

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-083

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 application on February 29, 2008, upon receipt of the applicant's completed application and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated November 25, 2008, 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 asked the Board to correct her record to reflect that an "injury, illness or disease was incurred or aggravated in the line of duty." She further requested processing through the Physical Disability Evaluation System (PDES) for separation or retirement by reason of physical disability with the back pay that she would have received if she had remained on active duty.

PROCEDURAL HISTORY

Personnel Records Review Board (PRRB) Decision

Prior to filing an application with the Board, the applicant filed an application with the PRRB requesting that her record be corrected "to include time on active duty from [October 1, 2003 through June 6, 2006, ¹] and to reflect that an injury, illness or disease was incurred or aggravated in the line of duty. [The] applicant further request[ed] . . . proper processing and performance of a physical examination and evaluations for a medical separation or retirement."

¹ The PRRB ordered the applicant's record corrected to show that the period from October 1, 2003 through June 13, 2006 as active duty. CGPC has corrected the applicant's DD Form 214 to reflect this period of active duty as directed by the PRRB.

On April 5, 2007, the Acting Director for Personnel Management of the Coast Guard approved the PRRB's recommendation, a pertinent part of which stated the following:

Recommend, with applicant's consent, recall to extended active duty to complete a thorough physical examination to determine the applicant's suitability for RELAD as required by Article 12.B.6.a. of the Personnel Manual . . . and Chapter 3.A.7.c.(1) of the Medical Manual . . . If the member is found to have incurred an injury, illness, or disease in the line of duty or disqualifying physical impairments then with the applicant's consent to remain on active duty under Article 12.B.11.f. of the Personnel Manual . . . and Chapter 6.A.6.a. of the Reserve Policy Manual . . . so necessary treatment maybe given and if necessary a medical board convened under Article 17.A.3. of the Personnel Manual . . . This recommendation is made due to the fact that the applicant was not provided due process through a physical examination from the EAD order covering the period [October 1, 2004] through [June 6, 2004].

May 25, 2007 Separation Physical

On May 25, 2007, as directed by the PRRB, the applicant underwent a separation physical, which found that she met the physical standards for release to the IRR component of the Reserve. The medical examination revealed that the applicant needed an eye examination and that she had an abnormal electrocardiogram for which she was referred to Water Reed cardiology department for evaluation. The applicant grew tired of waiting at the cardiology clinic for the doctor and decided to go home. The medical records note that in light of her decision to leave the clinic without seeing the cardiologist, the risks of that decision were explained to her. The medical record also indicates that the applicant had uncontrolled hypertension (systemic) for which she was taking Hydrochlorothiazide and uncontrolled diabetes for which she was taking Metformin. With regard to her diabetes the applicant was provided dietary counseling, foot care counseling, and weight counseling.

A physician's assistant performed the applicant's separation physical. He released the applicant from active duty without limitations and told her to follow-up with her primary care provider and/or the primary care clinic.

On August 22, 2007, the Executive Secretary of the PRRB informed the applicant that based upon the finding of fit for duty on her May 25, 2007 separation physical, no medical board was required in connection with the PRRB's order.

APPLICANT'S CURRENT ALLEGATIONS

The applicant alleged in her BCMR petition, as she did before the PRRB, that she was called to extended active duty (EAD) on October 1, 2003 under title 10 of the United States Code and incurred or aggravated an injury, illness, or disease in the line of duty rendering her unfit for duty. The applicant alleged that she was released from active duty (RELAD) and returned to the Individual Ready Reserve (IRR) without a proper separation physical. She asserted that she was

not evaluated by an Initial Medical Board (IMB), or processed under the PDES, or medically separated or retired.

The applicant stated that she considered her May 25, 2007 separation physical ordered by the PRRB to be biased, deficient, and perfunctory. She complained about the manner in which she was abruptly released from active duty in June 2006 without a medical examination and that she did not receive transitional medical benefits until October 2006 due to the alleged failure of the Coast Guard to update her status in DEERS. She alleged that she developed diminished hearing, headaches, and ear pain as a result of the lack of medical care. She further complained that during this period she did not have medication to treat her hypertension and diabetes. The applicant stated that in March 2007 she underwent major surgery to correct an aortic abdominal aneurysm. She stated that she continues to experience pain in her buttocks, thighs, and legs, as well as pain in other areas.

