DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-010

Xxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxx

FINAL DECISION

ANDREWS, Deputy Chair:

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 application was docketed on November 25, 200x, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated September 25, 2003, 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 his record to show that he was separated from the Coast Guard on August 10, 200x, for medical reasons rather than for "fraudulent entry into military service." The applicant alleged that during boot camp, the Coast Guard discovered that he had a juvenile criminal record that he had not revealed to his recruiter. Despite the discovery, the Coast Guard decided to allow him to stay in the service. However, later when he became ill, the Coast Guard unfairly discharged him for "fraudulent entry into military service" instead of processing him for a medical discharge.

SUMMARY OF THE RECORD

On September 9, 199x, the applicant signed a medical prescreening form on which he certified that he had never been treated for a mental condition and that he had never been addicted to drugs or alcohol. Above his signature, the form states that providing false information could result in a less than honorable discharge. The applicant

also signed a medical history form, denying treatment or counseling for any mental condition or abuse of alcohol or drugs other than marijuana.

On October 7, 199x, the applicant enlisted in the Coast Guard at the age of 18. On that day, he signed a DD form 1966/2, certifying that he had never tried or used any narcotic, depressant, stimulant, hallucinogen, or marijuana. Just below this certification and above his signature, the form stated that "if any of the information is knowingly false or incorrect, I could be tried in a civilian or military court and could receive a less than honorable discharge which could affect my future employment opportunities." On the same day, he also signed a form CG-3307, certifying that all of the information he had provided on his enlistment documents was current and still accurate, that he had not had any involvement with the police, and that he understood that withholding information might result in a less than honorable discharge for fraudulent enlistment.

On November 1, 199x, while at boot camp, the applicant admitted to an officer that he had a juvenile criminal record for stealing a car, burgling his father's building, shoving someone (assault and battery), and possessing alcohol as a minor. He released his criminal records for review, and the Coast Guard decided not to discharge him for fraudulent enlistment although he had concealed his criminal record when he enlisted. Following boot camp, the applicant attended training to become an avionics technician.

On July 6, 199x, the applicant reported that he had slipped and fallen on his buttocks and hurt his back. The doctor reported that he complained of cervical pain "upon cranial rotation" and upon palpation of the C-6 and C-7 vertebrae, but that the x-rays were "negative." He diagnosed the applicant with a cervical strain. At a follow-up visit on July 8, 199x, the doctor reported that he still complained of "pain lower cervical and mid thoracic."

On September 24, 199x, the applicant sought treatment for neck pain. He reported that for about two weeks, he had woken up with a stiff neck each morning and that the stiffness would diminish during the day but that he would occasionally have a shooting pain. He also reported that he had had a "pinched nerve" in his neck five years before with similar symptoms. The doctor found that he had a full range of motion in his neck but "slight discomfort" at the C-7 vertebra.

On June 28, 199x, the applicant underwent training in an altitude chamber. The next day, he reported to a doctor that a few hours after the training, a muscle in his lower left back began twitching, followed by twitching in his left quadriceps muscle. The second day, he reported that his neck felt stiff and had begun "making noise," that his head "felt waterlogged," and that he felt hyper and tense. Four days after the training, he reported feeling like he had "bugs all over him" and a sunburned neck.

On July 5, 199x, the applicant was treated for "the bends" in a hyperbaric recompression chamber. The doctor reported that since the training on June 28th, the applicant had developed neck stiffness, muscle spasms, numbness and tingling on his face and feet, pruritis (itching), and an "altered mental state." The applicant told him that during the training, he had been jolted by two significant "bounces." He complained of neck pain upon flexing or extending his neck. The doctor also noted that 14 out of the 18 people who had undergone the training had had some symptoms of the bends and that 8 had needed treatment in the hyperbaric chamber. The diagnosis was "altitude-exposure-induced decompression sickness Type II." After treatment in the hyperbaric chamber, the applicant reported that his "head had cleared" and that he felt no more twitching or numbness. However, he stated that his neck was still stiff.

On July 7, 199x, the applicant reported that his neck was still stiff and he still felt agitated and anxious. He again underwent treatment in a hyperbaric recompression chamber, which resolved more of his symptoms, but not his neck stiffness. The doctor wrote that he "has had intermittent stiff neck over last 4-5 years.* … " At the bottom of the medical report, the doctor wrote "*football." Another doctor wrote that the applicant reported a history of neck pain "for about last 4 years."

