

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-155

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FINAL DECISION

This proceeding was conducted under 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 July 12, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 10, 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 was honorably discharged on February 1, 2006, because of "weight control failure," pursuant to Article 12.A.5. of the Personnel Manual. Upon his discharge, he had completed 14 years, 7 months, and 22 days of active duty.

The applicant asked the Board to correct his record to show that he was retired from the Coast Guard by reason of physical disability with a 70% permanent disability rating and to award him backpay and allowances from the date of his separation. The applicant alleged that "[d]uring the separation board I was given a medical evaluation by a [Coast Guard] physician and they did not disclose my service-connected disability to the board." He argued that he should have been medically retired under the Coast Guard's Physical Disability Evaluation System (PDES). In support of his allegations, the applicant submitted the following documents:

(1) A "Split-Night Polysomnogram Report" dated October 4, 2003, shows that the applicant was diagnosed with "Severe Obstructive Sleep Apnea (OSA) (780.53-0)" and should use a CPAP (continuous positive airway pressure) machine while sleeping. The report notes that surgery or wearing an oral appliance were also options and that weight loss and positional therapy might help his OSA.

(2) A decision by the Department of Veterans' Affairs (DVA) dated May 19, 2006, shows that he was awarded a 70% combined disability rating, consisting of a 50% rating for

OSA, a 10% rating for right shoulder tendonitis, a 10% rating for hypertension, a 0% rating for a scar on his left chest wall, and a 0% rating for a right knee meniscal tear. The decision notes that a 50% rating is assigned for OSA when the veteran must use a CPAP machine while sleeping. Regarding his tendonitis, the DVA decision states that 10% was awarded “for painful or limited motion of a major joint.” The report further stated that

there is no right shoulder tenderness to palpation. No swelling or deformities. Right shoulder range of motion elevation is to 155 degrees with normal to 180 degrees. Abduction is to 145 degrees with normal to 180 degrees. Internal rotation is to 90 degrees and external rotation is to 90 degrees with normal to 90 degrees. There is no evidence of pain, incoordination, fatigability or further loss of function with exercise. There are no additional losses expected. Right shoulder x-rays show a normal right shoulder. The examiner diagnosed tendonitis, right shoulder. Your symptoms of degenerative changes with slight loss of motion warrants a 10 percent evaluation.

Regarding his hypertension, the DVA decision states that 10% is awarded “if diastolic pressure is predominantly 100 or more; or systolic pressure is predominantly 160 or more; or as a minimum evaluation for an individual with a history of diastolic pressure predominantly 100 or more requiring continuous medication for control.” The report notes that the applicant was diagnosed with hypertension in 2000 and that the condition is controlled with medication.

SUMMARY OF THE RECORD

On June 11, 1991, the applicant enlisted in the Coast Guard. He later attended Officer Candidate School and on September 22, 1995, was appointed an ensign in the Reserve. He served on extended active duty and was promoted to lieutenant junior grade on March 21, 1997, and to lieutenant on March 22, 2000. He was integrated into the regular Coast Guard on July 21, 2000.

On September 7, 1994, the applicant was found to weigh 257 pounds, which was 32 pounds overweight. A physician completed a Command Medical Referral Form noting that he was medically cleared to participate in a weight loss program to achieve his maximum allowable weight (MAW) by April 14, 1995.

On June 14, 1995, while attending Officer Candidate School, the applicant was advised on a form CG-3307 (“Page 7”) that at 231 pounds he was in compliance with the MAW standard for a man of his age (25 years), height (72.5 inches), and wrist size (7.5 inches). The Page 7 noted, however, that 231 pounds *was* his MAW and that if he should exceed it in the future he would be required to complete a body fat determination.

On July 26, 2000, the applicant was diagnosed with hypertension. Thereafter, it was treated with various medications, which were occasionally adjusted.

On October 24, 2000, the applicant underwent a polysomnogram and was diagnosed with mild OSA. He was advised to lose weight, not drink alcohol before bedtime, and optimize his sleeping position. The doctor noted that if these measures failed, the applicant would need a CPAP machine.

