

DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

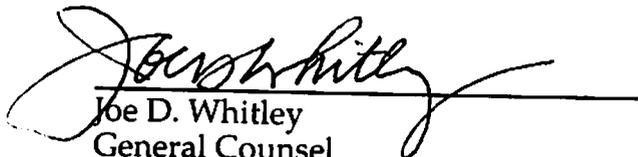
BCMR Docket No. 2004-141

DECISION OF THE GENERAL COUNSEL
AS THE DELEGATE OF THE SECRETARY

I approve the Board's majority recommended Final Decision.

I approve the recommended Dissenting Opinion.

Date: May 2, 2005



Joe D. Whitley
General Counsel
as delegated to act on behalf of the
Secretary of Homeland Security

**DEPARTMENT OF HOMELAND SECURITY
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BCMR Docket No. 2004-141

FINAL DECISION

Author: Ulmer, D.

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

This final decision, dated March 17, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case. The majority of the Board voted to grant relief. The minority voted to deny relief.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he retired on May 1, 2003, rather than on October 1, 2002. He further requested that he receive back pay and allowances for the period from October 1, 2002, until May 1, 2003.

The applicant alleged that the Coast Guard prematurely retired him on October 1, 2002, despite the fact that he had a serious medical condition, in violation of Article 2.C.2.b. of COMDTINST M1850.2C (Physical Disability Evaluation System (PDES) Manual).¹ He argued that his condition clearly matched the criteria in Article 2.C.2.b.(1)(b), which states that:

Continued performance of duty until a 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: . . . (b) acute, grave illness or injury, or other deterioration of the member's physical

¹ The applicant suggested in his statement that at some point he was on terminal leave prior to his retirement date, and that if he had not been on terminal leave Article 2.C.2.b.(1)(a) would also apply to his case. This subsection states that the presumption of fitness for duty may be overcome if "the service member, because of disability, was physically unable to perform adequately in his or her assigned duties." There is no indication in the military record whether or not the applicant had terminal leave.

condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered him or her unfit for further duty.

The applicant stated that he followed his doctor's orders and took all necessary steps to delay his retirement. He stated that he requested a delay in his retirement, but Commander, Coast Guard Personnel Command (CGPC) denied it. He stated that a subsequent request for a delay in his retirement was also denied. On September 13, 2002, the applicant was diagnosed as suffering from "1. Congenital cervical stenosis² at C3 through C6.³ 2. Significant central canal stenosis at C3-4 through C6-7, severe at C3-4 and C6-7. 3. Cervical cord changes noted behind C-3." After retirement, the applicant underwent surgery on October 18, 2002.

The applicant also alleged that his condition had been misdiagnosed during his more than 20-year career. He stated that his condition had always been diagnosed as a shoulder problem when it was a problem with his neck. He stated that the September 2002 MRI was his first.

Prior to filing an application with the Board, the applicant sought assistance from his senator and congressman, to no avail.

SUMMARY OF THE RECORD

On July 6, 1980, the applicant began active duty in the Coast Guard. The record indicates he begin experiencing lower back pain as early as 1987. He stated that he noticed the pain after lifting a 75-pound radio and playing basketball. He was diagnosed as suffering from a low back strain.

The applicant first reported pain in his left shoulder on October 3, 1989, after picking up his son's toys. The medical note of the 1989 visit indicated that the applicant had suffered with pain in his left shoulder for the past two months and that the pain had grown to be continuous rather than intermittent. He was diagnosed with a cervical strain and treated with Feldene⁴ and heat.

From December 7, 1990, through April 29, 1999, the applicant's medical record shows that he had at least 15 visits to the clinic complaining of either left shoulder pain or low back pain. A January 1994 x-ray of the left shoulder was reported to be negative. The applicant was often diagnosed as having either a shoulder or lower back strain and was prescribed the drug Feldene.

² Stenosis is an abnormal narrowing of a duct or canal. Dorland's Illustrated Medical Dictionary, 25th edition, p.1698.

³ C refers to the vertebra located in the neck. Dorland's, at 1958.

⁴ Trademark name for a piroxicam preparation, non-steroidal anti-inflammatory agent. Dorland's, at 658, 1392.

On December 1, 2000, the applicant requested to be retired from the Coast Guard, effective October 1, 2002.

On January 11, 2001, CGPC approved the applicant's request to be retired effective October 1, 2002.