She also expressed her disagreement with the findings of the May 25, 2007 medical examination and complained that she was not given the opportunity to agree or disagree with it. With regard to the separation medical examination, the applicant stated the following:

I believe that the narrative regarding my vascular condition, albeit erroneous and as the Coast Guard interpreted it, weighed heavily on the decision to release me into the IRR. I don't believe that my other conditions were given enough consideration Overall consideration was not given to my diabetes, pes planus, hypertension, and how they relate to my total physical condition. I was diagnosed with atherosclerosis in the arteries of my feet in December 2006, while on TAMP. While on ADHC,² I was not even given a Stress/Treadmill test, only an EKG, which was abnormal. The information used in this area were my doctor's visit on June 8th in which he stated I had hypertensive heart disease and should not be employed. The cardiologist, Dr. A reviewed the results of my EKG/Stress/Treadmill test from February 2007, which was the one prior to my surgery.

With regard to her request for active duty back pay and allowances, the applicant stated the following:

I am petitioning the BCMR for back pay and allowances I feel I am due because of errors and injustices associated with my release in June 2006. I feel that if I were processed correctly, I should have remained on active duty with pay and allowances until the status of my condition had been determined as well as the need for surgery. I was denied this consideration even though I was scheduled for a CT scan on June 27, 2006 . . . [H]owever, I was released on June 13, 2006. If I had been given the opportunity to have this CT scan done, it would have shown that my aneurysms had dilated to the point where surgery was required. Because of all of the errors associated with this situation, it cannot be determined how long I would have had to remain on active duty with pay and allowances because of

² Active duty for health care (ADHC) orders allow reservists to be ordered to or continued on active duty for periods of more than 30 days while being treated for (or recovering from) injuries or illnesses incurred or aggravated in the line of duty. Article 3.A. of the Reserve Policy Manual.

my condition. Additionally, it can never be known what the outcome would have been had I had surgery while on active duty as it relates to a referral to the IMB, PDES, and/or medical board.

The applicant alleged that a CWO G was instrumental in the decision to release her from active duty in June 2006, as well as the determination that the applicant was not disabled based upon CWO G's personal feelings rather than medical evidence. The applicant stated CWO G's bias against her was most likely due to the applicant's refusal to work at Headquarters during the applicant's ADHC period. The applicant stated that she did not work at Headquarters because she "was still in pain and that it would be too much for me to work with numbness in my legs as well as fight traffic from Springfield to DC to work."

In support of her contention that she was disabled, the applicant submitted her application for a Disabled Parking Placard or License Plate for Virginia, in which Dr. F, a Coast Guard surgeon, verified on the application that the applicant was permanently limited or impaired due to "pelvic aneurysm surgery – claudication" that restricted her ability to walk.

The applicant submitted an email to a CWO3 in the Reserve Management Division of CGPC dated August 30, 2007, in which she stated that she had just received the medical documentation that she was fit for RELAD and that she disagreed with that determination. The CWO3 advised the applicant that she could file an application with the BCMR. The applicant also sent to the CWO3 a July 31, 2007 email that she had sent to Dr. F, who was the surgeon for her abdominal surgery, in which she asked him to clarify whether he had told the Coast Guard that she was making satisfactory progress and that she suffered minimal pain.

On August 17, 2007, Dr. F responded to the applicant's email and told her to have the interested authorities speak directly to him, and that he would prepare a memorandum on her behalf. He further stated, "I do not know what they are reading, but it is obviously a misinterpreted note prepared by resident staff. As you stated, I even authorized a disability placard." He directed his assistant to work with the applicant to prepare a letter to her command in support of her effort to obtain disability separation or retirement from the Coast Guard.

Department of Veterans Affairs (DVA) Decision

On November 26, 2007, the DVA granted the applicant a 100% disability rating for an "infrarenal aorta abdominal aneurysm post surgical repair effective from June 14, 2006. The applicant underwent a subsequent VA examination to determine the current residuals of her aortic aneurysm, which was then rated at 0% disabling.

The DVA granted the applicant a 50% disability rating for a total abdominal hysterectomy with bilateral salpingo-oophorectomy, effective from June 14, 2006; a 20% disability rating for diabetes mellitus, type II, effective from June 14, 2006; a 20% disability rating for peripheral vascular disease, right lower extremity effective from December 6, 2006.

The DVA granted the applicant a 10% disability rating for each of the following conditions with an effective date of June 14, 2006: right carpal tunnel syndrome, bilateral

tinnitus with history of cerumen impaction, diverticulosis with gastroesophageal reflux disease, and hypertension. She was also granted a 10% disability rating with an effective date of January 16, 2007, for left carpal tunnel syndrome.