On November 15, 2000, a nutritionist advised him that it was very important for him to lose weight because of his hypertension and sleep apnea. On December 7, 2000, the applicant underwent a “complete nutrition evaluation and consultation.” The nutritionist recommended that he adopt a 1600-calorie, low fat, low salt, moderate carbohydrate diet and continue his new exercise program.

On March 8, 2001, the applicant underwent an MRI after complaining of pain in his right knee. An MRI showed a “tear of the anterior horn of the lateral meniscus.” The applicant underwent arthroscopic surgery to repair the tear and then physical therapy. At a follow-up visit on November 14, 2001, the applicant reported that he no longer had any knee pain and that he was playing basketball. The doctor recommended that he modify his lifestyle to increase his exercise and change his diet.

On January 29, 2002, the applicant was advised on a Page 7 that he weighed 304 pounds and was therefore 35 pounds over the MAW (269 pounds) for a man of his age (31 years), height (74 inches), and wrist size (8.5 inches). In addition, his body fat was measured at 31%, whereas the maximum allowed was 25%. The applicant was advised that he was required to lose 35 pounds or to drop below 25% body fat by September 30, 2002, and that if he failed to be in compliance with one of the two standards (weight or body fat) by the end of the probationary period, he would be processed for separation. The Page 7 noted that a doctor had examined him on January 28, 2002, and certified that he would be able to lose the weight safely and that he had no physical impairments to losing the weight. In addition, he was ordered to undergo weekly weigh-ins and to adopt a tailored weight loss program through a Health Promotion Manager.

On March 12, 2002, the applicant sought help for pain in his left knee, which he had injured five days earlier while jogging. On March 19, 2002, the applicant reported that the pain in his knee seemed to be going away. He was advised to do strengthening exercises.

On June 3, 2002, the applicant came into compliance with the body fat standard when his body fat measured 24%. However, he weighed 286 pounds, so that was established as his new MAW “screening weight.” He was warned on a Page 7 that if he exceeded this new MAW, his body fat would be re-measured. In 2002, 2003, and 2004, doctors noted several times in the applicant’s medical records that he was obese and needed to diet and exercise.

On October 9, 2002, the applicant sought treatment for a swollen knee and knee pain, which he reported having suffered for two or three weeks. The doctor found him fit for duty but recommended that he participate in only low-impact activities. On October 16, 2002, a doctor noted that the applicant’s knee problem was resolving and that he had a full range of motion with mild effusion and mild tenderness.

On November 25, 2002, the applicant sought treatment for flu-like symptoms. He was diagnosed with an upper respiratory infection (URI), prescribed Robitussin, and found fit for full duty. On November 29, 2002, he again complained of flu symptoms. He was diagnosed with sinusitis and found fit for duty. On December 9, 2002, the applicant was again diagnosed with a URI. He was put in “sick in quarters” status for one day.

On March 4 and 25, 2003, the applicant was treated for “chronic sinusitis.” On April 17, 2003, he sought treatment for a cough, which he reported had begun two days before. He was again diagnosed with another URI and prescribed medication. On April 25, 2003, a doctor noted that the applicant’s URI was resolving.

On July 23, 2003, the applicant was treated for a “shoulder sprain” after he fell off a bicycle. An MRI conducted on August 15, 2003, showed “supraspinatus tendinopathy” (tendonitis), a “SLAP tear with posterior extension,” and “moderate degenerative disease” at the acromioclavicular joint. He was prescribed strengthening exercises. At a follow-up visit on October 14, 2003, the doctor diagnosed the problem as a “resolved AC sprain” with “minimal R.C. tendonitis” and recommended that the applicant continue his strength training exercises.

On October 4, 2003, the applicant underwent sleep testing, was diagnosed with OSA, and prescribed a CPAP machine to use while sleeping.

On July 14, 2004, the applicant’s supervisor sent him an email reminding him to complete a weigh-in “to properly confirm your status and get a jump start on the changes to the personal fitness program.” The applicant responded that he would be weighed on July 21, 2004.

On July 18, 2004, the supervisor advised the applicant that “[y]ou need to be concerned with the imposition of new physical fitness and weight requirements and need to ensure you don’t start off behind with the new system. You have been previously advised to engage in routine physical exercise program including allowing to take some time during the work week in order to meet the minimum standards but more importantly for your own health.” The supervisor also noted that there were some gaps in the applicant’s record of weigh-ins.

