DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-056

Xxxxxxxxxxxxxxx
xxxxxxxxxxxxx

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was received on February 3, 2003, and docketed on January 20, 2004, upon receipt of the applicant's military and medical records.

This final decision, dated February 24, 2005, 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 medically retired from the Coast Guard on August 31, 2000, in lieu of the honorable discharge he received. He alleged that he should have been processed for a medical retirement under the Physical Disability Evaluation System (PDES). He alleged that the Department of Veterans' Affairs (DVA) has found him to be 50% disabled and that he was unable to join the Reserve just four months after his discharge because of his medical problems. He alleged that, prior to his discharge, his doctor recommended that he be evaluated by a medical board.

In support of his allegation, the applicant submitted medical records from a spine and brain rehabilitation clinic, which he first visited on September 22, 2003. At the clinic, the applicant complained of "significant pain in the lower lumbar spine" since an accident in 1991 when, he told the doctor, he was on active duty and received "multiple compression fractures in his back" when his bicycle was hit by a car. The applicant stated that the pain increased if he bent or leaned forward for more than ten

minutes while working on cars or sitting for prolonged periods and that it would waken him in the night. The doctor noted that the applicant also had "significant neck complaints, mainly in the central neck region with minimal radicular components into the bilateral upper extremities." The doctor also noted an excellent range of motion in the applicant's neck, and mildly decreased range of motion "throughout all planes" in his back. The doctor found "abnormal mobility at the L4-L5 region. It appears that the L5 spinous process is slipping under the L4 spinous process in an anterior fashion with posterior/anterior mobilization. There is moderate pain with posterior/anterior mobilization throughout the lower lumbar region and minimal over the upper lumbar thoracic region." The doctor noted that the applicant's compression fractures from the accident were "likely healed and not symptomatic" but that he might have a "spondylolisthesis" and a "discogenic source for his chronic intermittent low back pain." He also noted that there had been a "[r]ecent exacerbation of neck pain." The doctor referred the applicant for MRIs and xrays.

On October 23, 2003, the doctor reported that a cervical MRI showed "a moderately large disc herniation with disc spur complex at C5-C6 level on the left paramedian distribution. There is some spinal cord compression associated." A lumbar MRI showed "evidence of previous compression fracture at L1 anteriorly as well as mild disc dehydration at the L5-S1 level without evidence of high intensity zone or significant annular disruption." Xrays showed "considerable kyphosis at the lumbosacral junction with slight wedging of vertebral body L1 anteriorly and some narrowing of the disc space at T12-L1"; "degenerative spurs of the bodies of L4, L3, and L2"; "straightening and loss of the normal cervical lordosis"; "some narrowing and encroachment upon the right and left intervertebral foramen at C5-6 by spurs"; and plate and screws "present across an old fracture of the mandible [jaw]." The doctor reported that the applicant complained of "neck pain and left greater than right upper extremity radicular pain out to the lateral deltoid region. He does have some intermittent back pain, but that is of less concern." The applicant was given a cervical epidural steroid injection. The doctor urged him not to engage in contact sports because of the high risk of a spinal cord injury. He prescribed Lortab for the applicant's pain. On November 4, 2003, a CT scan of the lumbar spine showed "[s]mall Schmorl nodes … involving the superior endplates of L1 and L2."

The applicant also submitted medical records from a pain management clinic, which show that he was referred to the clinic in November 2003 due to lower back pain, neck pain, bilateral shoulder pain, midthoracic pain, and right lower extremity (wrist) pain. The doctor reported that the applicant told him this pain had begun in 1991 when his bicycle was hit by a car while he was serving on active duty in Italy. The applicant reported that his pain was constant (20/24 hours per day), that he was taking Zanaflex and Lortab for the pain, and that he had recently had cervical epidural steroid injections, which had not reduced his pain. The applicant also complained of difficulty breathing when recumbent, insomnia, vertigo, and severe headaches that had begun

since the cycling accident, during which he had a "closed-head injury" and a broken jaw. The pain management specialist noted that the applicant's "pain score is 6/10"; that there was a full range of motion in his cervical spine; that there was some tenderness in the thoracic and lumbar spine and upon ventral flexion of the cervical spine; that he had "mildly decreased sensation in the T7-T8 ulnar distribution of the left upper extremity; and that he had normal reflexes and good upper and lower body strength. The specialist diagnosed him with "degenerative joint disease of the cervical spine as well as the lumbar spine" and prescribed antidepressants, opiates, anti-inflammatories, Pamelor (a sleep aid), and cervical facet injections.