Because of the applicant's continuing neck stiffness and pain, he was grounded and place on limited duty (desk work). On August 31, 199x, he reported that he felt a lot better and had no pain. However, on December 29, 200x, sneezing had caused his neck to begin hurting again. He also complained of neck pain when he was being treated for a sprained ankle on June 12, 200x.

On August 31, 200x, the applicant sought treatment for insomnia and excessive worry about his disability and stressful family situations. He began seeing a counselor and taking Zoloft, an anti-depressant medication.

On October 30, 200x, the applicant sought non-punitive treatment for alcohol abuse and depression. He stated that he had been having neck pain and was getting into a "rut" with depression and alcohol. He reported having between 24 and 36 "drinks" per week. He asked for the cause of his neck pain to be investigated and treated. He was referred for an MRI and grounded as unfit for aviation duty. He was never again found fit for aviation duty.

On November 1, 200x, the applicant's counselor diagnosed him with chronic pain and a possible adjustment disorder with depression.

On December 14, 200x, the applicant reported that ever since getting the bends, he had had intermittent episodes of neck pain. He was taught stretching exercises and prescribed Percocet, a potentially addictive pain killer. The doctor noted that he was grounded because of the medications he was taking (Percocet and Zoloft).

On January 8, 200x, a doctor reported that the applicant had fallen on ice, which had greatly increased his neck pain. An x-ray had revealed a lucency, which indicated an old fracture of the spinous process of the C-7 vertebra.

On February 1, 200x, the applicant was screened for addictions. He was diagnosed with (1) ongoing alcohol dependence and (2) amphetamine dependence that was in sustained remission.

On February 2, 200x, the applicant's executive officer (XO) prepared an entry for his record stating that because he had been found to be alcohol dependent, he had been recommended for Level III inpatient treatment. The applicant was advised that as a condition of his employment by the Coast Guard, he could not consume alcoholic beverages for the remainder of his career.

On February 22, 200x, the applicant saw an orthopedic surgeon who noted that an x-ray that day had shown that his C-6 spiny process was in two parts. He stated that the applicant reported having significant neck pain and much milder pain in other joints since undergoing training in an altitude chamber.

On March 5, 200x, a "cervical spine bone scan" ruled out the presence of a tumor.

On March 19, 200x, the applicant underwent a physical examination pursuant to evaluation by an Initial Medical Board (IMB). The examiner noted his chronic neck pain, among other conditions.

On March 30, 200x, a doctor noted that at an appointment on March 21, 200x, the applicant had reported having used all of the 45 Percocet tablets that had been dispensed to him on February 8, 200x. The doctor stated that he talked to the applicant about the potential for addiction and about tolerance and the lessening of effectiveness. The applicant told him that he understood about lessening effectiveness because, before enlisting, he had used intravenous methamphetamine for about one month but was "never able to reach the same high" he had received the first time. The doctor also noted that during the physical examination on March 19, 200x, the applicant had told him that before entering the Coast Guard he had been diagnosed with attention-deficit/hyperactivity disorder (ADHD), borderline personality disorder, and an attachment (separation) disorder.

On April 2, 200x, the applicant's psychologist reported that his diagnoses were dysthymic disorder and polysubstance dependence in remission. She stated that "treatment of his chronic pain is complicated by [his] history of addictive behavior."

On April 10, 200x, the applicant reported that his neck pain was "less acute since starting the [physical therapy]."

On April 10, 200x, the applicant's supervisor, the unit's engineering officer, made an entry in his record stating that the applicant had failed to keep him informed of the fact that he had been prescribed a medicine that precluded him from performing his duties, which included operating machinery, acting as a safety observer, and working on aircraft. The officer also noted that the had been found sleeping on watch on February 21, 200x, and that his actions had created unsafe conditions in the workplace.

On April 16, 200x, the applicant was treated for warts. A senior medical officer noted that the applicant began "cracking jokes about resuming use of injected meth[amphetamine after] his discharge."

On April 24, 200x, the XO advised him that he had not earned his command's recommendation for advancement. The reasons cited included his failure to inform his supervisor about the medication he was taking and his financial irresponsibility in failing to pay certain bills.

On April 25, 200x, the applicant's physical therapist noted that he had reported a slight ("10%") overall improvement and zero episodes of intense pain since beginning physical therapy, but that he had not been compliant in doing his exercises at home.

