and separated because of a physical disability. She alleged that at the time of her release from active duty on May 1, 2000, she was not fit for duty because of pain and numbness in her back and leg.

SUMMARY OF THE RECORD

On January 2, 1997, the applicant enlisted in the Coast Guard Reserve to attend Officer Candidate School. On May 2, 1997, she was commissioned an ensign in the Reserve and began three years of extended active duty (EAD). On November 2, 1998, the applicant was promoted to lieutenant junior grade.

On January 11, 2000, the applicant requested retention on active duty following the termination of her EAD contract on May 1, 2000. Her command endorsed her request with a very strong recommendation for retention.

On January 29, 1999, the applicant had a lump of "irregular muscloadipose tissue" removed from her right calf. Microscopic inspection indicated that it was a "benign vascular malformation."

On June 30, 1999, the applicant began a series of eight sessions of physical therapy for a lumbosacral strain that began when her left foot slipped and she caught herself so as not to fall.

On January 28, 2000, the applicant began undergoing physical therapy for a "dull ache" with numbness and tingling in her lower back and left leg. The applicant reported that she had hurt her pelvic rim in May 1999 and that she took Tylenol and Motrin to alleviate the pain. The physical therapist reported that her lumbar flexion and extension were within normal limits but that she did complain of pain during forward flexion and extension.

On February 1, 2000, a health service specialist noted that a physician had questioned whether the applicant was medically eligible to remain in the Coast Guard because of her many medical complaints.

On February 4, 2000, the applicant consulted a plastic surgeon concerning a "keloid on her left shoulder associated with multiple attempts at removal of a dermatofibroma," another keloid on her right thigh, and a "hypertrophic scar on her right ankle associated with some sort of cyst excision." He recommended against excision of the ankle scar but stated that the "other two lesions are amenable to excision with definite risk of recurrence of the keloids."

On February 9, 2000, the applicant had an MRI of her lumbar spine after she complained of pain radiating to her left leg. The MRI showed "no evidence of disc herniation or far lateral abnormality. There is no stenosis involving the lateral recesses, the neural foramina or the canal. There are minor facet spurs that have no effect on the roots. IMPRESSION: Normal."

On February 16, 2000, Dr. R noted the applicant had a "completely normal" range of motion in her back although she "says there is a fair amount of pain when she moves at all. There is no obvious compromise in her strength at this point either." The doctor placed the applicant on limited duty for 90 days. On February 17, 2000, Dr. R noted that the applicant might be suffering from piriformis syndrome and referred her for a neurological examination.

On March 10, 2000, the Coast Guard Personnel Command (CGPC) informed the applicant that the Reserve Officer Extension Board had approved her request for retention on active duty past the expiration of her EAD extension contract.

On March 16, 2000, the applicant submitted a letter to CGPC in which she asked to be allowed to resign her commission "to attend graduate school and care for my newborn children." However, contrarily, she noted that she desired to have a commission in the Reserve.

On March 17, 2000, a neurologist reported that the applicant's lumbar and lower thoracic spine were "[t]ender to both mild and deep palpation," but "[t]here was no evidence of paraspinal spasm, nor was there punch tenderness over the vertebrae." However, the applicant's gait was normal, she did not complain of tripping, and although she complained of a lack of sensation on the left side of her back, her sensation was "intact throughout." The neurologist further reported the following:

Motor examination – There was normal tone, symmetric bulk and power that was 5/5. Examination of the left hip flexors resulted in back pain on the left and examination of the left foot inverters was 5/5, but there was give-away weakness after a good effort without apparent associated pain. ... Straight leg raising was positive on the left with associated pain going down into the region of the toes.

I documented a normal neurologic examination with respect to power, deep tendon reflexes and sensation. There was, however, evidence of low back pain and a positive straight-leg-raising examination. I note the results of the MRI studies of the lumbar spine (I have reviewed these films) and I agree that they demonstrated no abnormalities suggestive of disc herniation, impingement at the nerve roots or stenosis.