On July 22, 2004, the applicant stated that he did “not like the tone nor the implications that you are making” as he cannot control what notations the health technician made or failed to make in his record. The applicant wrote that he was

aware and concerned in regards to this new [weight standards] system. I also have in my medical files reasons for my current weight and disposition. I have addressed this topic several times with both you and [LCDR H] when he was here to have time to work out during the workday, then I worked out after hours. Your response assumes that I have not taken due diligence in making sure that I am in compliance with the current weight standards. I have taken due diligence through my workouts and through my constant visits to the medical staffs to address injuries and my [hypertension]. I guess you forgot about the documented upper respiratory infection I had for 4 months. I guess you forgot about the documented separated shoulder I had that I had to rehab for 3 months. I also guess you forgot about the sprained MCL on my left knee that I had to rehab for 2 months. In addition, I am currently on three different [blood pressure] medications with the side effects of each medication is [sic] weight gain I will take your advice and keep my own weigh-in records. This way I can be assured in the future that I have the proof against any future allegations.

On July 27, 2004, the supervisor invited the applicant to come talk about his concerns as his intention had been simply to remind the applicant of the need to verify his weigh-in record. The supervisor stated that he knew about the respiratory infection and shoulder separation but did not recall the knee injury or the side effects of his medications. The supervisor stated that he

had never been told that the applicant's conditions or medications provided a medical reason or justification for his weight gain.

On October 27, 2004, the applicant was treated for "back pain, musculoskeletal strain" following a car accident. He was prescribed Motrin and valium. An x-ray of his lumbar spine showed no abnormalities.

On November 19, 2004, a Page 7 was prepared noting that the applicant weighed 342 pounds, which was 56 pounds above his MAW screening weight of 286 pounds. In addition, his body fat measured at 36%. He was advised on a Page 7 that because his probationary period would exceed 36 weeks (probationary periods are computed to allow for weight loss at the rate of one pound per week), he did not qualify for a probationary period and would be processed for separation.

Also on November 19, 2004, the applicant's physician completed a Command Medical Referral Form, which showed that the applicant was 55 pounds overweight; that there was no underlying medical condition that caused the weight gain; that it was safe for the applicant to lose the excess weight through diet and fitness activities; and that the applicant had been counseled on diet and exercise. Laboratory reports dated November 9, 2004, indicate that no underlying medical causes of the weight gain were discovered.

On December 9, 2004, the applicant's commanding officer recommended that the applicant be separated for failing to meet the weight standards.

On January 14, 2005, the applicant was informed that the Coast Guard would be convening a board of officers to determine whether he should be required to show cause for retention in the Service.

On February 22, 2005, the applicant submitted a statement for consideration by the Determination Board. He wrote that as of February 17, 2005, he had lost 18 pounds and 3 inches from his waist in just 12 weeks. He stated that he was losing on average 1.5 pounds per week and was confident that he could be in compliance with the standards within 36 weeks. He attached to his statement a chart showing that in October 2004, he weighed 342 pounds and had 36% body fat; on December 2, 2004, he weighed 341 pounds; on January 6, 2005, he weighed 330 pounds; and on February 17, 2005, he weighed 324 and had 34% body fat.

On March 2, 2005, a Determination Board convened to determine whether the applicant should be required to show cause for retention on active duty. The board found that he should be required to show cause for the following reasons:

(a) [The applicant] is in violation of Commandant Instruction M1020.8E, Weight/Physical Fitness Standards for Coast Guard Military Personnel. He exceeded the maximum allowable weight and body fat beyond the limits of the maximum probationary period of 36 weeks. In accordance with COMDTINST M1020.8E, this requires an individual to be processed for separation from the Service.

(b) While [the applicant] is in violation of the standards, he has taken noteworthy initiative to reduce his weight and percentage body fat. This Board notes his 12-week reduction in weight by

18 pounds and percentage body fat by 2 percent. It is conceivable that with his continued diligent effort, [he] could bring himself to within the prescribed limits during the remaining special board process. Although we recommend he show cause for retention, we feel his continued progress and success in this are should be reviewed and taken into consideration at the Board of Inquiry.