On May 12, 200x, military police were called to the applicant's home to investigate a verbal altercation in which he was involved. They found him to be "highly intoxicated," in violation of the previous restriction, and they removed him from his home to prevent the situation from deteriorating.

On May 14, 200x, the IMB noted that the applicant's diagnoses were (1) dysthymic disorder, (2) "alcohol dependence [with] psychological dependence," (3) "poly-substance dependence, provisional, in remission," and (4) chronic neck pain. The IMB noted that the applicant's medical records indicated that he was in good health until he underwent training in an altitude chamber on June 28, 200x, but that no laboratory studies were done at that time. It further noted that he had "related a past history of intermittent stiff neck over the previous 4-5 years from football." The IMB found that the range of motion in his neck was limited by pain and that the applicant had a "very flat" affect, had poor eye contact, and "appeared very tired and much older than age." The IMB concluded that he was unable to perform his duties as an aircrewman because of his chronic neck pain and dysthymic disorder and recommended that he be referred to a Central Physical Evaluation Board (CPEB). The applicant was advised of the IMB's findings and indicated that he would submit a rebuttal.

On May 15, 200x, the applicant submitted a statement rebutting the IMB's finding that he had injured his neck playing football before he enlisted. He stated that the finding was false. He stated that after he got the bends, one Coast Guard doctor asked him if he had ever played football, and the applicant answered affirmatively. When the doctor asked him if he had ever been injured, he had stated that he had "pulled a muscle or two but nothing serious." He stated that the doctor had never asked him if he had injured his neck playing football. The applicant also stated that the IMB report indicating that he had suffered from neck pain for four or five years was "completely inaccurate." He stated that he had never had a problem with his neck until he got the bends. In addition, he wrote that the statement that the condition of his neck had improved with physical therapy was false. He said that although the frequency of acute pain episodes had decreased, the "constant underlying pain" had increased. He stated that getting the bends had had a very negative effect on his life since he was in pain all the time and had significant physical limitations.

On May 16, 200x, the IMB issued an addendum in response to the applicant's statement. The IMB flagged the instances in the applicant's medical record where his doctors had noted his mentioning a pre-enlistment history of neck pain. The IMB also noted that the applicant had been "disengaged" by his physical therapist on May 15, 200x, because of his lack of compliance with the exercise regimen.

On May 16, 200x, the applicant's commanding officer (CO) forwarded the IMB report to the Coast Guard Personnel Command (CGPC), concurring in the findings and strongly recommending that he be discharged. He stated that the applicant had been removed from flight duties and assigned to administrative and technical duties in the avionics shop. He also stated that the applicant had "been involved in documented incidents throughout his tenure at this command that have demonstrated poor judgment and are not in keeping with the Coast Guard's core values."

On June 4, 200x, the applicant was arrested by military police for driving while intoxicated (DWI), with a blood alcohol content of 0.145.

On June 11, 200x, a master chief at the applicant's unit sent an email noting that because the applicant was taking pain killers for his neck pain, he had never been able to enter the Level III inpatient treatment program. The master chief stated that the applicant was in a "Catch-22" situation and that holding him accountable for abusing alcohol after he had referred himself for treatment and was unable to enter treatment presented a "fairness issue." The master chief recommended discharging the applicant as soon as possible before he did something that would embarrass the Coast Guard.

On June 13, 200x, the Administrative Division of CGPC, which oversees the processing of members through the Physical Disability Evaluation System (PDES), sent the

IMB report to CGPC's Enlisted Separations Section because its review of the file had indicated that the applicant "may have enlisted fraudulently."

On June 15, 200x, CGPC advised the applicant's command that the applicant was being considered "for discharge due to fraudulent enlistment" because he had admitted that he had had "problems with drug addition" prior to his enlistment, that he had used intravenous methamphetamine, and that at age 15, he had been diagnosed with ADHD, borderline personality disorder, and separation disorder. Therefore, the applicant was to be given an opportunity to make a statement in his defense.

On June 18, 200x, the XO made an entry in the applicant's record stating that the May 12, 200x, incident during which he was found intoxicated and removed from his home by the military police had been his first "alcohol incident" and that any further incidents would result in his separation from the Coast Guard. The applicant acknowledged this warning with his signature.

On June 26, 200x, the XO made another entry in the applicant's record stating that the applicant's June 4, 200x, arrest for DWI was his second "alcohol incident" and that he would be processed for separation.