On January 29, 2001, the applicant reported to the clinic complaining of left shoulder radiating pain that started approximately six months earlier. He was diagnosed with a left shoulder strain and an x-ray was ordered. A subsequent medical note stated that the x-rays showed degenerative joint disease of the AC joint and sclerotic changes.

On March 20, 2001, the applicant reported to the clinic complaining of lower back pain. He was prescribed Naprosyn.⁵ From April 26, 2001 through April 11, 2002, the applicant had five additional medical appointments complaining of back and neck pain. New x-rays taken as a result of the April 11, 2002 visit showed degenerative joint disease at L3-L4.

On April 22, 2002, the applicant underwent a medical examination to determine whether he was fit to be retired. The doctor performing the examination found that the applicant met the standards for retirement. He noted that the applicant was being treated for DDD (degenerative disc disease) L3-L4⁶ with medication and that the symptoms had been present for the past four years. The doctor further stated that the applicant's condition had not interfered with the performance of his duties and the condition was NCD (not considered disabling).

On July 2, 2002, the applicant reported to the medical clinic complaining about pain in his neck that had started approximately four days earlier. He indicated that the pain had gotten worse and was radiating to both sides of the neck. The physical examination revealed no edema, no erythema, and no pain on palpation. There was some pain on side-to-side movement of the neck and on tilting the head backward. Motrin was prescribed for the applicant and he was found fit for full duty.

On August 18, 2002, the applicant reported to the emergency room of a Naval Medical Center complaining of pain in his left shoulder. The medical note reported that the applicant had a history of left shoulder pain and that he had suffered a flare up after playing football and golf. The applicant's arm was placed in a sling for three days and he was prescribed Vicodin,⁷ Naprosyn, and Flexeril.⁸

On August 19, 2002, the applicant reported to a primary care clinic for "[left] shoulder pain x 2 [weeks]. Pain is constant." He was placed on light duty for three

⁵ Naprosyn is a nonsteroidal anti-inflammatory agent for the treatment of arthritis. Dorland's, at 1177.

⁶ L refers to the vertebra in the lumbar spine located between the thoracic (middle part of spine) and the sacrum. Dorland's, at 1958.

⁷ Vicodin is a combination narcotic analgesic and cough reliever with a non-narcotic analgesic for the relief of moderate to moderately severe pain. See <http://www.healthsquare.com/newrx/vic1480.htm>.

⁸ Flexeril is a muscle relaxant. Dorland's, at 685, 443.

days, instructed to ice the area, and told to make an appointment with orthopedics. The applicant's medications were continued.

On August 23, 2002, the applicant reported to a Naval Medical Center still complaining about left shoulder and arm pain. The medical note stated that the applicant had experienced pain for the past two to three months. It stated that the applicant indicated that the pain had worsened and was radiating down his left arm, which felt numb at times. The applicant was diagnosed as suffering from C6 cervical radiculopathy. An x-ray showed that the applicant had significant degenerative joint disease. He was told to consult another physician for an MRI.

On September 7, 2002 an MRI was performed of the cervical spine (results discussed below).

On September 12, 2002, a medical note indicated that the applicant was fit for duty. However, the applicant was given a referral for a neurosurgical consultation because the MRI showed impingement of C3-C4 on the spinal cord.

On September 13, 2002, the applicant was examined by a neurosurgeon, who summarized the MRI finding as follows:

An MRI of the cervical spine of 7 Sept 02 read by [Dr. M] demonstrates significant congenital cervical stenosis at C3 through C6. Changes within the spinal cord are noted behind the body of C3. At C-3-4 severe central stenosis is noted with significant flattening of the cord at that level. Moderate central canal stenosis is noted behind C5-6 with severe bilateral neural foraminal narrowing. There is a broad-based disk bulge at that level. Moderate central canal stenosis is noted behind C6 and behind C6-7 with significant bilateral neural foraminal narrowing at the C6-7 level.

On physical examination, the applicant was described as alert, oriented, well developed, and well nourished. He noted that the applicant was taking Percocet,⁹ Valium,¹⁰ and Naprosyn. The physical examination revealed the following:

A positive Hoffmann's bilaterally; no clonus. Muscle strength is 5/5 in the upper extremities bilaterally. Sensation is intact to light touch in all dermatomes in the upper extremities. Spine-cervical with full range of motion including forward flexion, lateral bending, rotation and extension. Mechanical with negative lhermitte's; a positive Spurling's to the left on full forward flexion. Gait is intact including toe and heel walk. DTR's are 3 at the right biceps, right brachioradialis and left brachioradialis, 2+ at the triceps bilaterally, 0 at the left biceps, 3 at the patellas bilaterally and 2+ at the Achilles bilaterally.