The DVA granted the applicant a 0% disability with an effective date of June 14, 2006 for bilateral eye keratoconus, left lower extremity peripheral vascular disease, and bilateral pes planus.

The DVA denied service connection for bilateral hammertoes, bilateral hemorrhoids, hyperlipidemia, and sinusitis.

SUMMARY OF APPLICANT'S SERVICE HISTORY

As discussed in the PRRB decision, the applicant enlisted in the Coast Guard Reserve on October 4, 1985 and has continued to be affiliated with the Reserve without a break in service. She was involuntarily ordered to active duty for the period October 1, 2003 through September 30, 2004 under title 10 of the United States Code.

On October 1, 2004, the applicant entered into a voluntary EAD assignment at the Telecommunications and Information Systems Command, Alexandria, which ended on June 6, 2006. Subsequently, active duty special work (ADSW) orders were authorized for the applicant for the period from June 6, 2006 to September 30, 2006. These orders were canceled on June 13, 2006. Her DD 214 records "completion of required active duty" as the narrative reason for separation.

VIEWS OF THE COAST GUARD

On July 24, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted a memorandum in which he adopted the facts and analysis provided by CGPC and asked that the Board accept CGPC comments as the advisory opinion. CGPC recommended that the Board grant the following relief to the applicant:

The applicant should be afforded the opportunity to present a formal rebuttal to the findings of the physical examination in accordance with the [Article 3.B.5. of the Medical Manual].

Upon review of the case, [CGPC] shall make a determination in accordance with [Article 3.B.5. of the Medical Manual]. If additional medical evaluation is required, the applicant should be offered Reserve Ready Management Period (RMP)³ order for such testing. If it is determined that the applicant was not qualified for separation, a medical board shall be initiated. If subsequently found

³ An RMP is an additional inactive duty period authorized in excess of scheduled IDT drills to accomplish training preparation or unit administration and maintenance functions, such as medical and dental readiness examinations and participation in enlisted servicewide examinations. An RMP covers a period from a minimum of 3 hours to a maximum of 24 hours.

eligible for disability retirement or separation, such shall be back dated to June 14, 2006.

In recommending the above relief, CGPC admitted that the Coast Guard committed an error in 2006 when it released the applicant from active duty without conducting the required medical examination. CGPC noted that the Coast Guard has complied with the PRRB's determination by returning the applicant to active duty and conducting the required physical examination. CGPC noted that the physical examination determined that the applicant was fit for release from active duty. CGPC further stated the following:

The applicant alleges bias in the processing of her physical examination and she further contends that information presented in her official medical records relative to her post surgical status was inaccurate There is no evidence that the Coast Guard provided the applicant with a copy of her approved physical examination or a definitive examination of her status until August 22, 2007 She was released back into the IRR on July 23, 2007, though her physical was not approved until July 25, 2007. The Coast Guard should have properly and in a timely manner advised the applicant of her finding of fit for duty, and, in accordance with [the Medical Manual] the applicant should have been advised of the procedure to object to the finding of fitness for RELAD. Rather, the applicant was improperly advised that her only recourse was through the BCMR. The normal procedure relative to a rebuttal of the findings may entail additional consultations, medical records and evaluations to confirm or refute the elements of the evaluation that the applicant objects to. Since over one year has passed since the last physical examination, such objective evaluation is more difficult to obtain.

The applicant states that the information used in determining her fitness for RELAD was based upon erroneous medical record entries by Dr. [F] ... Information [in Dr. F's email] references a possible misreading of the medical records. However, it falls short of issuing a written correction to the official records. Additionally, the applicant's correlation between Dr. F's certifying a permanent disability for the applicant's Virginia disabled parking permit and the applicant's official records is not determinative of a permanent physical disability rating by the Coast Guard. This is additionally compounded by the subsequent DVA downgrading of the applicant's disability rating.

The applicant presents the DVA's disability determination ... in support of her application ... The military disability system determines unfitness for duty and then rates only the extent that the unfitting medical condition or conditions prevent the member from performing their duties at that time. The DVA ratings are based on an evaluation of the whole person, including the evaluation of the evaluatee's employability status and earning capacity. Accordingly, DVA ratings are not determinative of the issues involved in military disability ratings determinations ... Fluctuation in ratings over time is not unexpected and the applicant's current physical disabilities are being addressed through the appropriate venue. Additionally, the applicant's primary basis for contesting the physical examination is

precipitated upon her impairment relative to the aorta abdominal aneurysm, which was subsequently rated at 0 percent by the DVA. The DVA rating was downgraded at the conclusion of the six-month post surgery period.