On July 11, 200x, the applicant submitted a statement on his own behalf regarding his proposed discharge for fraudulent enlistment. He alleged, regarding the information that was being used against him, either that he had not disclosed it because his recruiter had told him that he did not have to report anything that occurred before his 18th birthday or that he had disclosed it during basic training. He stated that he had fully disclosed the information that he was being accused of withholding, and he alleged that his discharge for fraudulent enlistment was "a tactic derived from financial motives to avoid the Coast Guard's long term responsibilities" for his injury.

On July 13, 200x, the applicant's CO submitted his request for the applicant's immediate discharge along with the applicant's own statement to CGPC. He stated that the applicant had had three recent alcohol incidents, the third having occurred on July 11, 200x, when the applicant was involved in an altercation with his supervisor, admitted to having drunk alcohol the night before, and was charged with being absent without leave (AWOL) and failing to obey an order.

On July 23, 200x, CGPC ordered the applicant's command to separate him with an honorable discharge by reason of misconduct due to fraudulent enlistment, in accordance with Article 12.B.18. of the Personnel Manual, no later than August 21, 200x.

On July 31, 200x, the XO made an entry in the applicant's record stating that because he was about to be discharged, the charges against him for failing to obey a lawful order and being absent without leave would not be prosecuted. However, the

XO warned him that any further breach of discipline would result in disciplinary action and a delay of his discharge.

On August 10, 200x, the applicant was honorably discharged under Article 12.B.18. of the Personnel Manual for "fraudulent entry into military service" with a corresponding JDA separation code and an RE-4 reenlistment code, meaning that he is not eligible to reenlist.

On March 28, 200x, the Department of Veterans Affairs (DVA) awarded the applicant a 10-percent disability rating for his neck condition under VASRD code 5290 because its examiner found that the applicant had a normal range of motion in his neck but complained of pain. The DVA found that the applicant had not proved that his depression was service-connected. However, on June 19, 200x, the DVA granted service-connection for the applicant's depression and found him to have been 50 percent disabled by it from the date of his discharge. His combined disability rating is 60 percent.

VIEWS OF THE COAST GUARD

Opinion of the CPEB

In response to a request from the BCMR, the applicant's medical file was reviewed by a CPEB, which alleged that if a CPEB had reviewed the file prior to his discharge, the following findings would have been made:

- His dysthymia did not render him unfit for duty as it was controllable with medication;
- His alcoholism was not a ratable disability;
- His polysubstance dependence was not a ratable disability; and
- His chronic neck pain existed prior to his enlistment, was not aggravated by Coast Guard service, was not unfitting for military duty, and would therefore have been rated at 0 percent.

The CPEB alleged that the applicant could have been administratively discharged for a "condition, not a disability," for "alcohol rehabilitation failure," or for "personal drug abuse."

Advisory Opinion of the Chief Counsel

On March 31, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant the requested relief. However, he stated that he "would not object" if the Board granted alternative relief by changing the applicant's narrative reason for discharge from "fraudulent

entry" to "condition, not a disability." He did not recommend upgrading the applicant's reenlistment code. He based his recommendation in part on the memorandum on the case prepared by CGPC, which is summarized below.

The Chief Counsel argued that the applicant has not proved that the Coast Guard committed an error or injustice in discharging him. He stated that the Coast Guard is entitled to administratively discharge any member found to have an undisclosed physical condition that would have precluded enlistment had the condition been discovered prior to enlistment. He stated that when a member is found to have fraudulently procured enlistment by failing to disclose a known, disqualifying condition, the member is subject to discharge for misconduct in accordance with Article 12.B.18. of the Personnel Manual (PM). He argued, however, that because the Coast Guard "wished to honor the Applicant's request for 'non punitive' treatment, there is sufficient basis to change the discharge to a voluntary honorable discharge … due to a condition, not a disability, that interferes with performance of duty under Article 12-B-12."

The Chief Counsel argued that "disability statutes do not preclude disciplinary separation. The regulations provide that even if a member is in the process of a disability evaluation when disciplinary action for misconduct commences, the punitive or administrative discharge that results will foreclose and supersede any eligibility for disability retirement or payment."

The Chief Counsel further argued that the findings of the DVA have "no bearing or legal moment on the Coast Guard's medical findings." He argued that under Coast PDES regulations, the "sole basis for a physical disability determination in the Coast Guard is unfitness to perform duty. … Coast Guard regulations interpret these statutes to prohibit use of this authority to bestow compensation benefits on those who are retiring or separating and have continued on unlimited active duty while tolerating impairments that have not actually precluded Coast Guard service."

