

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-070

FINAL DECISION

ANDREWS, Attorney-Advisor:

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. It was docketed on March 31, 1998, upon the BCMR's receipt of the applicant's request.

This final decision, dated November 4, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant, a xxxxxxxxx who was retired from the Coast Guard on October 1, 199x, asked the Board either (a) to recall him to active duty so that his medical conditions may be evaluated and treated or (b) to correct his record to show that he was retired by reason of physical disability with a 40 percent disability rating on October 1, 199x. If he is recalled to active duty, the applicant asked to receive back pay and allowances, including retirement credit, for the intervening time.

APPLICANT'S ALLEGATIONS

In his original application and in a later submission to the Board on December 7, 1998, the applicant alleged that during a physical examination on June 20, 199x, prior to his retirement, the examining physician, Dr. X, concluded that he was not physically qualified for retirement and that his carpal tunnel syndrome, tinnitus, and hearing loss should be further evaluated. However, on July 7, 199x, before his conditions were properly evaluated, a non-medical chief petty officer certified him as meeting the physical standards for retirement. The

applicant alleged that the chief petty officer did not have authority to do this and that only the Maintenance and Logistics Command (MLC) can override an examining physician's determination of unfitness. Furthermore, the applicant alleged, the chief petty officer did not forward the report of his physical exam (form SF-88), as required, to MLC, which makes the final determination regarding whether members are physically qualified for retirement. In addition, the applicant alleged, he was not but should have been informed at this time that he had a right to request processing for a physical disability retirement under Article 12.C.3.b.(2) of the Personnel Manual. He alleged that he did not hear of this right until September 16, 199x, a few days before his retirement.

The applicant alleged that on July 28, 199x, an orthopedic surgeon, Dr. XX, examined him and advised him that he should not receive another steroid injection for his carpal tunnel syndrome. Instead, Dr. XX ordered further tests to determine if surgery should be performed. Because the tests could not be completed before September 1, 199x, the date the applicant was originally scheduled to be retired, his command asked PPC Topeka to continue his pay past his retirement date. However, his command forgot to inform the Coast Guard Personnel Command (CGPC) of his situation. The applicant alleged that he continued on active duty in September and received his pay, but then CGPC learned he had not been retired and approved his command's request to continue him on active duty only until October 1, 199x. Furthermore, the applicant alleged, CGPC caused his further medical appointments to be cancelled.

Prior to the applicant's retirement on October 1st, however, another senior medical officer, Dr. Y, reviewed his record and concluded that further evaluations of the applicant's carpal tunnel syndrome, tinnitus, and hearing loss were needed and that the applicant should be evaluated by an initial medical board (IMB). On September 30, 199x, Dr. Y requested that the applicant's retirement be delayed until December 1, 199x, but a lieutenant at CGPC disapproved the request the same day. The applicant alleged that the lieutenant's decision was improper because the lieutenant is not a medical officer and did not have authority to override Dr. Y's decision. The applicant alleged that only MLC had authority to override Dr. Y's decision, but MLC was never involved.

The applicant further alleged that because of the confusion concerning his status and the chief petty officer's failure to forward his SF-88 to MLC, CGPC promoted another member to the rank of xxxx on September 1, 199x, to replace him and thereby exceeded the authorized number of xxxxs in the Coast Guard. He alleged that this mistake created pressure to retire him without waiting for his medical conditions to be evaluated and reviewed by an IMB. He alleged that when he called the lieutenant who refused to delay his retirement, he was told that CGPC "had already promoted another xxxx and there was nothing he could

do about it.” The lieutenant also told the applicant that reviewing the report of his physical examination was not his job because he did not work for MLC.

The applicant alleged that after Dr. Y’s request was improperly denied, he exercised his rights under Article 12.C.3.B.(2) of the Personnel Manual, by requesting in writing that his medical problems be corrected or that he be processed for a physical disability retirement. However, the request was not processed prior to his retirement on October 1st.