I have difficulty making a diagnosis of a piriformis syndrome. In general, sciatic nerve entrapment is a rare event and this particular syndrome, even in the past, was difficult to establish and has, to a large degree, fallen into obscurity. Further, I have no electrophysiologic techniques that can distinguish entrapment at the level of the thigh or sciatic notch. ... Overall, I find that [the applicant's] neurologic physical examination shows no signs of impairment and I believe that she would probably benefit from a more extensive course [of] physical therapy, both in terms of length and in terms of the consideration of other medications (i.e., gabapentin, tricyclic antidepressants)

On March 24, 2000, the applicant informed CGPC that she intended to be released from active duty rather than accept the offer of an extension.

On March 28, 2000, the applicant sent an email to Dr. R stating that the neurologist did not determine the cause of her pain and numbness but recommended physical therapy. She asked to be referred to a particular physical therapist recommended by her brother in law. She noted that her "contract is up on the 1st of May, and I would like to be able to make that date if possible. Please let me know what I need to do in order to make this happen, and yet get some much needed relief beforehand." Dr. R responded the same day and instructed her to get an appointment with a physical therapist through the health services specialist.

On April 13, 2000, the applicant's physical therapist noted that the applicant was taking Tylenol and Motrin for lower back pain that radiated to her buttocks as well as pain in her mid back. The physical therapist noted that the applicant rotation and lateral flexion were normal but that her lumbar flexion and extension were each 75%. The applicant reported that her pain was 7 out of 10, that her ability to function was 4 out of 10, and that her ability to manage her condition was poor. The physical therapist reported that she expected the applicant to gain full recovery through physical therapy.

On April 21, 2000, the applicant underwent a physical examination in preparation for being released from active duty. On her Report of Medical History, the applicant wrote, "Present Health – Good. Chief complaints: associated pain and numbness from back injury while pregnant; also continued pain from mass excision of right lower calf." The only medications she listed were vitamins and birth control pills. Dr. R noted that the applicant was undergoing physical therapy for myofascial syndrome¹ and a limited ROM in her right ankle due to the excision of the mass from her right calf in 1999. However, Dr. R found her to be physically qualified for discharge.

On May 1, 2000, the applicant was released from active duty (RELAD) into the Reserve.

By October 1, 2004, the applicant had received a 50% combined disability rating from the Department of Veterans' Affairs (DVA) with the following separate ratings:

- 20% for chronic lumbar strain with radiation to the left leg;
- 10% for depressive disorder secondary to her chronic lumbar strain;
- 10% for left shoulder impingement; and
- 20% for the keloid scar resulting from the excision of a cyst from her right ankle.

The DVA noted that the xrays showed that the applicant has mild scoliosis in her lumbar spine.

VIEWS OF THE COAST GUARD

On July 14, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request. The JAG adopted the findings and recommendation in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the application was not timely and that the applicant did not justify her delay in seeking relief.

¹ Myofascial pain syndrome is caused by sustained muscle spasm in specific parts of the body.

CGPC stated that the applicant's release from active duty was voluntary as she was granted an extension of her EAD contract but then asked to resign her commission and then decided to seek release from active duty instead of resigning. CGPC stated that the applicant underwent a physical examination prior to her release from active duty and was found fit for separation. Although the applicant was receiving medical treatment for pain and numbness in her back and leg in 2000, CGPC argued, "there is no indication that the condition met the requirements of [the PDES Manual] to initiate medical board proceedings and there is no indication that [she] disagreed with the medical findings" of the physician who conducted her physical examination.

CGPC stated that, while the applicant has physical ailments, the DVA "is the appropriate venue for disposition of her case."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On September 18, 2006, the Board received the applicant's response to the views of the Coast Guard. The applicant alleged that while on active duty, she was not properly diagnosed. She questioned how she could have been found qualified for separation when she had several impairments and was having severe pain. The applicant stated that she was also depressed due to her pain but could not take antidepressants because she was nursing. The applicant stated that since her RELAD she has been following the procedures she knew of at the DVA and that no one mentioned the BCMR to her until 2005.