The applicant also submitted a copy of ALCOAST 012/03, issued on January 10, 2003, which established the position of PDES ombudsman to help members and commands understand the PDES system.

SUMMARY OF THE RECORD

On July 31, 1986, the applicant underwent a physical examination prior to enlistment. On the Report of Medical History he completed, he admitted that in 1980, he had been hit in the back and suffered muscles spasms, but he denied any recurrent back pain. The applicant's right-eye tested at 70/20 for distance vision and 20/40 for near vision, but was corrected to 20/20 for both.

On September 5, 1986, the applicant enlisted in the Coast Guard. Following boot camp, his first tour of duty was aboard a cutter, after which he attended "A" School to become an electrical technician. Following "A" School, he spent three years at Group Key West. On June 12, 1989, the applicant was treated for a corneal abrasion on his right eye. No abnormalities were noted. On September 12, 1990, he sought treatment for back pain and was diagnosed with a muscle strain. He was prescribed Motrin. At an optometric evaluation on October 3, 1990, the applicant was found to have an "early keratoconus" right eye.[1] Without corrective lenses, his right eye was found to have 20/200 distance vision and 20/120 near vision.

On May 7, 1991, the applicant was transferred to Italy. On June 15, 1991, he was riding a bicycle when he was hit by a car. He went to the base clinic. The doctor found that the applicant's mandible was fractured and sent him to a local civilian hospital. The hospital records are not in the applicant's military or DVA medical records.

On June 16, 1993, the applicant reported to a new station in Honolulu. On the Report of Medical History for his quadrennial physical examination on July 12, 1993, the applicant wrote "I feel great. No meds." The applicant also noted that his jaw had

[1] Keratoconus is "a noninflammatory, usually bilateral protrusion of the cornea, the apex being displaced downward and nasally. … The cause is unknown, but hereditary factors may play a role." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 25TH ED. (2000), p. 939.

been broken in June 1991, that he was initially sent to a local hospital in Italy, and that a metal plate had been installed in his jaw at an Army hospital in Germany. He did not mention any back injury related to the 1991 accident. The doctor noted that the applicant had the following conditions, which were not considered disqualifying: "glasses, keratoconus [right eye]," "childhood asthma," status post jaw fracture, "chronic insomnia," and "chronic/recurrent" pain, numbness, and tingling in his left and right lower back, which worsened with prolonged sitting. The doctor noted that the applicant reported that the "initial injury [to his back] was forced extension of back in football game at age 10. No regular [medication], doesn't interfere with work." The doctor also noted that the results of a back and extremity examination were within normal limits and that the applicant had normal sensation and a good range of motion.

On March 14, 1994, the applicant sought treatment for lower back pain. The doctor noted that he had "chronic/recurrent LBP, EPTE [existed prior to enlistment]." The doctor took xrays and prescribed Naproxen and physical therapy. The xrays showed evidence of an old "compression fracture of L1 with anterior wedging" and "degenerative disc disease at T12-L1 and L3-L4." On March 17, 1994, the physical therapist noted that the applicant complained of "recurrent LBP, mostly [right side], some upper lumbar since age 15."

On August 29, 1994, the applicant again sought treatment for lower back pain. He was advised to continue his physical therapy exercises and prescribed Feldene.

On April 4, 1996, the applicant underwent "functional sinus surgery" to alleviate chronic sinusitis, facial pain, nasal congestion, and headaches.

On October 8, 1996, the applicant complained of having pain in his right shoulder for about two months. Xrays of his shoulders revealed no evidence of fracture or dislocation. The results were deemed "normal." He was diagnosed with rotation cuff tendinitis, which continued to bother him despite physical therapy. On July 28, 1997, the applicant complained that his shoulder still hurt when golfing, lifting things overhead, and throwing balls.