The applicant alleged that racism may have caused him to be retired prematurely. He stated that he knows of a white xxxx who was properly processed by a medical board and awarded a 20 percent disability rating, whereas another Hispanic xxxx’s request for a medical board was denied. He stated that that Hispanic xxxx was later awarded a 20 percent disability rating by the Department of Veterans Affairs (DVA).

The applicant also stated that the DVA has assigned him a 40 percent disability rating. He alleged that, had he been properly evaluated before his retirement, he would have received this same rating from the Coast Guard.

The applicant stated that his wrongful retirement has created a financial hardship. He alleged that he could not find private employment and that the Dual Compensation Act would require him to give up more than \$10,000 of his retirement pay were he to take a job with the federal government. He alleged that, without the tax benefits of receiving disability retirement, he cannot take a federal job lower than GS-10 on the pay scale.

SUMMARY OF THE RECORD

The applicant submitted the following medical records in support of his application:

2/13/9x The applicant sought treatment for numbness in the fingers of his right hand. His physician diagnosed carpal tunnel syndrome, gave him a steroid shot and a splint, and prescribed no typing for three weeks.

6/20/9x The report of the applicant’s physical examination prior to his retirement (SF-88) indicates that Dr. XX found that the applicant had high frequency hearing loss and referred him for an audiogram. Dr. XX also found that the applicant had numbness and tingling in the third, fourth, and fifth digits of his right hand. The doctor marked him as “not qualified” for retirement in block 77, but left blocks 74, 75, and 78

on the report blank, where the summary of diagnoses and defects, recommendations for further treatment and evaluations, and numbered list of disqualifying defects are supposed to appear.

- 7/7/9x A health services technician in the administrative office at the applicant's command reviewed the SF-88 and marked on it that the applicant did "meet the physical standards for retirement as prescribed in COMDTINST M6000.1" (the Medical Manual) and had no disqualifying defects. The report of the examination was not forwarded to MLC. Nor was the report completed at that time by having the applicant sign a form CG-4057, which informs a member of his right to request an IMB.
- 7/28/9x An orthopedic surgeon, examined the applicant and found that he had chronic carpal tunnel syndrome in his right hand. The applicant reported that he had numbness and tingling in his right hand and experienced mild relief when using a splint. His symptoms had also been relieved for two months after a steroid injection in February 199x. The doctor ordered further testing.
- 9/17/9x The applicant's command (xxxxxxx) wrote a letter to the lieutenant at CGPC detailing the administrative mistakes that had been made with regard to the applicant's retirement and medical processing. He indicated that he did not receive confirmation of the applicant's failure to meet the physical standards for retirement until September 2, 199x, and that no IMB had been convened for the applicant, as required by Article 12.C.3. of the Personnel Manual.
- 9/17/9x The applicant signed a form CG-4057, indicating that he agreed "with the findings of the examining physician" on his SF-88. He attached to the form a statement indicating that he was an accountant and had worked with typewriters and computers for 26 years. He stated that he had suffered from numbness, tingling, and pain in his right hand and forearm since before 197x, when he first sought treatment and was diagnosed with carpal tunnel syndrome. The applicant also indicated that he had suffered hearing loss as "a direct result of repeated exposure to loud noises, high frequency turbine noises" when he served on a cutter as a "check sight observer" stationed at the front of a gun mount. He stated that the noise was so loud during rapid firing of the 5 inch gun that even double hearing protection provided very little relief. He stated that as a result of this hearing loss, sound entering his left ear sounds like breaking glass. Therefore, he cannot use his left ear for telephone conversations, which makes office work

difficult because he is right handed. In addition, tinnitus in his left ear causes a constant high-pitched squeal, which makes it very difficult to sleep. The applicant asked that his retirement be delayed until after his medical appointments on September 27, 199x, and October 7, 199x, or that he be processed for a physical disability retirement.

9/30/9x The applicant's command asked CGPC to delay the applicant's retirement date until December 1, 199x, because Dr. Y had decided to initiate an IMB for the applicant because his fitness for retirement could not be determined without further consultations and evaluations.

