

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2007-025**

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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 November 8, 2006, upon receipt of the application and the applicant's military and medical records.

This final decision, dated June 28, 2007, 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 machinery technician second class (MK2; pay grade E-5) who was discharged from Coast Guard Reserve on June 26, 2004, asked the Board to correct his record to show that he was retired from the Reserve for medical reasons. The applicant stated that he was not allowed to reenlist in the Reserve because of seizures and believes that he is entitled to a medical retirement. Apart from a copy of his final physical evaluation, the applicant submitted no other information or evidence on his own behalf.

**SUMMARY OF THE RECORD**

The applicant served on active duty in the Coast Guard from April 28, 1986, through June 25, 1998, when he was discharged upon the termination of his second enlistment contract. On June 26, 1998, the applicant enlisted in the Coast Guard Reserve for six years, through June 25, 2004, and began serving on inactive duty. From April 22 to 24, 2004, the applicant was hospitalized after suffering a "seizure de novo." He was prescribed Dilantin.<sup>1</sup>

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<sup>1</sup> Dilantin is a trademark name of the generic drug phenytoin, an anti-convulsant and cardiac suppressant "used in the treatment of all forms of epilepsy except petit mal and as an antiarrhythmic, administered orally." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29<sup>TH</sup> ED. (W. B. Saunders Co., 2000), pp. 502, 1374.

On May 15, 2004, while undergoing a physical examination required for reenlisting in the Reserve, the applicant stated on his Report of Medical History that one month earlier, he had been hospitalized for a seizure of unknown etiology and was taking Dilantin to avoid further seizures. A Chronological Record of Medical Care dated May 16, 2004, indicates that the examining physician determined that the applicant had suffered a single episode of grand mal seizures but that he was "cleared for full duty pending outcome of med board/waiver package." The Report of Medical Examination indicates that the doctor found him qualified for continued service pending a medical waiver and that "this physical examination has been signed pending further review of laboratory studies." However, the waiver was apparently not processed, and the applicant's command did not initiate a medical board to evaluate his fitness for continued service.

On June 25, 2004, the applicant was honorably discharged from the Reserve upon the expiration of his enlistment. He had completed more than 18 years of service. No DD 214 was issued.

### **VIEWS OF THE COAST GUARD**

On May 16, 2007, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the applicant the requested relief but grant alternative relief. The JAG submitted with his advisory opinion a copy of an email from the applicant, dated December 6, 2006, in which the applicant described the circumstances of his seizure as follows:

At the time of my reenlistment, I had completed a physical in Miami at D7; but then was told they [had] shredded it and I needed to complete another one. Although my medical record shows the dates and times I was there. I then started working on taking [extended active duty] orders to Sta[tion] Islamorada with the MK detailer [Mr. S], at which time I was told to complete another physical. I had reserve weekend that week and Sta[tion] Port Canaveral Yeoman Chief [X] scheduled me for a physical at Patrick Air Force Base. On 22 April '04, I went to PAFB and was told they would not see a Reserve unless I was under orders. I called Sta Port Canaveral Reserve Unit and had YNC [X] fax a set of orders to PAFB so I could complete the physical; these orders were signed by BMCS [N] (Acting Reserve unit [officer in charge]) due to the fact that the Sta CO was on leave. I completed part of the paperwork part of the physical but was told to reschedule the rest. That afternoon I had a seizure and was admitted to Parrish Medical Center. I [am] presently awaiting this paperwork from PAFB to prove this and have the paperwork in my record of the dates and times of my visit to Parrish Medical Center.

Prior to all this I had a seizure in February on the 7<sup>th</sup> and again was admitted to Parrish. I did not drill the second weekend as I was supposed to and called and told the watchstander and BMCS [M], section leader, why I couldn't. As you can see, I never got to fulfill the EAD orders and they were canceled by [Mr. S]. ... I completed a physical at Naval Air Station Jacksonville on May 16th and was stated [sic] that I was fit for full duty pending a medical board due to Commandant's instructions, ... a copy of which is included in my record. I contacted [Mrs. E], Group Mayport Corpman, and was told I could not drill till all this happened, and that all this would be put into action.

I was then informed by a phone call that I had been discharged on June 25, with no medical board pending or completed. I tried several times to research the medical board process and never even received any paperwork showing I was even discharged or a DD 214. I had to contact a friend at HQ [who] informed me I was indeed honorably discharged; and told I could not reenlist for at

least 18-24 months from my last seizure. The problem is I have had several since all this. And this effects me in the civilian world as a private yacht engineer.

I am requesting a early retirement due to medical discharge. I contacted several people that have said that due to the extensive active duty time and the enlistments in the reserves I qualify; especially since I can't physically reenlist and [because of] my age.