On March 7, 2005, the applicant was informed of the results of the Determination Board and of the fact that he would be required to show cause for retention before a Board of Inquiry. He was informed that he could appear in person and be represented by counsel.

On March 28, 2005, the applicant underwent a physical examination pursuant to the separation proceedings. On his Report of Medical History, aside from kidney stones and allergies, the applicant past medical problems he noted were his hypertension and his knee surgery in 2001. He told the doctor that the knee was “no problem now.” He listed the medications he was taking for hypertension, and the doctor noted that they “need monitoring.” The applicant was found fit for duty or separation.

On July 19, 2005, a Board of Inquiry (BOI) held a hearing for the applicant to show cause why he should be retained on active duty. Following the hearing and after reviewing his records, the BOI recommended that the applicant be discharged because he

did not show cause for retention on Active Duty. The respondent provided no evidence to refute the government’s position that he was in violation of the Weight/Physical Fitness Standards for Coast Guard Military Personnel Manual (COMDTINST M1020.8E). Evidence presented indicated he was 56 lbs over his maximum allowable weight (MAW) and 11% over his maximum allowable body fat when evaluated by Headquarters Support Command (HSC) in October 2004. HSC followed the procedures in COMDTINST M1020.8E, paragraph 2.G. and began processing [him] for separation. The respondent did not present any evidence that the government improperly followed the procedures as established in COMDTINST M1020.8E. Also, [he] presented no official medical evidence precluding him from or waiving him from the requirements of the weight program.

[The applicant’s] record indicates his official struggle with his weight began in January 2002, when he was found to exceed the limits of the Coast Guard’s legacy weight program instituted under COMDTINST M1020.8C. [His] own testimony indicates that he embarked on a “Fad Diet” to gain compliance with the program and was found to be in compliance shortly before his PCS transfer in July of 2002.

Base on the testimony of witnesses [the applicant] gained weight after arriving at his new duty station, and was very likely overweight for the majority of the time since 2002. ... Several months prior to the update of ... [COMDTINST M1020.8E], [the applicant] was reminded by his supervisor about the impending update and the need for him to determine what impact it may have on his weight status. In that correspondence, via email, the supervisor also reminded [the applicant] that he had been previously advised to engage in a routine physical fitness/exercise program. [The applicant] contends that he started working out several times but was unable to stay on a fitness program due to multiple injuries incurred during physical fitness activities. Also, the command provided [him] with time during the workday to participate in a fitness program. There are multiple exercise programs that [he] could have participated in despite his injuries. It appeared to the board [he] failed to either take the personal initiative or the advice of his supervisors to get serious about losing weight prior to the promulgation of the Weight/Physical Fitness Standards for Coast Guard Military Personnel Manual (COMDTINST M1020.8E).

On October 6, 2005, the applicant weighed 313 pounds and had 30% body fat.

On October 7, 2005, the applicant's counsel submitted a rebuttal to the report of the BOI. The rebuttal states that the BOI failed to consider the quality of the applicant's many years of service; the medical conditions that led to his weight gain and prevented him from exercising; and his "current commitment to leading a healthy lifestyle." The rebuttal also asserts that the applicant did attempt to lose weight prior to the October 2004 weigh-in but could not because he "aggravated pre-existing injuries while exercising and trying to lose weight: he injured his shoulder in a bicycle accident and injured his knee while running. In addition, [the applicant] was involved in a car accident in October 2004 where he injured his back." The rebuttal alleges that the applicant tried to join a Ship Shape program in July 2004, but his entry was delayed until January 2005. The rebuttal complained that the BOI failed to acknowledge the applicant's efforts and injuries.

The applicant's rebuttal to the BOI report further alleged that the BOI ignored the recommendation of the Determination Board that the BOI take into consideration the applicant's recent efforts and progress in losing weight. The rebuttal claimed that by the time the BOI met, the applicant had lost 23 pounds and 8% of his body fat from his high of 341 pounds and 38% body fat. The rebuttal stated that because of his progress, the applicant now qualified for a probationary period, and so the Coast Guard should "not give up on him and cast him aside."