⁹ Percocet is a Narcotic Analgesic prescribed to relieve moderate to severe pain. See <http://www.drugs.com/percocet.html>.

¹⁰ Valium is a sedative that causes depression of the central nervous system. It is used to treat anxiety, insomnia, seizures, and muscle spasms. See <http://www.chem..ox.ac.uk/mom/valium/default.html>.

The neurosurgeon's assessment of the MRI was that the applicant had congenital cervical stenosis at C3 through C6, significant central canal stenosis at C3-4 through C6-7, severe at C3-4, C5-6 and C6-7, and cervical cord changes noted behind C3. The neurosurgeon recommended "in the strongest terms possible" that the applicant undergo a decompressive cervical laminectomy¹¹ (C3, C4, C5, and C6). He diagnosed the applicant as suffering from "1. Multi-level diffuse congenital cervical stenosis . . . 2. Bilateral foraminal stenosis . . . Myelopathy by exam and possibly by his history. 4. Possible left C-6 or C7 radiculopathy."

The neurosurgeon stated, "I told [the applicant] that I thought it was highly likely that he would wind up in a wheelchair in the not too distant future without any operation of this sort." He further stated that he wanted to proceed with surgery as early as possible in view of the results from the MRI, but the situation was not an emergency.

The neurosurgeon placed the applicant on light duty for a period of 30 days. The applicant's restrictions included no lifting, no physical exercises, no duty involving prolonged standing/walking, and

no physical readiness training, forced marching, shipboard duty, contact sports or other overly strenuous physical activities; No prolonged standing, sitting, walking, stooping or repetitive bending. No lifting greater than 15 lbs. and this individual should not be carrying a pack or participating in field exercises. NO ACTIVITIES PUTTING HEAD & NECK AT RISK FOR INJURY.

This individual should not participate in activities which may reasonably be expected to exacerbate the existing clinical syndrome. To do so, may put the patient at increased risk of injury. Except under the most unusual of circumstances, this individual should be allowed to use his or her own pain level as a guide to activity level for the duration of this chit.

On September 17, 2002, the applicant's command asked CGPC to delay the applicant's retirement for a period of six months to allow the applicant to have surgery and a period of recovery.

On September 19, 2002, CGPC denied the applicant's request for a delay in his October 1, 2002 retirement date. CGPC stated that "even though [the applicant] may have impairments, he is presumed fit for retirement as per Article 2.C.2.b. of COMDTINST M1850.2C. CGPC informed the applicant that he could obtain treatment from the Department of Veterans Affairs (DVA) after his retirement.

On September 23, 2002, the applicant provided CGPC with additional medical information about his condition in an effort to have his retirement delayed.

¹¹ A laminectomy is a type of surgery in which part or all of the vertebral bone is removed to relieve compression of the spinal cord or nerve roots. See <http://www.St.John'sMercy.org/healthinfo/test/ortho/TPO35.asp>.

On September 23, 2002, a handwritten note by CGPC personnel stated that the new information indicated that the applicant had been playing basketball. (The September 13, 2002, medical note under the section entitled Chief Complaint actually states "[the applicant] usually plays basketball and states that he noted problem with shooting baskets with his left hand. He is left handed." The record does not indicate that the applicant played basketball after being placed on light duty for thirty days with restrictions.) CGPC personnel acknowledged that surgery was advised but stated that it was not an emergency and recommended that the applicant be retired as scheduled.

On September 26, 2002, the applicant underwent a CT Myelogram, which confirmed the findings of the MRI. It also showed that the applicant was suffering from lumbar stenosis.

On September 30, 2002, the applicant had a follow-up visit with the neurosurgeon. He opined that the applicant was at risk for a severe spinal cord injury as well as steady function degeneration if he did not have the cervical problem fixed. The doctor stated that he would see what he could do to get a delay in the applicant's scheduled retirement. However, he stated that whether or not he was successful in delaying the applicant's retirement, surgery should proceed in a timely fashion. It was scheduled to take place in October. The applicant's duty status remained on light duty.

On October 1, 2002, the applicant retired from the United States Coast Guard.