The JAG argued that the doctor's finding "that the applicant was fit for duty pending a waiver is essentially a finding that he was not fit for duty." However, his command failed to follow through by completing the procedures necessary for requesting a waiver or by initiating evaluation by a medical board. The JAG stated that the applicant's command should have either requested a waiver for him or followed the procedures for discharge under Chapter 8.D.7. of the Reserve Policy Manual. The JAG also alleged that the applicant himself did not timely follow up on his status.

The JAG recommended that the Board grant alternative relief by offering the applicant one of two options. First, the Board could order the Coast Guard to convene a medical board to determine whether the applicant was fit or unfit for duty. If the applicant were found unfit for duty and if his disability were determined to be "service related,"<sup>2</sup> the JAG stated, the applicant "would be entitled to severance or disability retirement" under Chapter 12.B.15. of the Personnel Manual and Chapter 8.D. of the Reserve Policy Manual. However, the JAG also noted that if the applicant were found fit for duty or if he was not fit for duty but his disability was not deemed "service related," he would be offered an early retirement from the reserves pursuant to Chapter 8.D.8. of the Reserve Policy Manual.

The second option for alternative relief recommended by the JAG was that the applicant receive early retirement from the reserves pursuant to Chapter 8.D.8. of the Reserve Policy Manual without going through Physical Disability Evaluation System (PDES) processing.

The JAG stated that the Board should ensure that the applicant is "adequately counseled on the effects of and possible outcomes of the choices" before making his decision. In addition, the JAG stated that the Board should order the Coast Guard to issue the applicant a DD 214 reflecting the outcome of his case.

### **APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS**

On June 19, 2007, the applicant responded to the views of the Coast Guard. He stated that because the Coast Guard erred, he "should be retired as Active Duty with severance and a pension. Per my memo of December 06, 2006, I was under active duty orders or the medical facilities at Miami, Patrick and Jacksonville would not have seen me for the physicals." He stated that medical board procedures were never explained to him and that he was discharged without notice.

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<sup>2</sup> The Board notes that the term "service related" is used by the Department of Veterans Affairs, not by the Coast Guard's medical boards, which instead determine whether a disability was "incurred in the line of duty."

## APPLICABLE STATUTES AND REGULATIONS

### *Retirement and Separation Statutes*

Title 10 U.S.C. § 1204 provides the following for reservists serving on active duty for periods of 30 days or less or serving on inactive duty training:

Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that--

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability--

(A) was incurred before September 24, 1996, as the proximate result of--

(i) performing active duty or inactive-duty training;

(ii) traveling directly to or from the place at which such duty is performed; or

(iii) an injury, illness, or disease incurred or aggravated while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training, if the site of the inactive-duty training is outside reasonable commuting distance of the member's residence;

(B) is a result of an injury, illness, or disease incurred or aggravated in line of duty after September 23, 1996--

(i) while performing active duty or inactive-duty training;

(ii) while traveling directly to or from the place at which such duty is performed; or

(iii) while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training, if the site of the inactive-duty training is outside reasonable commuting distance of the member's residence; or

(C) is a result of an injury, illness, or disease incurred or aggravated in line of duty--

(i) while the member was serving on funeral honors duty under section 12503 of this title or section 115 of title 32;

(ii) while the member was traveling to or from the place at which the member was to so serve; or

(iii) while the member remained overnight at or in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence;

(3) 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; and

(4) either--

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) 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.

Title 10 U.S.C. § 1206 provides the following for reservists serving on active duty for periods of 30 days or less or serving on inactive duty training:

Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the member may be separated from his armed force, with severance pay computed under section 1212 of this title, if the Secretary also determines that—

- (1) the member has less than 20 years of service computed under section 1208 of this title;
- (2) the disability is a result of an injury, illness, or disease incurred or aggravated in line of duty—
  - (A) while—
    - (i) performing active duty or inactive-duty training;
    - (ii) traveling directly to or from the place at which such duty is performed; or
    - (iii) remaining overnight immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training, if the site is outside reasonable commuting distance of the member's residence; or
  - (B) while the member—
    - (i) was serving on funeral honors duty under section 12503 of this title or section 115 of title 32;
    - (ii) was traveling to or from the place at which the member was to so serve; or
    - (iii) remained overnight at or in the vicinity of that place immediately before so serving;
- (3) 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;
- (4) based upon accepted medical principles, the disability is or may be of a permanent nature; and
- (5) 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, in the case of a disability incurred before October 5, 1999, was the proximate result of performing active duty or inactive-duty training or of traveling directly to or from the place at which such duty is performed.

However, if the member is eligible for transfer to the inactive status list under section 1209 of this title, and so elects, he shall be transferred to that list instead of being separated.