On the same day, a lieutenant at CGPC informed the applicant's command that the request was disapproved because his "condition does not meet the criteria set forth" in Article 2.C.2.b. of COMDTINST M1850.2C, the Physical Disability Evaluation System (PDES) Manual.

The applicant's discharge form (DD 214) indicates that he was honorably retired on September 30, 199x, after serving more than 26 years on active duty, pursuant to Article 12.C.6. of the Personnel Manual. His separation code is RBD, which means "voluntary retirement authorized but not required by law when a member has attained sufficient service to retire."

10/17/9x The applicant's command sent his medical records, separation papers, and DD 214 to CGPC.

6/4/9x The DVA awarded the applicant a combined disability rating of 40 percent, based on a 10 percent disability for each of the following four conditions: carpal tunnel syndrome in right arm; carpal tunnel syndrome in left arm; high blood pressure and controlled hypertension; and tinnitus. The DVA did not find the applicant's hearing loss to be disabling.

9/12/9x The applicant wrote a letter to an admiral in the Coast Guard stating that a xxxx serving as a supply officer for a unit near the applicant's home was planning to leave the Coast Guard in the summer of 199x. The applicant suggested that he could serve in that billet for three years while being medically evaluated. The applicant stated that he had served in the unit before and was very familiar with the job and that it would save the Coast Guard the cost of moving another xxxx to the unit. Because the admiral had retired, the applicant's letter was forwarded to the BCMR.

VIEWS OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On June 18, 1999, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief.

The Chief Counsel stated that his advisory opinion is based on the medical records provided by the applicant because the applicant's medical records have not been found.

Citing Article 1.A. of the PDES Manual, the Chief Counsel stated that "[t]he law that provides for physical disability retirement or separation and associated benefits (Chapter 61, Title 10, United States Code) is designed to compensate members whose military service is terminated due to a service connected disability, and to prevent the arbitrary separation of individuals who incur disabling injuries." Furthermore, he argued, under 10 U.S.C. § 1201 and Article 2.C.2.a. of the PDES Manual, "[t]he sole basis for a physical disability determination in the Coast Guard is unfitness to perform duty." Article 2.C.2.b. of the PDES Manual, he stated, expressly "prohibit[s] use of this authority to bestow compensation benefits on those who are retiring or separating and have continued on unlimited active duty while tolerating impairments that have not actually precluded Coast Guard service."

Under Article 2.C.2.b.1., the Chief Counsel argued, "[c]ontinued 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. ... If the evidence establishes that service members adequately performed the duties of their office, grade, rate or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments."

The Chief Counsel stated that the applicant "has not presented any evidence that he was unable to fulfill his duties while on active duty prior to and coincident with his voluntary retirement." The applicant's records indicate he performed his duties "at a highly satisfactory level" until his retirement. The Chief Counsel alleged that "there is not a single instance of a documented sick leave or hospitalization day in Applicant's OER file." Therefore, he argued, the applicant has failed to prove he was physically unable to perform adequately his assigned duties.

The Chief Counsel alleged that "[t]he fact that the physician conducting his retirement physical identified the potential presence of one or more physical

defects is immaterial to Applicant's request for relief. The record shows that the Applicant performed his duties in a highly satisfactory manner during his career up to and including the time of his retirement from the service. ... Therefore, there was no basis to evaluate him under PDES for a physical disability retirement, nor was there any legal basis to medically retire the Applicant."

Regarding the applicant's allegations that non-medical personnel improperly made the determination that he was fit for retirement, the Chief Counsel stated that, contrary to the applicant's statement, the final determination of fitness rests with CGPC, not with the examining physician or MLC. The Chief Counsel stated that CGPC has many qualified medical personnel on staff and that "in the instant case, the decision made by CGPC was not a decision requiring specific medical expertise. Under the provisions of the PDES Manual, CGPC need only determine if the Applicant had adequately performed the duties of his office until such time when he was referred for physical evaluation."