On October 14, 2005, the BOI responded to the applicant's rebuttal. The BOI stated that the report shows that the board did review the applicant's performance record, which contained many fair and average marks, before issuing its recommendation based on its finding that the applicant had not proved that he should be retained. The BOI noted that its report referred to the applicant's injuries in 2004, showing that the Board members took them into consideration but found that he still could have participated in a weight loss program. The BOI further noted that testimony during the applicant's hearing had revealed that when the applicant's supervisors counseled him in the summer of 2004 that the weight standards were going to be more strict and that he needed to lose weight to meet them, the applicant "responded defensively" and his supervisor "did not notice [him] take any initiative until [he] was notified that he was to be processed for separation." In addition, "[s]everal of the [applicant's] witnesses who observed [him] around the summer and fall of 2004 testified that they only noticed [him] take his weight seriously around the time of the implementation of the new policy. ... There was also evidence that the respondent participated in some sports programs during the summer of 2004 despite his injuries. ... [He] played on a men's basketball team and other sports" The BOI noted that the applicant submitted some new medical records with his rebuttal, but that the records show that he was able to exercise in the summer and fall of 2004.

The BOI's response to the rebuttal further stated that the applicant failed to sufficiently address his diet even though his own mother is a nutritionist. The applicant admitted that he did not begin a diet until November 2004. The BOI stated that the applicant had access to many other sources of information and help aside from the Ship Shape program but did not use them and "did not take initiative until it was too late." The BOI further noted that the applicant's body fat had not diminished from 30% since the date of the BOI hearing on July 19, 2005, and that he remained out of compliance with the Coast Guard's weight standards nearly a year after being informed that he would be processed for separation due to his weight. The BOI concluded that

[r]egardless of whether diet or exercise alone would have resulted in sufficient weight loss or loss of body fat, the [applicant] did not begin either until after the new Weight/Physical Fitness Standards policy took effect, despite warning from his superiors that failing to take action could jeopardize his future in the Coast Guard. The hearing before the Board of Inquiry was a show cause hearing at which the [applicant] had the burden to show cause why he should be retained. [He] presented witnesses and documents to the Board of Inquiry for that purpose, which the Board considered. Ultimately, the Board was not swayed by the evidence the respondent presented. There is no serious suggestion in [the applicant's rebuttal] that the hearing was not fair and impartial; there is merely dissatisfaction with the [BOI's] recommendation.

On November 15, 2005, a Board of Review convened to review the BOI recommendation and decide whether the applicant "has or has not established that he should be retained in the Service." The Board of Review approved the recommendation for discharge.

On February 1, 2006, the applicant was honorably discharged for "weight control failure."

VIEWS OF THE COAST GUARD

On December 13, 2007, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief. In so doing, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that after the applicant was found to be 56 pounds overweight and to exceed the maximum allowable body fat of 25% at 36% on November 19, 2004, he was advised that he would be administratively separated because his weight probationary period would have exceeded more than 36 weeks. CGPC stated that the applicant was accorded all due process prior to his discharge on February 1, 2006, including a Determination Board convened on March 2, 2005; a Board of Inquiry convened on July 19, 2005; and a Board of Review convened on November 15, 2005. CGPC stated that there is no evidence of any wrongdoing and that his physician "operated within the scope of applicable policy."

CGPC stated that although the applicant had certain medical conditions, "none of these conditions presented impairment or were disqualifying from continued military service as outlined in [the PDES Manual and the Medical Manual]. The applicant was able to perform the duties of his rank prior to discharge and had he not been discharged for weight control failure, his record up until his discharged does not support that he suffered from a condition that would warrant PDES processing or that presented an inability to perform his duties." CGPC argued that under the PDES Manual, if "a member being processed for separation for reasons other than physical disability adequately performs the duties of his or her office, grade, rank or rating, the member is presumed fit for duty even though medical evidence indicates he or she has impairments."