CGPC Memorandum

The Commander of CGPC stated that the applicant's claim that he had previously disclosed the information for which he was being discharged during boot camp is without merit because the record indicates that the boot camp investigation concerned purely his prior criminal record and not his prior drug and alcohol abuse and psychiatric diagnoses, which would have disqualified him for enlistment. Commander, CGPC, stated that although the discharge for fraudulent enlistment was appropriate, the applicant's "documented effort to seek 'non-punitive' treatment for these conditions, commencing in October, 200x" is a mitigating factor that should be considered.

Commander, CGPC, stated that no promises were made to the applicant that disclosures he made to his doctors would not be used against him. However, he stated,

> I am convinced it was in the best interest of the member and the Coast Guard to encourage his complete honesty to obtain the best possible medical treatment. … I find that both the Coast Guard and the Applicant found themselves in a "Catch-22" situation, in that their best interests were served by the Applicant finally being honest about his history prior to enlistment. However, Coast Guard policy would require the Applicant's separation for fraudulent enlistment. Though I find the Applicant's behavior during the entire matter to be unacceptable and reject any assertion that he was victimized by the Coast Guard, I believe that in the interest of justice, the Applicant's separation for fraudulent enlistment should be changed.

Commander, CGPC, stated that he concurred in the findings of the CPEB that the applicant should be discharged for a "condition, not a disability." However, he argued, because of the applicant's disqualifying conditions and his demonstrated unreliability, his reenlistment code should remain RE-4.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS[1]

On April 1, 2003, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 30 days. The applicant requested and was granted an extension and responded on June 10, 2003. In his response, the applicant stated that the Coast Guard had never provided him with alcohol rehabilitation treatment because, he was told, he was not fit for duty because of his neck condition. He alleged that before he revealed his problems with alcoholism and depression, he never got into trouble, but thereafter, "they immediately began writing me up for every situation that I was involved in, even if I was not in the wrong." He alleged that if the Coast Guard had timely provided rehabilitation treatment, he would have gotten "back on the right track." He alleged that they once told him that he could stay in the Service if he would divorce his wife, but he refused.

In support of his allegation that he had never injured his neck playing football prior to his enlistment, he submitted a statement from the athletic director of his high school. The athletic director wrote that the applicant had only played football during his freshman year, that during that year "he received no injuries of any kind and he played the entire season," and that, to his knowledge, the applicant never played high school sports after his freshman year.

In addition, the applicant submitted a statement from his mother, who stated that the applicant had lived with her from age 12 to 15 years and was never injured during that period. She stated that during his freshman year, the applicant played football and track.

---

[1] The BCMR sent the Chief Counsel a copy of the applicant's response. On June 19, 2003, the Chief Counsel informed the BCMR that the Coast Guard would not submit a supplemental opinion.

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 if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "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. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."

Veterans Affairs Schedule for Rating Disabilities (38 C.F.R. part 4)

VASRD code 5290 is for rating limitations of motion of the cervical spine caused by the fracture of a vertebra. Possible ratings are 30% for a severe limitation, 20% for moderate limitation, and 10% for slight limitation of motion.

Provisions of the Personnel Manual (COMDTINST M1000.6)

PM Article 12.B.1.e.1., which concerns "Cases Involving Concurrent Disability Evaluation and Disciplinary Action," states the following:

> Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander, (CGPC-adm) is processing a member for disability while simultaneously Commander, (CGPC-epm-1) is evaluating him or her for an involuntary administrative separation for misconduct or disciplinary proceedings which could result in a punitive discharge or an unsuspended punitive discharge is pending, Commander, (CGPC-adm) suspends the disability evaluation and Commander, (CGPC-epm-1) considers the disciplinary action. If the action taken does not include punitive or administrative discharge for misconduct, Commander, (CGPC-epm-1) sends or returns the case to Commander, (CGPC-adm) for processing. If the action includes either a punitive or administrative discharge for misconduct, the medical board report shall be filed in the terminated member's medical personnel data record.