Title 10 U.S.C. § 12731b provides the following special rule for reservists whose physical disabilities are not incurred in the line of duty:

- (a) In the case of a member of the Selected Reserve of a reserve component who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for purposes of section 12731 of this title [which controls non-regular retirements], determine to treat the member as having met the service requirements of subsection (a)(2) of that section [20 years of satisfactory service] and provide the member with the notification required by subsection (d) of that section if the member has completed at least 15, and less than 20, years of service computed under section 12732 of this title.
- (b) Notification under subsection (a) may not be made if—
  - (1) the disability was the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned; or
  - (2) the disability was incurred during a period of unauthorized absence.

## ***Coast Guard Regulations***

Chapter 8.D.3. of the Reserve Policy Manual (RPM) reflects 10 U.S.C. § 1204 by providing the following for reservists on serving on inactive duty or on active duty for a period of 30 days or fewer:

A member of the Reserve not covered by the above section [which is for reservists serving on continuous active duty for more than 30 days], who is determined by the Commandant to be unfit to perform the duties of their office, grade, rank, or rating because of physical disability resulting from injury, may be permanently retired with retired pay, if the Commandant also determines that:

- a. The disability is of a permanent nature, and
- b. Is the proximate result of performing active or inactive duty, or
- c. Is not a pre-existing condition or the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence, and
- d. Either:
  - (1) The member has at least 20 years service computed under 10 U.S.C. 12739,or
  - (2) The disability is at least 30 percent.

Chapter 3.F.15.e. of the Medical Manual states that convulsive disorders may render a member unfit for retention and that “[f]ollowing a seizure, the member is NFFD [not fit for duty], and will remain unfit until he/she is controlled with medications with no seizures for twelve months. A medical board is not required if the convulsive disorder is well controlled.”

Article 3.D.4. of the Physical Disability Evaluation System (PDES) Manual (COMDT-INST M1850.2C) provides that if, during a physical examination, a reservist is found unfit for duty because of a medical condition that is disqualifying for retention, the reservist’s command shall initiate his evaluation by a medical board to determine whether he is fit for continued service or to recommend that he be evaluated by a Physical Evaluation Board and processed for separation under the PDES. Under Chapter 2.C.3.a.3.d.2.a., if a reservist is referred to the Physical Evaluation Board, that board will determine, *inter alia*, to what extent the reservist is disabled (which is reflected in a percentage disability rating) and whether the reservist’s disability was incurred in the line of duty or is a proximate result of his military service, which would make the disability potentially compensable under 10 U.S.C. §§ 1204 or 1206.

Article 2.A.23. of the PDES Manual defines “incurrence of disability” as the moment “when the disease or injury is contracted or suffered as distinguished from a later date when the member’s physical impairment is diagnosed or the physical impairment renders the member unfit for continued duty.”

Article 2.A.43. of the PDES Manual defines “proximate result of military service” as occurring when an injury or disease or aggravation thereof “may reasonably be regarded as an incident of military service or may reasonably be assumed to be the effect of military service.”

Chapter 8.D.7. of the Reserve Policy Manual states the following:

- a. The unit commander shall initiate separation action when a reservist is found to have a permanent disqualifying physical condition and the condition is determined to be not the proximate

result of performing active or inactive duty. Relevant medical and administrative documentation shall be forwarded with recommendations to CGPC-rpm, copying the servicing ISC (pf), for final determination and separation authority. Commanding Officer, Training Center Cape May has final separation authority for Reserve personnel undergoing IADT.

b. Reservists shall be notified of their right to request retention waivers for disqualifying physical conditions. Medical waiver procedures are contained in section 3.A.8, Medical Manual, COMDTINST M6000.1 (series).

Chapter 8.D.8. of the Reserve Policy Manual provides the following “Special Rule for Members with Physical Disabilities Not Incurred in Line of Duty”:

a. By the authority of 10 U.S.C. 12731b, in the case of a SELRES member who no longer meets the qualifications for SELRES membership solely because the member is unfit because of physical disability, the Commandant may determine to treat the member as having met the service requirements for non-regular retirement if the member has completed at least 15, and less than 20, years of service.

b. Such determination shall not be made if:

- (1) The disability was the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention; or
- (2) The disability was incurred during a period of unauthorized absence.

## **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 should have been medically retired from the Reserve because of his seizure disorder. Under 10 U.S.C. § 1204, the applicant, who was not serving on extended active duty, would only be entitled to a medical (physical disability) retirement if he were found to be at least 30% disabled as the result of a medical condition that was incurred or aggravated in the line of duty (assuming that his seizure disorder began after 1996<sup>3</sup>). The record shows that in May 2004 while undergoing a physical evaluation in preparation for reenlisting, the applicant admitted to the doctor that he had recently suffered one or more seizures and was taking an anti-convulsant medication to control them. The doctor noted that the applicant would need a waiver of the medical retention standards to reenlist. The record indicates that no waiver was granted and that the applicant was separated from the Reserve when his enlistment expired on June 25, 2004, after more than eighteen years of service.