On October 9, the applicant's surgery was scheduled for October 18, 2002.

On October 18, 2002, the applicant underwent a C3-6 decompressive cervical laminoplasty.

On November 26, 2002, the applicant had his first post-surgery follow-up visit. The medical note stated that his incision was well healed.

On November 6, 2003, the applicant had a medical appointment with the neurosurgeon. A medical note stated that the applicant "still gets a bit of back and leg discomfort from time to time, but overall is functioning nicely and is golfing and working full time." A MRI showed spondylotic stenosis at L3-4 and L4-5.

A January 8, 2004 medical note stated that on December 12, 2003, the applicant began experiencing a marked increase of pain in his neck at the lower portion of the incision. The physical examination revealed that his neck range of motion was good, as well as his strength bilaterally, proximally, and distally. The applicant was advised to request medications if the pain continued.

Duties of an Electronics Technician

The applicant was a chief electronics technician (E-7). There is no description of his assigned duties in the military record. The Coast Guard's website, <http://www.uscg.mil/jobs/z%5ftest/opportunities/enlisted%2Det.htm>, describes the duties of an electronics technician as follows:

Electronics Technicians (ETs) are the Coast Guard's Electronics Specialists. ETs are responsible for the installation, maintenance, repair, and management of sophisticated electronics equipment, including Command and Control (C2) systems, shipboard weapons guidance and fire control systems, communications receivers and transmitters, data and voice encryption equipment, navigation and search radars, tactical and electronic detection systems, electronic navigation equipment, and computers.

IEWS OF THE COAST GUARD

On October 19, 2004, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He based his recommendation in part on a memorandum on the case prepared by CGPC (see below). In addition, he argued that "absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith," citing *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992), and *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). He argued that the applicant has failed to submit any evidence to show that the Coast Guard committed an error or injustice in conducting his final physical examination or in failing to process him under the PDES for a disability retirement. He further stated that the applicant's medical condition was not an acute condition and did not meet the criteria for canceling his already approved retirement orders in order to keep him on active duty for medical treatment.

Memorandum of CGPC

CGPC stated that the record indicates that the applicant suffered periodically during his enlistment from several conditions, but the conditions were controlled through medication. He further stated the following:

The record does not indicate that this condition impaired the applicant's ability to perform his duties or rendered him unfit for continued service. Following the applicant's assessment on September 30, 2002, the surgery was determined to pose a very low risk of further injury. Additionally, he was found fit for full duty w/light duty.

It is clear from the record that the applicant willingly remained on active duty for a number of years and continued to satisfactorily perform his duties, despite suffering from a variety of conditions. Coast Guard Policy states that service members being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform adequately in their assigned duties. Under current law and service policy, the Coast Guard must presume that members with approved retirement requests are medically fit for retirement unless their medical condition makes them physically unable to perform in their assigned duties or the condition is found to be

an acute, grave illness, or injury . . . The applicant's request to delay his retirement date was considered in light of current law and Coast Guard policy and after determining that his condition did not meet this criteria, his request was disapproved. The Coast Guard Personnel Command's consideration included communication between the senior medical officer and doctors familiar with [the] applicant's condition . . . The applicant's condition did not meet the criteria for evaluation through the PDES.

Attached to the CGPC's comments was an email from CGPC's senior medical officer dated October 7, 2002. He wrote that "I spoke per telephone today with Dr. [N], who has over 17 years of experience with the Navy Disability System, regarding [the applicant's] cervical condition. Dr. [N] said that he does not consider this an acute grave injury."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On December 14, 2004, the BCMR received the applicant's response to the views of the Coast Guard. He continued to charge that he had suffered an injustice that needed to be corrected.

The applicant disagreed with the Coast Guard that he had not proved that his condition had been misdiagnosed during his Coast Guard career. He alleged that his condition had always been diagnosed as a shoulder problem when in fact he suffered from neck problems. He alleged that his condition was not properly diagnosed until August 2002 when an x-ray showed that his pain originated in his neck.