PM Article 12.B.18.b.(2) authorizes the Commander of CGPC to discharge a member for misconduct upon discovery that the member "[p]rocure[d] a fraudulent enlistment, induction, or period of active service through any deliberate material misrepresentation, omission or concealment which, if known at the time, might have resulted in rejection." It goes on to specifically encompass the concealment of the member's pre-enlistment medical history or criminal records. PM Article 12.B.18.a. states

that the discharge may be honorable, general, or other than honorable. PM Articles 12.B.5. and 12.B.18.e. provide that members who are considered for such a discharge and have less than eight years of service are not entitled to a hearing before an Administrative Discharge Board but may submit statements on their own behalf. They are only entitled to counsel if something other than an honorable discharge is contemplated.

PM Article 20.A.2.e. defines an "alcohol incident" as "[a]ny behavior in which the use or abuse of alcohol is determined to be a significant or causative factor and which results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ) or federal, state, or local laws." Under Article 20.B.2.g., after the first such incident, the member must be advised in writing on a form CG-3307 that a second "alcohol incident" will normally result in his discharge. Article 20.B.2.h.2. provides that "members involved in a second alcohol incident will normally be processed for separation."

Under PM Article 20.C.3.c., a "drug incident" occurs when a member's CO is persuaded, based upon tests or testimony, that a member has willfully used an illegal drug by a preponderance of the evidence. Article 20.C.4. states that a member must be processed for separation after the first such incident.

Under PM Article 12.B.12.a.12., members with certain medical conditions that do not constitute physical disabilities but that do interfere with their performance of duty may be discharged administratively for the convenience of the government.

Separation Program Designator (SPD) Handbook

The SPD Handbook states that members with no entitlement to an ADB who are involuntarily discharged because they have "procured a fraudulent enlistment, induction, or period of military service through deliberate material misrepresentation, omission or concealment" may be assigned a JDA separation code, an RE-4 reenlistment code, and "fraudulent entry into military service" as the narrative reason for separation shown on their discharge forms.

The SPD Handbook states that members with no entitlement to an ADB who are involuntarily discharged "when a condition, not a physical disability, interferes with the performance of duty" may be assigned a JFV separation code, "condition, not a disability" as a narrative reason for separation, and an RE-4 or RE-3G or RE-3X (which mean eligible for reenlistment except for the disqualifying condition) reenlistment code.

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

Chapter 3.F. of the Medical Manual provides that members with medical conditions that are disqualifying for continuation in the Service shall be referred to an IMB by their commands. Chapter 3.F.1.c. of the Medical Manual states 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.

Chapter 3.G. of the Medical Manual provides that avionics technicians, such as the applicant, and other aircrew members must pass special examinations to be fit for their aviation duties. Chapter 3.G.2.e.(1), which concerns when a medical board should be convened, provides that "[e]xcept for enlisted personnel in aviation ratings, fitness to perform aviation duties is a determination independent of the determination of fitness for continued service."

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

The PDES Manual governs the separation of members due to physical disability. Chapter 3 provides that 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 CPEB. The member is advised about the PDES, provided a copy of the IMB report, and permitted to submit a response to the report.

Chapter 4 provides that a CPEB, composed of at least one senior commissioned officer and one medical officer (not members of the IMB), shall review the IMB report, the CO's endorsement, and the member's medical records and issue a report on whether the member is fit or unfit for duty and, if unfit, whether the disability was incurred or aggravated while he served on active duty and what percentage of disability rating is warranted.

Chapter 3.I.8. provides that before forwarding an IMB report to the CPEB, a member's CO must carefully screen it to look for conditions that existed prior to entry and "[s]hould it appear there may have been a fraudulent enlistment, the record shall be forwarded to [CGPC]."

Chapter 2.C.5.a. provides that "clear and convincing evidence is required to establish the existence of any injury or disease before a member's entrance into the

Coast Guard." Chapter 2.B.4. provides that "[i]njury or disease is presumed to be incurred in the line of duty. The presumption stands unless rebutted by clear and convincing evidence."

Chapter 2.C.2.a. provides that the "sole standard" that a CPEB or FPEB may use 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."

Chapter 2.A.47. defines being "unfit for continued duty" as the "status of an individual member who is physically and/or mentally unable to perform the duties of office, grade, rank, or rating because of physical disability incurred while entitled to basic pay. The status of unfitness applies to individuals unable to perform specialized duty, such as duty involving flying or diving, only if the performance of the specialized duty is a requirement of the member's enlisted rating."