3. Under Chapter 3.F. of the Medical Manual and Article 3.D.4. of the PDES Manual, when the applicant was found to suffer from a seizure disorder, his command should have convened a medical board to process him under the PDES. His command failed to do so. If the applicant had been processed under the PDES, a Physical Evaluation Board would presumably have determined whether his seizure disorder was incurred or aggravated in the line of duty, as

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<sup>3</sup> Disabilities dating to 1995 or earlier must be the “proximate result of military service” to be compensable under either §1204 or § 1206 of 10 U.S.C.

defined under Article 2.A.23. of the PDES Manual, and whether he was entitled to retirement or severance pay under 10 U.S.C. §§ 1204 or 1206, respectively. Although the applicant has proved that his command erred in not initiating a medical board, he has not proved that his seizure disorder was incurred or aggravated in the line of duty. Therefore, he has proved that he was erroneously denied PDES processing, but he has not proved that he was erroneously denied a physical disability retirement or separation pursuant to 10 U.S.C. §§ 1204 or 1206. Under those statutes, the applicant's entitlement to a physical disability retirement or separation depends upon whether his seizure disorder was incurred or aggravated in the line of duty. Under Chapter 2.C.3.a.3.d.2.a. of the PDES Manual, that determination is properly made by a Physical Evaluation Board.

4. The applicant alleged that he should receive active duty disability retirement pay because he was on active duty orders when he underwent his physical examination. However, the provisions for active duty disability retirement or severance pay under 10 U.S.C. §§ 1201 and 1203 do not apply unless a member incurs or aggravates his disability while serving on a period of continuous active duty that is longer than 30 days. The applicant has presented no evidence to show that he incurred or aggravated his seizure disorder while serving on active duty for more than 30 days.

5. The JAG pointed out in his advisory opinion that even if the applicant is not entitled to a physical disability retirement or separation under 10 U.S.C. §§ 1204 or 1206, he is entitled to a Reserve retirement under 10 U.S.C. § 12731b and Chapter 8.D.8. of the Reserve Policy Manual because he completed more than eighteen years of service. The JAG recommended that the Board order the Coast Guard to advise the applicant about the following two types of relief and require him to choose one: (1) evaluation by a medical board and further PDES processing if he is found unfit for duty, or (2) early retirement from the Reserve pursuant to Chapter 8.D.8. of the Reserve Policy Manual without going through PDES processing.

6. The applicant's command erred in failing to convene a medical board to evaluate him. If his command had convened a medical board, it is likely that the applicant would have been referred to a Physical Evaluation Board for further PDES processing. Therefore, the Board finds that the applicant is entitled to evaluation by a medical board and further PDES processing if he is found to have been unfit for duty on June 25, 2004. However, the applicant also could have requested early retirement under Chapter 8.D.8. of the Reserve Policy Manual, in lieu of PDES processing, and he should have had that option in June 2004.

7. Accordingly, after being advised by the Coast Guard about his options under this order, the applicant should, at his discretion, be evaluated by a medical board to determine whether he was fit for duty on June 25, 2004, and if found unfit for duty, he should be referred to a Physical Evaluation Board for further processing under the PDES. If the applicant does not choose to be evaluated by a medical board, if he is found to have been fit for duty, or if his seizure disorder is found not to have been incurred or aggravated in the line of duty, he should be retired as of June 26, 2004, pursuant to Chapter 8.D.8. of the Reserve Policy Manual.



**ORDER**

The application of former MK2 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted in part as follows:

Within 60 days of the date of this decision, the Coast Guard shall advise the applicant about his options under this order.

Within 90 days of the date of this decision, the applicant shall inform the Coast Guard in writing whether he agrees to undergo evaluation by a medical board to determine whether he was fit for duty on June 25, 2004, and if found unfit for duty, to be referred to a Physical Evaluation Board for further processing under the PDES.

If the applicant does not choose to be evaluated by a medical board within 90 days of the date of this decision; if he is found by the medical board to have been fit for duty on June 25, 2004; or if his seizure disorder is found not to have been incurred or aggravated in the line of duty, he shall be retired as of June 26, 2004, pursuant to Chapter 8.D.8. of the Reserve Policy Manual.

The Coast Guard shall correct his military record as necessary to reflect any action taken under this order and shall pay him any amount he may be due as a result of such corrections.

All other relief is denied.

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Julia Andrews

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Jordan S. Fried

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Richard Walter