CGPC further stated that the Medical Manual "does not classify sleep apnea or hypertension, when controllable through medication or external means, as disqualifying conditions for retention. Regarding the other DVA disability [rating] for tendonitis of his right shoulder, the

applicant's record does not support that he suffered any inability to perform his duties, other than temporarily during period of rehabilitation as noted in his medical record." CGPC noted that although the applicant twice complained of a right shoulder strain while on active duty, at the time of his separation physical examination, he did not complain of current shoulder pain and he met the physical standards for retention. Moreover, CGPC argued that DVA disability ratings "are not determinative of the issues involved in military disability determinations. The evaluation of the applicant at the time of his discharge is not affected by a subsequent [DVA] disability rating."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 17, 2008, the applicant responded to the views of the Coast Guard. The applicant argued that if he did not qualify for PDES processing because he worked on active duty for two years after being diagnosed with OSA, "it should have been clearly stated in the March 28, 2005, medical report. Nowhere in that report was my sleep apnea listed. ... It is clear that they did not list this physical disability because it would at least warrant a closer look at my medical history." The applicant alleged that the Coast Guard did not consider the affects of the OSA on his performance and denied having received due process since there was no PDES processing.

The applicant disagreed with the Coast Guard's claim that he was able to perform his duties adequately despite the OSA, hypertension, and tendonitis. He noted that on one form, a doctor noted that his hypertension needed to be monitored and that his hypertension medications "were consistently being adjusted to bring my hypertension under control." The applicant argued that his OSA should not be dismissed as "a mere impairment" and that he should have been granted a hearing by a medical board to determine his status. He stated that at the very least, he should have received "a medical severance package if not a medical retirement" because of his condition.

APPLICABLE LAW

Fitness and Administrative Separation Regulations

COMDTINST M1020.8E provided the "Weight/Physical Fitness Standards for Coast Guard Military Personnel" in 2005. Article 2.D.1. states that all military personnel will be weighed each October and April, but COs may screen members against standards anytime they deem it necessary. Article 2.E.1. states that members not in compliance with MAW and body fat standards "shall be referred to a medical officer or local physician, who shall make a recommendation to the command as to the member's health, whether or not weight and/or body fat loss would be detrimental to the member's health, and the member's ability to participate in each component of the monthly fitness assessment." Article 2.E.4. states that a member with a medical condition that precludes his or her participation in fitness activities is still responsible for meeting MAW standards within the timeline specified by the probationary period. Article 2.F.3. states that if a doctor determines that the member has a medical condition—such as a thyroid condition—that actually prevents him from losing weight or body fat at the required rate, the CO may request permission from Headquarters to hold the probation in abeyance.

Article 2.F.1. of COMDTINST M1020.8E states that “overweight members who also exceed their maximum body fat percentage shall be placed on probation, during which they must lose their excess weight or body fat. The probationary period cannot equal or exceed thirty-six weeks, however.” Article 1.A.3. states that healthy weight loss “should be at a rate of 0.5 to 1.0 pound per week.” Article 2.F.4. states that the probation period “shall equal the amount of time it would take the member to lose all excess weight at an average of one pound per week or one percent body fat per month, whichever is greater.” Article 2.F.5. states that “[m]embers whose probationary period has been determined to be equal to or greater than 36 weeks both by weight calculations and by body fat calculations ... shall be processed for separation.”

Article 2.G.1. of COMDTINST M1020.8E states that “[m]embers who exceed their MAW and body fat percentage to such an extent that they would be placed in a probationary period of 36 weeks or more, fail to demonstrate reasonable and consistent progress during probation, or fail to attain their MAW or body fat by the end of their probation ... shall be processed for separation.”

Article 12.A.15.c.1.g. of the Personnel Manual authorizes the separation “for cause” of officers who fail to meet the Coast Guard’s established weight standards. Under Article 12.A.15.e., any commanding officer who finds that an officer should be considered for separation shall refer the matter to CGPC, who after reviewing the records may refer the officer’s case to a Determination Board to decide whether the officer should be required to “show cause” for his or her retention on active duty at a hearing. Under Article 12.A.15.f.6., if the Determination Board, based on a review of the record, finds that the officer should be required to show cause for retention, the officer is notified and CGPC convenes a Board of Inquiry. The officer is appointed counsel to represent him or her before the BOI. Under Article 12.A.15.g., prior to the BOI, the officer must undergo a physical examination to determine his fitness for duty and separation. “If the officer has a condition which requires him or her to enter the physical disability evaluation system or a serious disease or injury intervenes, ... the officer concerned is normally processed concurrently for cause under this Article and in the physical disability evaluation system. A final determination on the officer’s status normally will not be made until both processes are completed.” Art. 12.A.15.g.