The applicant also disagreed with the Coast Guard's statement that his pain was not acute. The applicant stated that his pain was not only acute but it was chronic. He stated that his medical condition jeopardized his mobility and there was a grave risk that he would suffer paralysis, if he had not undergone surgery. The applicant further stated the following:

[A]t no time have I requested anything other than the Coast Guard do the right thing. That is my position and that is where I stand. I know the Coast Guard had an obligation to ensure that I was fit for retirement and when I was retired[,] I was not fit. My life had ceased; I was in excruciating pain, heavily sedated with medication and underwent major surgery that required a lengthy recovery period, all which were legitimate reasons to hold my retirement in abeyance until my condition was stable. The Coast Guard chose the opportunity to shun its duty to take care of its own; that is "INEXCUSABLE". Now the Board for Correction of Military Records has the opportunity to "Right a Wrong", send a clear message to the Coast Guard that that kind of mistreatment of its members, who has performed its duty and mission outstandingly and diligently for over 22 years, will not be tolerated.

The applicant complained that the Coast Guard denied his first request for a delay in his retirement without any knowledge of his condition, except for a generic code identifying the name of his condition. He stated that subsequently CGPC

reviewed the medical tests and even though they realized the seriousness of his condition, his request for a delay in his retirement was denied for a second time. He pointed out that CGPC did not speak to his doctor, a neurosurgeon. He asked the Board to inquire why CGPC would not consult his doctor about the seriousness of his condition.

SUMMARY OF APPLICABLE LAW

Provisions of the Personnel Manual (COMDTINST M1000.6A)

Under Article 12.C.3. of the Personnel Manual, members who are going to retire must undergo a physical examination. If the examination uncovers an impairment that is listed as disqualifying under the Medical Manual, the member may be processed for a disability retirement under the PDES "only if the provisions of the [PDES Manual], paragraph 2.C. are satisfied."

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

Under Article 3.F.15.o., persistent pain or sensory disturbances "of such a degree as to definitely interfere with the performance of duty" are disqualifying.

Article 4.B.27.a. of the Medical Manual requires completion of a form CG-4057 "as a statement of agreement or disagreement with the assumption of fitness of duty upon separation from the Coast Guard." Article 4.B.27.c. provides that "[m]embers not already in the physical disability evaluation system, who disagree with the assumption of fitness for duty at separation shall indicate on the reverse of form CG-4057. They shall then proceed as indicated in paragraph 3-B-5. of this manual. Members who agree with the assumption shall check the box indicating agreement."

According to Article 3.B.5., which is entitled "Objection to Assumption of Fitness for Duty at Separation,"

[a]ny member undergoing separation from the service who disagrees with the assumption of fitness for duty and claims to have a physical disability as defined in section 2-A-38 of COMDTINST M1850.2 (series), Physical Disability Evaluation System, shall submit written objections, within 10 days of signing the Chronological Record of Service (CG-4057), to Commander [Military Personnel Command]. . . .

. . . Commander [Military Personnel Command] will evaluate each case and, based upon information submitted, take one of the following actions:

- (1) find separation appropriate, in which case the individual will be so notified and the normal separation process completed;
- (2) find separation inappropriate, in which case the entire record will be returned and appropriate action recommended; or
- (3) request additional documentation before making a determination.

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

The PDES Manual governs the separation of members due to physical disability. Article 2.C.2.a. provides that the "sole standard" to be used in "making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service." Article 2.C.2. of the PDES Manual states the following:

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member 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 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 service 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 him or her unfit for further duty.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. On December 1, 2000, the applicant requested to be retired from the Coast Guard effective October 1, 2002. His request was approved on January 11, 2001, and he was scheduled to retire on October 1, 2002. The applicant asserted that he should not have been retired on October 1, 2002, because he was unfit for duty at that time.

3. Disagreement exists between the applicant and the Coast Guard about the applicant's fitness for duty at the time of his retirement. Since the applicant had not been involved in the Physical Disability Evaluation System (PDES) and was scheduled to retire on October 1, 2002, Article 2.C.2.b.(1) of the PDES Manual was the controlling regulation.

4. This provision states that the continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability

creates a presumption of fitness for duty. This provision further states that the 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 that an "(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 him or her unfit for further duty."

5. The Coast Guard is correct that the applicant suffered from back and right and left shoulder pain for most of his career. Apparently, these conditions did not interfere with the performance of his duties at that time. The Coast Guard is also correct in stating that the applicant's April 2002 retirement physical determined that he was fit for duty, while noting that the applicant suffered from degenerative disc disease at L3-L4 that was not considered disabling. However, it appears that the Coast Guard, in stating that the applicant had not rebutted the presumption of his fitness for duty, applied only that portion of Article 2.C.2.b.(1) (b) of the PDES Manual to the applicant's situation that speaks about having an acute, grave illness or injury immediately prior to retirement, rather than applying the entire provision that also speaks of having an "other deterioration of the member's physical condition" immediately prior to retirement that renders a member unfit for further duty. Moreover, the Coast Guard appears to have completely ignored subsection (a).