Chapter 2.B.1. states that members are presumed to be fit for duty when they enter the Coast Guard and that "[a]ny increase in the degree of a preservice impairment which occurs during active service is presumed to be due to aggravation unless it is shown to be due to the natural progression of the disease or injury which existed prior to entry on active duty."

Chapter 2.C.11.a. provides that "[i]f a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member … final action on the disability evaluation proceedings will be suspended. Chapter 2.C.11.b. provides that "[i]f the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official medical record."

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 his discharge for fraudulent enlistment was erroneous because he had previously revealed his juvenile criminal record during boot

camp, and the Coast Guard had decided not to discharge him for fraudulent enlistment at that time. However, the record indicates that the applicant was not discharged because of his concealment of his juvenile criminal record but because of his concealment of his pre-enlistment drug and alcohol abuse and pre-enlistment psychiatric diagnoses of ADHD, personality disorder, and attachment/separation disorder. The record indicates that the applicant was duly informed of the reason for his proposed discharge and permitted to submit a statement on his own behalf, in accordance with his rights under Articles 12.B.5. and 12.B.18.e. of the Personnel Manual. In deciding not to discharge him for fraudulent enlistment when he revealed his juvenile criminal record during boot camp, the Coast Guard did not waive its right to discharge him for fraudulent enlistment at a later date upon the discovery of further concealed information.

3. The record indicates that while enlisting, the applicant failed to reveal his prior drug use and psychiatric diagnoses on his enlistment forms. Moreover, he signed sworn statements certifying that he had not lied on the forms. Later, in seeking treatment for his alcohol addiction and mental condition, he admitted to pre-enlistment intravenous drug use and three psychiatric diagnoses. Had he not lied to the Coast Guard about these matters on his enlistment forms, he might have been rejected for enlistment. Under Article 12.B.18.b.(2), therefore, the Coast Guard was entitled to discharge him for fraudulent enlistment. Moreover, as he was duly advised of the Coast Guard's intention and allowed to submit a statement on his own behalf, he was provided all due process under the Personnel Manual. Under Articles 12.B.5. and 12.B.18. of the Personnel Manual, he was not entitled to a hearing because he had less than eight years of active service, and he was not entitled to counsel because a less than honorable discharge was not contemplated.

4. The applicant alleged that he should have received a medical discharge because of his injured neck. However, under Article 12.B.1.e.1. of the Personnel Manual and Chapter 2.C.11.a. of the PDES Manual, when a member undergoing PDES processing for a physical disability is also subject to separation for misconduct, such as fraudulent enlistment, under Article 12.B.18. of the Personnel Manual, the member's PDES processing is suspended and not resumed unless the member is not discharged because of the misconduct. In this case, the record indicates that the applicant's PDES processing was suspended when his fraudulent concealment of his pre-enlistment drug use and psychiatric diagnoses was discovered. Because he was ultimately discharged for fraudulent enlistment, his PDES processing was not resumed. The applicant has not proved that the Coast Guard committed any error in not medically separating him under the PDES.

5. The applicant has insisted that he never injured his neck playing football and that his neck was not injured prior to his training in the altitude chamber on June 28, 199x. However, his medical record shows that on September 24, 199x, and twice after his altitude chamber training, the applicant told doctors that he had had pain in

his neck intermittently during the previous four or five years, indicating that the pain had occurred before his enlistment in 199x. The only evidence that this pre-enlistment neck pain resulted from a football injury, however, is a single, unelaborated footnote with the word "football" in a doctor's notes of a medical consultation.

6. Absent evidence to the contrary, the Board presumes that government officials, including the applicant's doctors, have acted correctly, lawfully, and in good faith. *See 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 applicant has submitted nothing to explain why three different doctors would have erroneously reported his admission that he had had neck pain before his enlistment. The Board finds that the preponderance of the evidence in the record indicates that the applicant experienced intermittent neck pain prior to his enlistment. However, given the statements submitted by his mother and coach and the fact that Chapter 2.C.5.a. requires "clear and convincing evidence" that any injury occurred before a member's enlistment, there is insufficient evidence in the record to conclude that he had injured his neck playing football.