On November 4, 1997, the applicant sought treatment for lower back pain, which had begun about nine days before when he was pulling on a cable. On November 20, 1997, an MRI of the applicant's lumbosacral spine showed a "less than 25% anterior compression fracture of the L1 vertebral body which was present on the plain film done on 19 Aug 94." The doctor noted that the MRI "showed no significant findings and was consistent with those identified in 1994." On November 24, 1997, the applicant was referred for physical therapy. The referral note states that the applicant had been taking Motrin and Flexeril "with marked improvement in symptoms." On January 30, 1998, the physical therapist noted that the applicant's symptoms had improved and that the range of motion in his lower back was within normal limits.

On July 20, 1998, the applicant sought treatment for pain in his left shoulder and was diagnosed with "tendinitis/bursitis." He was prescribed Tylenol with codeine.

On December 1, 1998, the applicant sought treatment for neck pain, which had begun suddenly the day before when he had bent his head forward to look down. On December 2, 1998, the doctor found that the applicant had a full range of motion in his neck and diagnosed a "strain/sprain."

On January 4, 1999, the applicant sought treatment for lower back pain, which had begun two days before. He was placed on limited duty for seven days and prescribed Atarax and Naproxen.

On June 28, 1999, the applicant was transferred to a cutter based in Alameda, California. On January 25, 1999, he sought treatment for his left shoulder, which he had hurt over the weekend playing golf. He was diagnosed with tendinitis.

On January 13, 2000, an opthamologist noted that the applicant could not see through his right eye without a contact lens.

On March 6, 2000, an abscess was surgically removed from the applicant's right forearm near the wrist.

On April 11, 2000, the applicant sought help for lower back pain. He stated that it had begun the day before as a result of "prolonged sitting in bent over position" and that it was consistent with episodes he had had since 1991. A health services technician referred him to a doctor for treatment and to determine his duty status. The health services technician also included the notation "Med Board?" The doctor diagnosed the applicant with a "lower trapezius strain," prescribed Flexeril; noted that he was not fit for duty for one day; and referred the applicant to physical therapy.

On April 13, 2000, a physical therapist noted that the applicant stated that his wrist had normal function again. The physical therapist found that there was a free range of motion in the wrist and that its strength was 5/5. The physical therapist also noted that the applicant "refused [physical therapy] evaluation for his LBP [lower back pain]. States LBP is chronic for 9 years now. States he was already seen by 2 [physical therapists and] a chiropractor in the past [and] participated in regular [physical therapy treatment] sessions [without] significant improvement. [He] would like to know if there are other [treatment] options."

On April 19, 2000, the applicant underwent a physical examination at the Integrated Support Command (ISC) in Alameda in preparation for his voluntary separation from active duty. On a Report of Medical History, he stated that his health was good

with the exception of his lower back, for which he was taking Flexeril. The medical officer, a physician's assistant, noted that the applicant had a keratocnus right eye, which was not considered disqualifying in that it was corrected to 20/20, and that the applicant complained of bilateral shoulder pain, lower back pain, and insomnia, which were also found not to be disqualifying. The medical officer found him fit for release from active duty. The applicant completed form CG-4057 to indicate his agreement or disagreement with the officer's findings as follows:

I agree [x] (or) do not agree [ ] that at the time of separation:

1) I am reasonably able to perform my current duties, or [handwritten:] *w/ lower back pain*
2) I have a high expectation of recovery in the near term from illness, injury or surgical procedure such that I would again be able to perform my usual duties.

On May 11, 2000, the applicant complained that his back was "still sore all the time" and that he had had constant lower back pain since 1991, which increased with prolonged standing or sitting. The same physician's assistant who had conducted the applicant's separation physical noted that there was some tenderness around the spine but that the applicant had a free range of motion without pain and "5/5 strength." He took xrays; prescribed Motrin and Flexeril for the pain; ordered an MRI, which he noted that the cutter's health services technician "will coordinate"; and noted that the applicant was FFFD (fit for full duty). There is no evidence in the record that the MRI was ever completed.

On May 15, 2000, the physician's assistant also referred him to an orthopedist because the applicant complained that he had had intermittent pain in his right shoulder since 1998. He noted that there might be right shoulder impingement.

On July 10, 2000, the applicant was treated at the ISC in Alameda for a fever, congestion, and cough. He stated that he had been sick for two days and that his wife and child were similarly sick.