6. The Board finds that if the entirety of Article 2.C.2.b. (1) (a) and (b) of the PDES Manual had been applied to the applicant's situation by the Coast Guard, no other conclusion could have been reached, except that the applicant had successfully rebutted the presumption of his fitness for duty. For the reasons discussed below, the Board reaches such a conclusion.

7. Approximately four months after the retirement examination, the applicant's condition worsened. In August 2002 approximately six weeks prior to his scheduled retirement date, the applicant suffered either a new injury or aggravated his existing neck/shoulder condition. Article 2.A.4. defines aggravation as "[a] measurable or demonstrated increase in the level of a member's impairment in excess of that due to the natural progression of a disease or injury. "

8. Although the applicant had suffered neck/shoulder/back pain during his more than 20-year career, on August 18, 2002, he incurred a measurable increase in the level of his neck/shoulder pain, leading to surgery. On August 18, 2002, he reported to the emergency room complaining of pain in his left shoulder. The medical note indicated that he had a flare-up of pain while playing football and golf. He was prescribed the drugs Vicodin, Naprosyn, and Flexeril, and his left arm was placed in a sling for three days. Wearing a sling on the left arm for three days had to interfere with his performance of his duties because the applicant is left-handed. The next day, August 19, 2002, the applicant reported to a primary care clinic complaining of left shoulder pain, which he described as radiating and constant. The applicant was placed on light duty for three days. He was continued on Vicodin, Naprosyn, and Flexeril. The applicant's August 2002 treatment for his left shoulder pain was more substantial than that he had received during his previous 20 years of service. The record indicates that prior to August 2002, the applicant was treated with Feldene, heat and ice, and there are

very few indications, if any, in the medical record that he was placed on light duty due to his neck/shoulder pain. Therefore, the Board concludes that placing the applicant's arm in a sling for three days, placing him on light duty for three days, and changing the type and strength of his pain medication indicated a change in the severity of his condition.

9. As a result of the applicant's August medical examinations he was referred for an orthopedic consult that led to an MRI. In September 2002, the applicant underwent an MRI of the cervical spine, after which he was examined by a neurosurgeon. The neurosurgeon's assessment of the MRI was that the applicant had "congenital cervical stenosis at C-3 through C-6," "significant central canal stenosis at C3-4 and C6-7," and "severe central canal stenosis at C3-4, C5-6, and C6-7." The MRI also showed that the applicant had cervical cord changes behind C3. He diagnosed the applicant as suffering from multi-level diffuse congenital cervical stenosis, bilateral foraminal stenosis, myelopathy by exam and possible history, and possible left C6 or C7 radiculopathy.

The neurosurgeon recommended in the strongest terms possible that the applicant undergo surgery (decompressive cervical laminectomy) as soon as possible, although he noted that it was not an "emergency" situation. The neurosurgeon further stated that without the surgery it was highly likely that the applicant would end up in a wheel chair. The neurosurgeon placed the applicant on light duty for the maximum 30-day period, with the following restrictions:

No physical readiness training, forced marching, shipboard duty, contact sports or other overly strenuous physical activities; No prolonged standing, sitting, walking, stooping or repetitive bending. No lifting greater than 15 lbs. and this individual should not be carrying a pack or participating in field exercises. **NO ACTIVITIES PUTTING HEAD & NECK AT RISK FOR INJURY.**

10. The PDES Manual uses the term fit for limited duty (FFLD) rather than fit for light duty (FFLD). Article 2.A.16 defines limited duty as an interim status of a member who is temporarily unable to perform *all* of the duties of the member's office, grade, rank, or rate. (Emphasis added.) It appears to the Board that the light duty restrictions of no lifting more than 15 pounds, no prolonged walking, standing, bending, or sitting, and no activities putting the head and neck at risk interfered with the duties of an electronics technician. The Board concludes that an ET's duties of installing, maintaining, repairing, and managing the Coast Guard's sophisticated electronics equipment would require lifting more than 15 pounds as well as prolonged walking, standing, bending, and sitting. The Board further finds that some of these duties would potentially put the applicant's head and neck at risk, such as carrying equipment heavier than 15 pounds.