[CGPC] has reviewed the information presented by the applicant in support of her BCMR application under the purview of a rebuttal to the findings of her physical evaluation . . . However, based upon the information presented it is preferred that the applicant present a formal written rebuttal to the findings of the physical evaluation . . . including written documentation challenging the contents of [Dr. F's July 2, 2007 post surgical evaluation], which is the primary contested element of the physical findings. If it is further determined that the applicant was not fit for RELAD as indicated in her RELAD physical, the applicant should be processed through the [PDES]. If [the applicant is] subsequently found eligible for disability retirement or separation, such shall be back-dated to June 14, 2006.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On August 4, 2008, the Board received the applicant's reply to the views of the Coast Guard, which appeared to be her formal rebuttal to the findings of her May 2007 separation physical. In accordance with the recommendation in the advisory opinion, to which the applicant agreed, the formal rebuttal to the findings of the separation physical are to be submitted to CGPC for their review. The Board will return a copy of the rebuttal to the applicant so that she can forward it to CGPC for their review and any further action, if necessary.

SUMMARY OF APPLICABLE LAW

Coast Guard Personnel Manual

Article 12.B.6.b. of the Personnel Manual states when 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. When the member agrees he or she is physically qualified for separation, the original of Standard Form 88 shall be sent to Commander, (CGPC-adm) along with the terminated health record.

Article 12.B.6.c. states that if 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 CGPC-epm-1 for review. If necessary the member may remain in service beyond the enlistment expiration date.

Coast Guard Medical Manual

Article 3.B.5.a. of the Medical Manual states that any member undergoing separation from the service who disagrees with the assumption of fitness for duty and claims to have a physical disability shall submit written objections within 10 days of signing the chronological record of service to CGPC. The member is responsible for submitting copies of the following

along with written objections: (1) report of medical examination (SF-88); (2) Report of Medical History (SF-93); signed copy of chronological record of service (CG-4057); (4) appropriate consultations and reports; and (5) other pertinent documentation.

Article 3.B.5.b. states that consultations shall be obtained to thoroughly evaluate all the problems or objections indicated by the evaluatee. Consultations obtained at the examinee's own expense from a civilian source shall also be included with the report.

Article 3.B.5.c. states that CGPC will evaluate each case and, based upon the information submitted, take one of the following actions: (1) find separation appropriate, in which case the individual will be so notified and the normal separation process completed; (2) find separation inappropriate, in which case the entire record will be returned and appropriate action recommended; or (3) request additional documentation before making a determination.

Physical Disability Evaluation System (PDES) Manual

Article 2.A.15. of the PDES Manual defines "fit for duty" as "[t]he status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating." Article 3.F.1.c. of the Medical Manual stated the following:

Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) which interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Members considered temporarily or permanently unfit for duty shall be referred to an Initial Medical Board for appropriate disposition.

Article 3 of the PDES Manual provides that if a member's fitness for continued duty is in question, an IMB of two medical officers shall conduct a thorough medical examination, review all available records, and issue a report with a narrative description of the member's impairments, an opinion as to the member's fitness for duty and potential for further military service, and if the member is found unfit, a referral to a Central Physical Evaluation Board (CPEB). The member is advised about the PDES and permitted to submit a response to the IMB report.

United States Code

Title 10 U.S.C. § 1203 (*Regular and members on active duty for more than 30 days separation*) sets forth the requirement for a separation or retirement by reason of physical disability upon a determination of the Secretary concerned.⁴

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:

⁴ The Commandant under delegation from the Secretary has set forth the rules in the PDES Manual to determine whether a member should be separated with severance pay or retired by reason of physical disability.