The applicant alleged that prior to her RELAD, she thought she was going to be evaluated by a medical board and had discussed PDES processing with Dr. R. However, on February 17, 2000, Dr. R tricked her by telling her that to undergo evaluation by a medical board she would have to accept being extended on active duty indefinitely until the medical board process was completed and so he convinced her to RELAD and get help from the DVA instead. She alleged that Dr. R did so "in order for the burden of my medical problems to be off their shoulders." The applicant stated that she did not mention her medical problems in her request to RELAD because she was told it would be easier to return to active duty if she did not.

The applicant also alleged that the neurologist's report dated March 17, 2000, contains several errors. She stated that during the examination she told him that she lacked sensation in one area of her left side while he was testing her and he admitted to her when he palpated her back that he could feel her spasms. Yet he reported that her sensation was intact throughout and that she had no paraspinal spasms. The applicant also alleged that she complained to him that she stumbled frequently and yet he reported that she did not.

The applicant stated that she was not given a chance to disagree to anything and asked “what would I have disagreed to” since she was in pain. The applicant alleged that her pain has continued and increased since her RELAD and her “physical limitations prevent [her] from standing, walking or sitting for more than 5 – 10 minutes without pain and numbness.” She alleged that walking up or down stairs is not “next to impossible” and she is “constantly tripping or stumbling s [her] left foot/leg gives out.” She stated that she walks like a “decrepit old lady.” The applicant stated that a radiologist for the DVA stated that she is in pain because her spine is curved with scoliosis and her pelvis is twisted.

SUMMARY OF APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be “unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay” may be retired or discharged by reason of physical disability. If the disability is “at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination,” the member is retired. If the disability is rated at only 10 or 20 percent under the schedule, the member is discharged with severance pay. 10 U.S.C. § 1203.

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

Article 3.F.1. of the Medical Manual provides that members with medical conditions that “are normally disqualifying” for retention in the Service shall be referred to an Initial Medical Board or a waiver shall be requested by their commands. Article 3.F.13. identifies the following conditions of the spine that may be disqualifying for retention on active duty:

- a. Congenital anomalies.
 - (1) Spina bifida. Demonstrable signs and moderate symptoms of root or cord involvement.
 - (2) Spondylolysis or spondylolisthesis. With more than mild symptoms resulting in repeated hospitalization or significant assignment limitation.
- b. Coxa vara. More than moderate with pain, deformity, and arthritic changes.
- c. Herniation of nucleus pulposus. More than mild symptoms following appropriate treatment or remediable measures, with sufficient objective findings to demonstrate interference with the satisfactory performance of duty.
- d. Kyphosis. More than moderate, or interfering with function, or causing unmilitary appearance.
- e. Scoliosis. Severe deformity with over two inches of deviation of tips of spinous processes from the midline.

Article 3.F.15.n.(1) states that neuralgia (pain radiating along the course of a nerve) may be disqualifying “[w]hen symptoms are severe, persistent, and not responsive to treatment” may be disqualifying for retention.”

Article 3.F.16.c. states that recurrent major depression or depression “associated with suicide attempt, untreated substance abuse, requiring hospitalization, or requiring treatment (including medication, counseling, psychological or psychiatric therapy) for more than 6 months” may be disqualifying for retention.”

Article 3.B.6. provides that “[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.”

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

Chapter 2.C.2. states the following:

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate members whose military service is terminated due to a physical disability that has rendered 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.

c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is presumed fit for duty even though medical evidence indicates he or she has impairments.

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f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluatee is unfit for continued military service by reason of physical disability.

(1) Inability to perform all duties of his or her office, grade, rank or rating in every geographic location and under every conceivable circumstance. ...

(2) Inability to satisfy the standards for initial entry into military service

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(4) Inability to qualify for specialized duties requiring a high degree of physical fitness, such as flying

(5) The presence of one or more physical defects that are sufficient to require referral for evaluation or that may be unfitting for a member in a different office, grade, rank or rating.