11. On September 26, 2002, the applicant underwent a CT myelogram of the lumbar and cervical spine. It confirmed the cervical stenosis shown on the MRI and also found that the applicant had lumbar stenosis. The neurosurgeon noted that the cervical stenosis was far more pressing than the lumbar stenosis. His note indicated that the surgery should proceed in a timely fashion whether or not the Coast Guard

delayed the applicant's retirement. The applicant underwent surgery on October 18, 2002.

12. Despite the medical evidence depicting the applicant's condition from August 18, 2002, forward, the Coast Guard refused to delay the applicant's retirement, stating that the applicant's situation did not meet Article 2.C.2.b.(1) of the PDES Manual because he had worked for more than 20 years with various ailments and that his surgery was not an emergency. It appears that the Coast Guard gave very little weight to the most current medical evidence, which showed that the applicant had suffered an increase in pain as evidenced by the increase in the kind and strength of his medication, the results of the MRI showing significant and severe cervical stenosis, the myelogram showing both significant cervical and lumbar stenosis, the statement of the neurosurgeon that he wanted to proceed with the surgery as early as possible in light of the MRI findings and his opinion that the applicant was at risk for spinal cord injury, and the placement of the applicant on light duty for the maximum 30-day period or until surgery.

13. The question is not whether the surgery was an emergency, whether the applicant had worked previously while in pain, or even whether the applicant's condition was earlier misdiagnosed, but rather whether the applicant had produced sufficient medical evidence to show his physical condition rendered him unfit for further duty. The Board finds that applying the entirety of Article 2.C.2.b.(1) of the PDES Manual, the medical evidence provided by the applicant and available to the Coast Guard prior to the applicant's retirement rebutted the presumption of his fitness for duty. From August 18, 2002, forward, the applicant had a potentially disabling condition. As stated above, he suffered severe shoulder pain resulting from cervical stenosis that required treatment with Percocet, Vicodin, Valium, and Naprosyn and was placed on light duty until he could undergo surgery. In fact, the neurosurgeon stated that the applicant was at risk for a severe spinal cord injury as well as steady function degeneration and could end up in a wheel chair without the surgery.

14. Article 12.C.3.b. of the Personnel Manual requires that an initial medical board (IMB) be convened if a physical examination pursuant to retirement discovers an impairment which is identified as unfitting in the Medical Manual and if the provision of Article 2.C. of the PDES Manual is satisfied. According to the Medical Manual, persistent pain that interferes with the performance of duty is unfitting for duty.

15. Whether the applicant was permanently unfit, we do not answer here because the Coast Guard failed to convene an IMB after medical evidence raised significant doubt as to the applicant's fitness for duty/retirement and the applicant did not request it.

16. There is some indication from the applicant that he was on terminal leave prior to his retirement date. Leave is the authorized absence of an individual from a place of duty. See Article 7.A.2. of the Personnel Manual. Even if the applicant were on terminal leave, it would not have terminated his active duty status. His active duty status did not terminate until his retirement on October 1, 2002, and his leave could have been canceled at any point until October 1, 2002. The act of playing football in August 2002 was certainly not inconsistent with his then active duty status. The military

encourages such physical activity. CGPC's suggestion in its September 23, 2002, refusal to delay the applicant's retirement that the applicant had been playing basketball is misleading. In providing a history of the applicant's complaint, the September 13, 2002 medical report, which was provided to CGPC, stated that the applicant plays basketball and noticed the problem when he shoots the ball. The medical report did not state that the applicant played basketball on or after August 18, 2002. There is no indication in the record, except for a suggestion by CGPC, that the applicant played any sport from August 18, 2002 until well after his surgery. Therefore, the Board finds that the applicant's actions were not inconsistent with his active duty status or his doctor's direction.