Article 12.A.15.h.1. of the Personnel Manual states that a BOI “affords officers a fair, impartial hearing at which they have an opportunity to establish their retention in the Coast Guard is warranted. The officers concerned may present evidence to refute matters of record offered against them or otherwise establish they should be retained. The board of inquiry will consider all relevant evidence presented at the hearing and make findings and a recommendation based on a preponderance of evidence.” At the hearing, “the officer concerned has the opportunity to present evidence to refute matters of record offered against him or her or otherwise establish the Service should retain him or her.” Art. 12.A.15.h.3.c. Under Article 12.A.15.h.3.k.(1), in deciding whether to recommend retention or separation, the BOI may take into consideration an officer’s recent improvements but that recent improvement resulting “from an unusual effort on the officer’s part after learning he or she was recommended for separation for cause ... does not overcome a pattern of ineffectiveness. The board may consider improved performance together with other evidence in the record to determine whether the officer has overcome the pattern.”

Under Article 12.A.15.i., when a BOI recommends separation, the case is reviewed by a Board of Review to decide whether the officer should be retained or separated. Under 12.A.15.h.8.c., an officer has a right to submit to the Board of Review a rebuttal to the report of the BOI, and if he does, the Recorder of the BOI may submit a written response to that rebuttal. If the Board of Review does not decide that the officer should be retained in the Service, the Commandant exercises final authority to approve separation.

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.

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

Article 3.F.1. of the Medical Manual provides that members with medical conditions that “are normally disqualifying” for retention in the Service shall be referred to an Initial Medical Board for possible processing under the PDES. Article 3.F.15.1. states that obstructive sleep apnea (OSA) may be disqualifying for retention on active duty “when not correctable by use of CPAP or surgical means.” Article 3.F.12.a.(2)(a) states that a shoulder condition may be disqualifying for retention if the maximum abduction (sideways elevation) or forward elevation of the arm is less than 90 degrees—i.e., perpendicular to the body and parallel to the ground. Article 3.F.8.c.(2)(a) states that hypertension may be disqualifying for retention if the member’s diastolic pressure consistently measures higher than 90 mm Hg despite medical treatment.

Article 3.B.6. provides that “[w]hen a member has an impairment (in accordance with section 3-F of this Manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation.”

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

The PDES Manual governs the separation of members due to physical disability. Chapter 2.C.2. states the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions, the Coast Guard's submissions, and applicable law:

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

2. The Board begins each case presuming that the applicant's military records are correct and that Coast Guard officials, including his doctors, have acted correctly and in good

faith in performing their duties.¹ The applicant bears the burden of proving, by a preponderance of the evidence, that he was entitled to PDES processing and a disability rating upon separation.²

3. The applicant alleged that the Coast Guard should have processed him under the PDES and assigned him a disability rating because of the medical conditions that the DVA found to be service connected and ratable as of the date of his discharge. The DVA awarded him a 50% rating for obstructive sleep apnea (OSA), a 10% rating for right shoulder tendonitis, and a 10% rating for hypertension. However, the DVA assigns ratings for all service-connected disabilities ratable under the VASRD in accordance with how the disabilities affect a veteran's civilian employment,³ whereas the Coast Guard assigns disability ratings only when a medical condition renders the member permanently unfit to perform continued active duty at the time of separation.⁴ DVA ratings are "not determinative of the same issues involved in military disability cases."⁵ Therefore, the fact that the DVA assigned the applicant a 70% combined disability rating as of the date of his discharge does not prove that the Coast Guard erred in failing to process him under the PDES and separate or retire him by reason of disability.

4. Regarding the applicant's fitness for duty, under Article 3.F.15.1. of the Medical Manual, OSA is only disqualifying for retention on active duty "when not correctable by use of CPAP or surgical means." The record shows that the applicant was prescribed a CPAP machine, and he has failed to prove that his condition was not "correctable" by the use of it while he was serving on active duty. Article 3.F.12.a.(2)(a) of the Medical Manual states that a shoulder condition such as tendonitis is only disqualifying for retention if the member cannot raise his arm to the front and the side to at least 90 degrees—i.e., perpendicular to the body and parallel to the ground. His medical records and the DVA's report show that the range of motion in his shoulder greatly exceeds the minimum necessary to be considered fit for duty. Likewise, the applicant failed to show that, prior to his discharge, his hypertension was not sufficiently controlled by medication to make him fit for duty in accordance with Article 3.F.8.c.(2)(a) of the Medical Manual. The Board finds that the applicant has failed to prove by a preponderance of the evidence that any of his medical conditions (aside from obesity) rendered him unfit for duty—either separately or when considered together—at the time of his discharge.