On August 31, 2000, the applicant was administratively discharged from the Coast Guard. His reenlistment code was RE-1 (eligible to reenlist). His separation code was MBK (voluntary release or transfer to another Service component upon completion of required service). His DD 214 bears the handwritten notation "mbr refuse to sign."

On January 24, 2001, the applicant underwent a physical examination to enlist in the Reserve. The Report of Medical Examination shows that the doctor found that he had the following disqualifying conditions, which rendered him unfit for enlistment in the Reserve: keratocnus right eye, which could be corrected to 20/40; recurrent back pain; a right shoulder problem with a history of bursitis; and childhood asthma. The report also shows that the doctor sought a waiver for the disqualifying conditions.

On June 13, 2001, the applicant underwent a physical examination for his claim for medical benefits from the DVA. On January 25, 2002, he received a 30% rating for his keratocnus right eye; a 10% rating for "status post L1 compression fracture, residuals"; and a 10% rating for "residuals, status post right wrist surgical removal of mass." His combined disability rating was calculated at 40%. These conditions were found to be "service-connected," and the ratings were backdated to September 1, 2000.

The DVA's rating report stated that with a contact lens, the applicant's vision in his right eye is 20/20, but whenever a contact lens is medically required, 30% is the minimum evaluation allowed for the disability.

Regarding the 10% rating for "status post L1 compression fracture, residuals," the report noted that a 10% rating is assigned "for slightly limited motion of the lumbar spine, or demonstrable deformity of a vertebral body from fracture with muscle spasm or limited motion. A higher evaluation of 20 percent is not warranted unless there is a moderate limitation of motion of the lumbar spine, or demonstrable deformity of a vertebral body from fracture with slight limitation of motion." The report noted that under 38 C.F.R. 4.59, "findings of painful, unstable, or malaligned joints due to healed injury should be at least entitled to the minimum compensable rating (10 percent) for the joint."

Regarding the applicant's right wrist, the DVA's report stated that the applicant complained of a constant ache with sharp pains upon "turning objects or holding objects tightly. However, the "examiner states that there is no pain, weakness, lack of stability, incoordination, or fatigue noted" but that the applicant was "status post right wrist surgery with residual symptoms" and therefore entitled to the 10% rating.

The DVA also found that the applicant had service-connected "residuals, status post nasal surgery, with chronic nasal congestion" but that it was 0% disabling. The DVA denied service-connection for a cervical spine condition because there was no evidence of one in his military medical records and because, upon examination, he denied neck pain and had a normal range of motion with no spasms or tenderness; for insomnia; for a right knee condition; headaches; a left foot condition; tendinitis in the right shoulder rotator cuff and the left shoulder; and a right forearm nerve condition.

On July 22, 2002, the DVA awarded the applicant an additional 10% rating for "residuals, status post mandibular fracture." The report stated that the 10% rating is "granted whenever there is indication of limited inter-incisal movement between 31 and 40 mm, or lateral excursion between 0 and 4 mm." The additional 10% rating raised his combined rating to 50%.

VIEWS OF THE COAST GUARD

On May 28, 2004, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request. The JAG based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant's medical records show that he "suffered from a variety of injuries and conditions during his military service … . Despite these conditions, the Applicant continued in the service for several years and appeared to suffer no impairments that interfered with his performance of duty." CGPC noted that the applicant had been found fit for duty at the time of his separation physical and that he was authorized to reenlist. CGPC noted that he "continued to receive therapeutic treatment for his conditions until his separation. However, there is no evidence that any of these conditions prevented him from performing his duties."

CGPC stated that "there is no evidence that [at the time of his separation] the Applicant's back condition or any other condition was considered as possibly disqualifying for service." CGPC argued that if the applicant believed he was disqualified for separation because of his back pain, he should have indicated his objection with the finding that he was fit for duty rather than indicating that he agreed with the finding "except for lower back pain." CGPC stated that because the applicant continued to perform his duties satisfactorily until his separation, he must be presumed fit for duty.

CGPC stated that "the physical standards used to evaluate the Applicant for separation or retention and enlistment into the Reserve within 6 months of separation are the same." CGPC stated that the applicant has submitted no evidence to prove that his "medical condition remained the same for the four-month period" between his separation and attempt to enlist in the Reserve. Therefore, CGPC argued, the applicant has not "overcome[] the presumption of regularity that Coast Guard officials used the same evaluation standards and made appropriate findings and determinations for both physical exams."