17. In light of the above, the Board finds that the evidence of record rebutted the applicant's fitness for duty at the time of his retirement and that the Coast Guard committed an error by not retaining the applicant on active duty and convening an IMB to determine whether he was unfit for further duty. In cases in which the Coast Guard has failed to convene an IMB, the Board has directed that one be convened to determine an applicant's fitness for duty and that the PDES process be continued, if warranted. In this case, the applicant has not requested processing through the PDES, but rather that his record be corrected to show that he was retired on May 1, 2003. The relief requested by the applicant, an additional seven months of active duty, appears to be a reasonable amount of time under the circumstances for the applicant to have undergone surgery and to have had a period of recovery, if he had not been improperly retired. The seven months requested is consistent with that requested by the command in its attempt to delay the applicant's scheduled retirement and with Article 12.B.11.f. of the Personnel Manual. This provision states that an active duty member whose enlistment expires while the member suffers from a disease or injury incident to service and who needs medical care and hospitalization may be retained, with the member's consent, until he or she meets the requirements for separation or a medical board ascertains that the disease or injury is of a character that prevents recovery to such an extent. The provision further states that a member in this category ordinarily will remain up to six months after the enlistment expiration date, but the Commandant may authorize a further retention. The Board notes that the applicant's request for seven months of additional active duty rather than six months is because he is counting the six months permitted under this provision from the date of his surgery, which was October 18, 2002 and the fact that retirements occur on the first of the month--hence his request for May 1, 2003. Therefore, the seven months of additional active duty requested by the applicant appears to be a fair and equitable remedy for his improper retirement, particularly in light of Article 12.B.11.f. of the Personnel Manual; in light of the fact that November 6, 2003, is the first indication in the record that the applicant was functioning normally; and in light of the fact that had he been retained, as he should have been, he probably would have been processed through the PDES, which likely would have taken longer than seven months. Members who have served for twenty or more years should be treated as well as those who are completing their first four-year tour of active duty. Accordingly, the Board will direct the relief requested by the applicant.

18. The Board also notes that there is no form CG-4057 in the applicant's record to show whether he agreed or disagreed with the assessment of the physician who conducted his retirement physical examination that he was fit for a voluntary retirement. Under Article 4.B.27.a. of the Medical Manual, if a member objects to a physician's

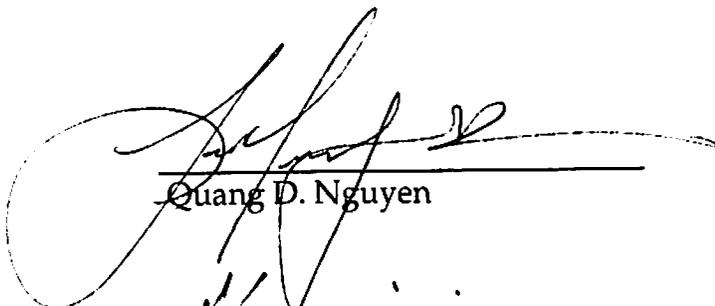
finding of fitness on this form, his case is reviewed by CGPC. The failure to prepare the CG-4057 was error.

19. Accordingly, the applicant is entitled to relief.

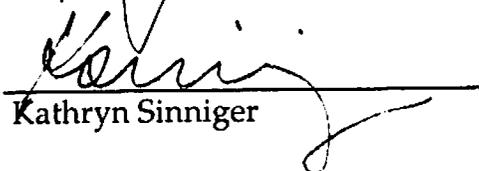
[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of _____ (Ret.), for correction of his military record is granted. His record shall be corrected to show that he was retired on May 1, 2003, rather than October 1, 2002. The applicant shall receive back pay and allowances subject to appropriate off-sets.



Quang D. Nguyen



Kathryn Sinniger

See Dissenting Opinion

Molly McConville Weber

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-141

DISSENTING OPINION

I respectfully dissent. In my view, the applicant did not carry his burden of establishing, 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 him or her unfit for further duty." Article 2.C.2.b.(1)(a), (b) of COMDTINST M1850.2C (Physical Disability Evaluation System (PDES) Manual). Under Article 2.C.2.b.(1), the applicant was presumed fit for duty, and it was his burden to rebut this presumption.

On September 13, 2002, the applicant's neurosurgeon placed him on light duty for a period of 30 days with restrictions. On September 30, 2002, the day before the applicant's retirement, his status was fit for full duty with light duty under the same restrictions. The applicant did not present evidence, however, regarding his duties as a Chief Electronics Technician (E-7), or explain why his physical condition at the time rendered him unable to perform adequately in his assigned duties or unfit for further duty. Furthermore, even if the duties of an Electronics Technician as noted by the Board are considered, there appears to be insufficient evidence that these duties are similar to the applicant's actual duties (including whether there are differences in the duties of a Chief Electronics Technician and an Electronics Technician), or that they involved any of the activities in which the applicant was restricted (such as lifting or prolonged standing, sitting, walking, stooping, or repetitive bending). Therefore, on the basis of this record, I would deny the applicant's request for relief.


Molly McConville Weber