5. Moreover, Chapter 2.C.2.b. of the PDES Manual states that the PDES is "not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service." The record shows that the applicant was being mandatorily separated because of obesity and, although he was prescribed treatment (CPAP and hypertension medications) for two ongoing medical conditions, he continued to perform duty in a fit for full

¹ 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) (holding that "absent strong evidence to the contrary," government officials are presumed to have acted "lawfully, correctly, and in good faith").

² 33 C.F.R. § 52.24(b).

³ 38 C.F.R. § 4.1.

⁴ PDES Manual, Chaps. 2.C.3.a.(3)(a), 2.C.2.i., 9.A.1.c.(1), and 9.A.2.b.

⁵ *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983).

duty status until his discharge. The applicant has not overcome the presumption of fitness provided under Chapter 2.C.2.b.1. to show that he was entitled to evaluation by a medical board prior to his separation for obesity.

6. The applicant alleged that in discharging him for obesity, the Coast Guard failed to consider that he had injured his knee, shoulder, and back or that weight gain is a side effect of his hypertension medications. However, several times during the applicant's military career, doctors with access to his medical records certified that there were no underlying medical causes for his weight gain and that there was nothing to prevent him from dieting and exercising to lose weight. The fact that the applicant took medications listing weight gain as a possible side effect, had arthroscopic knee surgery in 2001, developed tendonitis in his right shoulder in the summer of 2003, and strained his back in October 2004 does not persuade the Board that his doctors erred in certifying that he had no medical condition that prevented him from dieting and exercising to lose weight to attain his MAW. Under Article 2.E.4. of COMDTINST M1020.8E, even members with injuries that preclude certain fitness activities are expected to lose weight as necessary to attain their MAWs. The record shows that the applicant had been placed on weight probation a few times before the Coast Guard's new fitness standards went into effect in 2004 and had previously received fitness and nutritional counseling. His supervisors reminded him months in advance of the October 2004 weigh-in that he needed to ensure that he would meet the new fitness standards. Yet he was 56 pounds overweight at the weigh-in, which meant that he did not qualify for a probationary period under Article 2.F.1. of COMDTINST M1020.8E and so had to be processed for separation under Article 2.F.5.

7. The applicant argued that the recommendation of the BOI was unreasonable and unfair because by the time of his BOI hearing, he had reduced his body fat to 30% and would have qualified for a probationary period. He pointed out that although the Determination Board found that he should have to "show cause" for retention, it also recommended that the BOI take into consideration any continued progress in losing weight. Under Article 12.A.15.h.3.k.(1), in deciding whether to recommend retention or separation, a BOI may take into consideration an officer's recent improvement, but recent improvement does not necessarily resolve the matter in favor of retention as the BOI must "determine whether the officer has overcome the pattern" of behavior that led to the "show cause" hearing. The BOI Recorder's response to the applicant's rebuttal shows that the BOI did consider his weight loss efforts following his notification that he would be separated due to obesity but were not persuaded that he should be retained. It is clear from both the BOI report and the Recorder's response that the BOI thought that the applicant should have responded to his doctors' and supervisors' advice and the nutritional counseling he received long before November 2004 and that they considered his recent weight-loss efforts under threat of separation to be "too little, too late." Given that the applicant weighed 342 pounds—56 pounds above his MAW—in November 2004, despite his physicians' advice and supervisors' warnings, and weighed 313 pounds—still 27 pounds above his MAW—in October 2005, this Board cannot conclude that the BOI's recommendation was unreasonable or unfair.

8. The preponderance of the evidence in the record shows that the applicant received all due process with respect to his discharge for obesity and that he was not entitled to PDES processing or a disability rating from the Coast Guard.

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

ORDER

The application of former LT xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Dorothy J. Ulmer

Thomas H. Van Horn

Darren S. Wall