CGPC stated that when a veteran's service-connected medical conditions worsen following separation the DVA is the appropriate venue for treatment and rating. Regarding the DVA's ratings, CGPC argued that the DVA's and military's evaluation systems "are different and serve different purposes … . The military services first determine unfitness for duty and then rate only the extent that the unfitting medical condition or conditions prevent the member form performing their duties. … Accordingly, [D]VA ratings are not determinative of the issues involved in military disability rating determinations."

The JAG argued that the applicant "never disputed the finding that he was medically fit for separation and never requested to be considered by the PDES. Even if he

had, the presumptions embedded in the system would have likely precluded any finding in his favor based on the fact that he was already being processed for separation and that he continued to perform his assigned duties despite the existence of physical ailments." The JAG argued that under Article 2.C.2.c. of the PDES Manual and 10 U.S.C. § 1201, the "sole standard for a physical disability determination in the Coast Guard is unfitness to perform duty."

The JAG argued that under *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), the applicant's DVA rating "is not determinative of the same issues involved in military disability cases." The JAG argued that "[a]ny long-term diminution in [the applicant's] earning capacity attributable to military service is properly a matter for determination by the [DVA], not the Coast Guard or the BCMR." The JAG also argued that the "procedures and presumptions applicable to the DVA evaluation process are fundamentally different from and often more favorable to the veteran than those applied under the PDES. The DVA is not limited to the time of the Applicant's discharge. If a service-connected condition later becomes disabling, the DVA may award compensation on that basis."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On June 1, 2004, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 30 days. He was granted two 60-day extensions and responded on October 28, 2004.

The applicant stated that while riding his bicycle to his base in Italy in 1991, he was hit by a car and sustained two fractures to his mandible, bruised ribs, head trauma, and a neck injury. He stated that later, while assigned to the 14th District, he was unable to perform color guard duties "due to my inability to stand at attention, carry flags, or salute for long periods of time because of the damage to my neck and back from the accident in Italy." He stated that the medical staff in the 14th District repeatedly treated him for back pain and because his arms would fall asleep when extended above his shoulders for any length of time.

The applicant stated that later, after he was transferred to a cutter, one physician's assistant told him that his neck and back pain were his "cross to bear." He complained and asked for another one. The new physician's assistant arranged for MRIs and xrays of his neck and back. However, his cutter was deployed to Alaska, and the Executive Officer did not allow him to skip the deployment because he was the only ET1 on board. Therefore, he did not receive the tests. He stated that he tried again to get the MRIs when the cutter took on stores in Washington State, but the Executive Officer denied his request. He was discharged soon thereafter without having had the tests.

The applicant alleged that upon his discharge, he was supposed to go directly into the Reserve. However, someone in his PERSRU (Personnel Reporting Unit) failed to process his paperwork, so he had to apply and take a physical examination. He alleged that at the examination, the doctor "just laughed about my existing conditions and stated that there would be no way that I would be allowed into the Coast Guard or any other branch of service."

The applicant alleged that after his discharge, a pain management doctor and orthopedic surgeon told him that he had a "severe ruptured disc that had been that way for a long period of time" and that he probably had nerve damage since he had "loss of feeling in both arms, loss in range of motion, and loss of strength in both arms and hands." The doctors advised that he undergo surgery as soon as possible, so he had "a diskectomy and a level 1 cervical fusion."

SUMMARY OF APPLICABLE LAW

Disability Statutes

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

Provisions of the Personnel Manual

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

Article 1.G.4.c. states that "[a] person enlisting in the Coast Guard Reserve within 24 hours after discharge from the Regular Coast Guard is not required to take a physical examination provided the person was found to be physically qualified by a complete

physical examination no more than one year prior to discharge, and provided the applicant's medical history during the last 12 months has been satisfactory." Article 1.G.4.d. states that "[a] person who does NOT enlist in the Coast Guard Reserve within 24 hours after discharge from the Regular Coast Guard … must take a physical exam in accordance with the Coast Guard Recruiting Manual, COMDTINST M1100.2 (series), and be processed through a Coast Guard recruiting office."