7. Although the CPEB alleged that the applicant's neck condition was not aggravated by his military service, the record strongly supports a contrary finding. First, on July 6, 199x, a doctor investigating pain around the applicant's C-6 and C-7 vertebrae reported that x-rays of the applicant's neck were "negative," indicating no sign of fracture, whereas on January 8, 200x, x-rays showed a healed fracture in the spinous process of the C-7 vertebra, and on February 22, 200x, an orthopedic surgeon determined that the applicant's C-6 spinous process was fractured in two parts. Second, prior to enlistment, the applicant's pain was apparently intermittent, but by late 200x and early 200x, it had become much more frequent. Therefore, the Board finds that the applicant's neck condition was clearly aggravated by his military service.[2] However, as stated above, under Article 12.B.1.e.1. of the Personnel Manual and Chapter 2.C.11.a. of the PDES Manual, the Coast Guard committed no error in suspending his PDES processing when it discovered his fraudulent concealment of his pre-enlistment drug use and psychiatric diagnoses and began processing him for misconduct in accordance with Article 12.B.18. of the Personnel Manual. Therefore, the fact that the applicant's neck condition was aggravated by his military service, though germane to the DVA's finding that the condition was service-connected, is immaterial to the outcome of this decision.

8. The CPEB alleged that, in lieu of being discharged for fraudulent enlistment, the applicant could have been discharged for drug abuse or alcohol abuse. How-

---

[2] Moreover, in light of the fact that the applicant was an avionics technician—whose duties include flying as part of an aircrew—and had been grounded for months because of the medication he was prescribed for his neck pain, the Board does not agree that the applicant's neck condition did not render him unfit for the duties of his rating, in accordance with Chapters 2.C.2.a. and 2.A.47. of the PDES Manual and Chapter 3.G.2.e.(1) of the Medical Manual.

ever, there is no evidence in the record that the applicant ever used or tested positive for illegal drugs while serving on active duty. Admissions of pre-enlistment drug use do not constitute a "drug incident" under Article 20.C.3. of the Personnel Manual. Therefore, there was no basis in the record for discharging him for drug abuse. Although the applicant did have two "alcohol incidents" in his record, the record also indicates that he was not notified of the possible consequences of the first incident until June 18, 200x, after the second incident had already occurred on June 4, 200x. Moreover, the only alcohol-related narrative reason for discharge used by the Coast Guard is "alcohol rehabilitation failure," but the applicant was never sent to the rehabilitation program his doctors recommended because of the medication he was taking for his aggravated neck pain. Therefore, the Board finds that it would have been erroneous and unfair for the Coast Guard to have discharged him for "alcohol rehabilitation failure."

9. The Commander of CGPC recommended that the applicant be discharged for a "condition, not a disability" rather than for fraudulent enlistment, and the Chief Counsel stated that he would not object to such a correction. Commander, CGPC, pointed out that the applicant voluntarily reported his alcoholism and pre-enlistment medical history and was in a "Catch-22" situation in that he needed to admit his medical history to get proper treatment but, in doing so, risked being discharged for misconduct. Commander, CGPC, further stated that, as a matter of policy, it is in the Coast Guard's interest to encourage members to be honest about their medical history. Discharging members in the applicant's situation for fraudulent enlistment discourages such honesty. Therefore, he concluded that, although the Coast Guard did not legally err in discharging the applicant for fraudulent enlistment, it would be in the interest of justice to change his narrative reason for separation to "condition, not a disability." For the reasons stated by the Commander of CGPC, the Board finds that it would be in the interest of justice to change the applicant's narrative reason for discharge to "condition, not a disability." The Board notes that the applicant has been diagnosed with at least two conditions—unresolved alcoholism and the personality disorder—that sometimes render members unfit for military service but do not count as physical disabilities that entitle members to PDES processing and disability ratings. Coast Guard Medical Manual, Chapters 3.F.16.c., 5.B.2., and 5.B.5.a.

10. Furthermore, the Board also agrees with the Commander of CGPC that the applicant's reenlistment code should remain RE-4 because the record indicates that he has a disregard for the truth, unresolved psychiatric diagnoses, and a recurrent problem with alcohol.

11. Accordingly, the Board should correct the applicant's record to show that he was discharged for a "condition, not a disability" with a JFV separation code, in accordance with Article 12.B.12. of the Personnel Manual, but no correction should be made to his reenlistment code.

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

His DD form 214 shall be corrected to show that he was discharged by reason of a "CONDITION, NOT A DISABILITY" with a JFV separation code, under Article 12.B.12. of the Personnel Manual. The correction to his DD 214 shall be made by issuing him a new DD 214, not by issuing a form DD 215.

His RE-4 reenlistment code shall remain unchanged.

Margot Bester

Donald A. Pedersen

Dorothy J. Ulmer