(6) Pending voluntary or involuntary separation, retirement, or release to inactive status.

i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the [DVA] does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty ... Such a member should apply to the [DVA] for disability compensation after release from active duty.

Provisions of the Personnel Manual

Article 12.B.6.a. provides that “[b]efore discharge ..., retirement, or release from active duty ..., every enlisted member ... , shall be given a complete physical examination. ... the examination results shall be recorded on Standard Form 88.” Article 12.B.6.b. provides that “[w]hen the physical examination is completed and the member is found physically qualified for separation, the member will be advised and required to sign a statement on the reverse side of the Chronological Record of Service, CG-4057, agreeing or disagreeing with the findings.” Article 12.B.6.c. provides that when “a member objects to a finding of physically qualified for separation, the Standard Form 88 together with the member’s written objections shall be sent immediately to Commander (CGPC-epm-1) for review. If necessary the member may remain in service beyond the enlistment expiration date.”

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in her record. 10 U.S.C. § 1552. The applicant was released from active duty without PDES processing on May 1, 2000. She knew or should have known about her lack of PDES processing and disability rating on that date. Therefore, her application was 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 alleged that she did not timely apply to this Board because she did not know about the BCMR until 2005. The applicant's explanation for her delay is not compelling.

5. A cursory review of the merits of this case indicates that the applicant voluntarily ended her active duty upon the expiration of her EAD contract on May 1, 2000, even though the Coast Guard authorized her retention on active duty and her command wanted her to remain on active duty. On March 16, 2000, the applicant asked to resign her Reserve commission but also asked to have a Reserve commission upon her release from active duty. On March 24, 2000, she corrected the error by informing CGPC that she did not want the offered extension of her EAD contract.

6. Although the applicant alleged that she was tricked into leaving active duty by Dr. R, the record shows otherwise. The applicant stated that on February 17, 2000, Dr. R explained to her that PDES processing took time (in fact, it can take up to a year) and would require her retention on active duty past May 1, 2000, until such time as the PDES processing was complete. He apparently explained to her that if she did not want to be retained on an "indefinite extension," she would be released from active duty and could seek treatment from the DVA. The applicant did not want to be retained past May 1, 2000, and so asked to be released from active duty upon the expiration of her EAD contract on March 16, 2000, and again on March 24, 2000. She reaffirmed her choice on March 28, 2000, when she wrote to Dr. R in an email that her "contract is up on the 1st of May, and I would like to be able to make that date if possible."

7. Chapter 2.C.2.b. of the PDES Manual states that the “law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate members whose military service is terminated due to a physical disability that has rendered 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.” Although the applicant had physical impairments at the time of her RELAD, she was found fit for duty during her RELAD physical examination and she continued to perform active duty until her contract expired.

8. Under Chapter 2.C.2.b.(2) of the PDES Manual, 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.” Those paragraphs state that PDES processing may only be started if “(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.” Although the applicant sought treatment for back pain and numbness during her last four months on active duty, her Coast Guard medical records do not support a finding that she was unable to perform her duties adequately or that she incurred “an acute, grave illness or injury or other deterioration of her condition.” Chapter 2.C.2.i. expressly states that “[a]lthough a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty ... Such a member should apply to the [DVA] for disability compensation after release from active duty.”

9. The only significant error in the applicant’s record is the lack of a CG-4057 showing whether the applicant accepted or rejected Dr. R’s finding that she was qualified for separation during her RELAD physical examination. The preponderance of the evidence in the record, however, shows that the applicant was eager to be RELAD on May 1, 2000, and did not want an indefinite extension on active duty so that she could be evaluated by medical boards and fully processed under the PDES. The preponderance of the evidence indicates that the applicant would have signed the CG-4057 to accept Dr. R’s finding.

10. Accordingly, the applicant’s request should be denied for untimeliness because of the lack of a compelling reason for her delay and the lack any apparent merit in her claim that she was unjustly denied PDES processing.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Bruce D. Burkley

Harold C. Davis, M.D.

George A. Weller