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

Article 3.F.1.a. of the Medical Manual states that the physical standards provided in the article must be met for retention in the service, sea duty, or for "enlistment/reenlistment of prior service USCG personnel within 6 months of discharge from active duty in the Regular Coast Guard." Article 3.F.2. states that the list of "normally disqualifying conditions" contained in the article is neither all-inclusive nor "a mandate that possession of one or more of the listed conditions or physical defects means automatic retirement or separation."

Article 3.F. of the Medical Manual provides that members with medical conditions that "are normally disqualifying" for retention in the Service shall be referred to an IMB or a waiver shall be requested by their commands. Article 3.F.5.b.(f) states that a normally disqualifying condition is "[w]hen vision is correctable only by use of contact lenses or other corrective device." Article 3.F.12.a.(2)(a) requires each arm, at the shoulder, to have forward elevation to 90 degrees and abduction (side elevation) to 90 degrees. Article 3.F.12.a.(c) requires that each wrist have a "total range, extension plus flexion, of 15 [degrees]." Article 3.F.13.c. states that herniation of a disc in the spine is normally disqualifying if there are "[m]ore than mild symptoms following appropriate treatment of remediable measures, with sufficient objective findings to demonstrate interference with the satisfactory performance of duty."

Article 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.

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

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

Chapter 2.A.15. of the PDES Manual defines "fit for duty" as "[t]he status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating. This includes 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.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.
>
> • • •
>
> f. The following standards and criteria will <u>not</u> be used as the sole basis for making determinations that an evaluee 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 … .
>
> • • •

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

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

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

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

Chapter 3.D.7. states that a "member who is being processed for separation … shall not normally be referred for physical disability evaluation. … [A]bsence of a significant decrease in the level of a member's continued performance up to the time of separation or retirement satisfies the presumption that the member is fit to perform the duties of his or her office, grade, rank or rating (see paragraph 2.C.2.)."

FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that when he decided to leave the Coast Guard, he should have been processed under the PDES and retired by reason of physical disability. However, the record indicates that following his separation physical examination on April 19, 2000, he agreed with the medical officer's finding that he was fit for separation, and he agreed that he was "reasonably able to perform [his] current duties" although he suffered from lower back pain. Chapter 2.C.2.b. of the PDES Manual provides that the disability "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 record indicates that, at the time the applicant decided to leave the Service, he was ably performing sea duty although he had been tolerating bouts of lower back pain and a keratocnus right eye for

years. Chapter 3.D.7. states that a "member who is being processed for separation … shall not normally be referred for physical disability evaluation. … [A]bsence of a significant decrease in the level of a member's continued performance up to the time of separation or retirement satisfies the presumption that the member is fit to perform the duties of his or her office, grade, rank or rating." There is no evidence in the record of a significant decrease in the applicant's performance during the year prior to his voluntary separation.

3. The applicant alleged that he should have been processed under the PDES because a health services technician made the notation "Med Board?" in his record on April 11, 2000, and because on May 11, 2000, a medical officer ordered an MRI that was never performed. However, the purpose of the health services technician's notation is unclear. If the applicant himself inquired about receiving a medical board evaluation, the health services technician might have made this notation simply to draw the applicant's inquiry to the medical officer's attention. The medical officer who saw the applicant after the health services technician did not make any corresponding notation about a medical board in the applicant's record and did not begin PDES processing. In addition, although he ordered an MRI on May 11, 2000, he also noted that the applicant was fit for full duty. The fact that an MRI was ordered but not performed prior to the applicant's discharge—perhaps because he was performing sea duty—does not persuade the Board that he was unfit for continued service or separation. There is no evidence in the record that any doctor or medical officer thought that the applicant might be unfit for continued service prior to his separation on August 31, 2000.

4. Under Chapter 2.C.2.b.(1) of the PDES Manual, if a separating member has continued to perform duty without limitation, he is presumed fit. Under Chapter 2.C.2.b.(1) and (2), PDES processing may only be started if "(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or (b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty." The record indicates that the applicant was performing sea duty without limitation prior to his separation, and there is no evidence of any acute injury in the months prior to his separation that rendered him unfit for further duty. Even if, as he alleged, the applicant could not perform color guard duties, this inability would not have entitled him to PDES processing because under Chapter 2.C.2.f. of the PDES Manual, the inability to perform every possible duty to which a member could be assigned cannot be the sole basis PDES processing. Therefore, the Board finds that the applicant has not proved that the Coast Guard erred in finding him fit for continued service and for separation or in refusing to process him through the PDES prior to separation.