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant is a reservist who served continuously on active duty from October 1, 2003 until June 13, 2006 under various active duty orders. Toward the end of her active duty period, the applicant was given ADSW orders for a period from June 7, 2006 until September 30, 2006. However on June 13, 2006, the Coast Guard released the applicant from active duty and canceled the remainder of the ADSW orders. The Coast Guard released the applicant from active duty without a separation physical and, according to the applicant, without health care transition benefits. The applicant indicated that in October 2006, she obtained health care benefits and, in fact, underwent surgery in March 2007. Eventually, she filed an application with the PRRB for correction of her military record to show that she incurred an injury, illness, or disease in the line of duty and to show that she was processed through the PDES. The PRRB found that the applicant had not been given a separation physical as required by Article 12.B.6.a. of the Personnel Manual. Therefore, the PRRB directed the Coast Guard to recall the applicant to active duty, with her consent, for the purpose of having her undergo a separation physical. The separation physical occurred on May 25, 2007, and the applicant was found fit for duty, although several medical conditions were noted on the medical evaluation report form. On August 22, 2007, the PRRB informed the applicant that based upon the findings of her May 25, 2007 separation physical the Coast Guard was not required to hold a medical board in her case. In February 2008, the applicant filed an application with the BCMR requesting the same relief that she had requested before the PRRB, which was that her record be corrected to show that she incurred or aggravated an injury, illness, or disease in the line of duty that was unfitting, and therefore, she should have been processed through the PDES.

3. The applicant underwent the separation physical required by the Personnel Manual and ordered by the PRRB in May 2007. She was found fit for duty. However, the Coast Guard admitted in the advisory opinion, and the Board agrees, that it committed an error by not immediately informing the applicant that she was found fit for duty as a result of her May 2007 separation physical and by not informing the applicant of the procedure for objecting to the fit for duty finding. In this regard, Article 12.B.6. of the Personnel Manual and Article 3.B.5. of the Medical Manual allow a member to object to the findings of a separation physical. Furthermore, both the Personnel Manual and Medical Manual state that if a member objects to a finding of physically qualified for separation, the Standard Form 88 (medical evaluation report form) together with the member's written objections and any other evidence shall be sent immediately to CGPC for review. The Coast Guard admitted that it did not provide the applicant with a copy of the May 25, 2007 separation physical until after her release from ADHC or with the opportunity to object to the separations findings until just recently.

4. Therefore, the Board agrees with the Coast Guard that the applicant should be given an opportunity to submit a formal written rebuttal objecting to the fitness for duty finding to CGPC for review in accordance with the Medical and Personnel Manuals. The Board also agrees with the advisory opinion that if CGPC determines that additional medical evaluation is required the applicant should be offered orders for a Reserve Ready Management Period for such testing. If after reviewing the applicant's rebuttal and other pertinent records and documents,

CGPC determines that the applicant was not qualified for separation, a medical board should be initiated. If a medical board determines that the applicant was unfit for duty on June 13, 2006, the Coast Guard should continue PDES processing of her case.

5. The applicant stated that she agreed with the advisory opinion. However she submitted what appeared to be her formal rebuttal to the separation physical as her reply to the advisory opinion. The applicant should have sent her rebuttal to CGPC. Therefore, the Board will return a copy of the applicant's rebuttal to her and direct that she submit it to CGPC in accordance with the Board's order in this case.

6. In addition to the allegations made above, the applicant made various others in her application about her treatment while on active duty. In light of the remedy proposed by the Coast Guard, which will be directed by the Board, a decision on the allegations raised by the applicant with respect to her fitness for duty would be premature. If the applicant is not satisfied with CGPC's and/or the PDES's decision after review of her formal written rebuttal, she may file a request with this Board for further consideration.

7. Accordingly, the applicant is entitled to the relief discussed above.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXX USCGR, for correction of her military record is granted in part as follows:

The applicant shall submit a written formal rebuttal to CGPC objecting to the findings of her May 2007 separation physical examination in accordance with Article 3.B.5. of the Medical Manual. She shall do so within 30 days from the date of this decision.

CGPC shall review the applicant's rebuttal as required by Article 3.B.5. of the Medical Manual. If CGPC determines that further medical evaluations or consultations are necessary, it may order the applicant to a period of inactive or active duty for the purpose of such consultations or evaluations. If after review of the applicant's rebuttal and any additional medical consultations and evaluations, CGPC determines that the applicant was not qualified for release from active duty, a medical board will be initiated. If the medical board determines that the applicant was unfit, the Coast Guard shall continue processing the applicant through the PDES. If ultimately determined to be physically unfit for continued service as of June 13, 2006, she shall be separated or retired from the Coast Guard retroactive to June 14, 2006, and she shall be paid corresponding back pay and allowances subject to appropriate off-sets. If after review of the evidence, CGPC determines that the applicant was fit for duty on June 13, 2006, the date of her release from active duty, no corrective action is necessary.

The Coast Guard shall complete its processing under this order within 180 days from the date of receipt of the applicant's rebuttal.

Donna M. Bivona

Robert F. Parker

Eric J. Young