5. The applicant alleged that his 50% combined disability rating from the DVA proves that he should have received a rating under the Coast Guard's PDES. However, as the JAG argued, under *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), the applicant's DVA rating "is not determinative of the same issues involved in military disability cases." Moreover, the applicant's 50% combined rating from the DVA includes the following:

(a) 30% rating for a keratocnus right eye. The record indicates that the applicant served ably in the Coast Guard for more than 10 years with his keratocnus right eye and that it did not interfere with his performance of duty. Although under Article 3.F.5.b.(f) of the Medical Manual, such a condition is sometimes considered disqualifying because it requires the use of contact lenses, the applicant has not proved that he was entitled to PDES processing because of his eye condition.

(b) 10% rating for the residuals of having previously broken his mandible. There is no evidence in the record that the applicant complained of pain in or a problem with his mandible prior to his separation or that any such pain or problem rendered him unfit for continued service.

(c) 10% rating for the residuals of having had an abscess removed from his wrist. The record indicates that on April 13, 2000, just six days before his separation physical examination, the applicant told his physical therapist that his wrist was back to normal following the surgery, and the physical therapist found that he had a free range of motion and full strength in the wrist.

(d) 10% rating for the residuals of having had an L1 compression fracture. The record indicates that although the applicant periodically sought treatment for lower back pain throughout his military service, he continued to perform active duty despite the impairment. Moreover, the medical officer who examined him on April 19, 2000, and May 11, 2000, noted that he had a free range of motion in his back and that he was fit for full duty.

Therefore, even in light of the DVA's ratings, the Board is not persuaded that the Coast Guard erred in finding that the applicant was fit for separation.

6. The applicant alleged that the fact that he failed a physical examination to join the Reserve on January 21, 2001, proves that he should have been processed under the PDES and retired from active duty by reason of physical disability. His Reserve entry physical occurred approximately four and one-half months after his separation from active duty. Therefore, under Article 3.F.1.a. of the Medical Manual, the medical standards for the applicant's Reserve entry physical examination were supposed to be the same as those applied for his separation physical examination on April 19, 2000. The fact that he passed the first examination in April 2000 but failed the second in Janu-

ary 2001 seems anomalous if the same standards were used. However, as the Coast Guard argued, the applicant has submitted no evidence to prove that his several conditions did not worsen shortly after his separation from active duty on August 31, 2000. Absent evidence to the contrary, the Board must presume that the officers who conducted the applicant's separation and Reserve entry examinations performed their duties correctly.[2] Even assuming *arguendo* that his condition did not worsen during the four and one-half months between August 31, 2000, and January 21, 2001, this does not prove that the applicant's separation physical was erroneous, as the Board could just as easily conclude that the Reserve entry physical examination was erroneous.[3]

7. The applicant alleged that he should not have been required to take a physical examination at all because he had planned to and tried to enlist in the Reserve on September 1, 2000. Under Article 1.G.4.c. of the Personnel Manual, "[a] person enlisting in the Coast Guard Reserve within 24 hours after discharge from the Regular Coast Guard is not required to take a physical examination provided the person was found to be physically qualified by a complete physical examination no more than one year prior to discharge, and provided the applicant's medical history during the last 12 months has been satisfactory." Although the applicant's DD 214 shows that he was discharged from active duty, his separation code was appropriate for a member being released into the Reserve. The applicant alleged that he was denied enlistment only because someone in his PERSRU failed to process his paperwork. However, he has not asked the Board to correct his record in this regard. Moreover, because the applicant had no obligated Reserve service remaining upon his separation from active duty, to enter the Reserve on September 1, 2000, he would have had to sign a new Reserve enlistment contract. The applicant has submitted no evidence to show that he actually completed the paperwork necessary to enter the Reserve on September 1, 2000.

8. Accordingly, the applicant's request for a retirement from the Coast Guard by reason of physical disability should be denied.

ORDER

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

---

[2] 33 C.F.R. § 52.24(b). *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").

[3] As the applicant has not asked the Board to instate him in the Reserve, this issue need not be addressed.

Harold C. Davis, MD

Audrey Roh

Marc J. Weinberger