Regarding the applicant's allegation that he should have appeared before an IMB and been processed for a physical disability retirement, the Chief Counsel stated that the Coast Guard had no duty to do so under Article 12.C.3.b.1. of the Personnel Manual because "the Applicant's physical condition did not render him unfit for continued service." The Chief Counsel argued that the applicant's carpal tunnel syndrome, tinnitus, and hearing loss are "chronic medical conditions, which did not prevent the Applicant from adequately fulfilling his duties in his assigned rank or position. Therefore, the Applicant's physical condition did not require the convening of an [IMB]."

The Chief Counsel stated that, under *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), disability ratings awarded by the DVA "are not determinative of the issues involved in military disability retirement cases. ... The DVA determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combinations of injuries. The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his rate and specialty ... because of a physical disability." Furthermore, the Chief Counsel argued, the DVA's determination in June 199x that the applicant was 40 percent disabled does not prove he was 40 percent disabled on the date of his retirement, October 1, 199x. The Chief Counsel also alleged that the applicant did not prove that his conditions were service connected.

The Chief Counsel concluded that the applicant has failed to prove that his retirement was in error or unjust or that he was eligible for a medical retirement under Chapter 61 of Title 10 U.S.C. He further stated that this case "involves a significant issue of Coast Guard policy. Action by the Board other

than denial and the waiver of the ten-month rule would therefore be subject to final action by the Secretary pursuant to 33 C.F.R. § 52.64(b)."

Memorandum of the Commander of the Coast Guard Personnel Command

The Chief Counsel attached to his advisory opinion a copy of a memorandum on the case from CGPC dated May 25, 1999.

CGPC stated that on June 20, 199x, the physician conducting the applicant's physical examination prior to retirement marked him as not qualified for retirement. On September 30, 199x, the applicant's command asked CGPC to extend his retirement date due to "consultations and evaluations needed to be completed for the purpose of an Initial Medical Board (IMB). These evaluations included looking at his carpal tunnel syndrome, hearing loss and tinnitus."

CGPC stated that it denied this request because "the applicant's condition did not meet the criteria set forth by COMDTINST M1850.2C, ART 2.C.2.B." CGPC stated that the applicant was not referred for disability evaluation because he was ably performing his duty at the time and that members who serve "unencumbered until retirement, but with pain such as that experienced by [the applicant], [are] normally referred to the Department of Veterans Affairs (DVA) subsequent to retirement, to address the member's employability."

CGPC further stated that "[a]lthough the physician who conducted the retirement physical indicated that the member was not physically qualified for retirement, the final decision for such matters rests with the [CGPC], not the physician. ... Failure to complete consultations and examinations set up prior to the member's separation from service do[es] not support a delay in retirement. The DVA was established to handle cases such as this."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On June 9, 1999, the Chairman sent copies of the Chief Counsel's advisory opinion and CGPC's memorandum to the applicant and invited him to respond within 15 days. The applicant requested an extension and responded on August 4, 1999.

The applicant argued that he fully qualified for a disability retirement under 10 U.S.C. § 1201 because (a) his disability is "based upon accepted medical principles and is of permanent nature and stable; (b) his disability is not the result of misconduct; and (c) he has served more than 20 years on active duty and his disability rating is more than 30 percent according to the schedule used

by the DVA.¹ He stated that the Chief Counsel's claim that the DVA rating is irrelevant is wrong because 10 U.S.C. § 1201 mandates use of the DVA rating schedule.

The applicant also argued that it was wrong for the Coast Guard to retire him without reviewing his medical records. He alleged that he offered to fax or mail his records to the Coast Guard overnight in September 199x, two weeks before he was retired, but was told the decision had already been made. He alleged that CGPC's action was analogous to a judge deciding a case without ever looking at the evidence.

The applicant alleged that the non-medical member who overrode his doctor's determination that he was unfit for retirement and who marked on his SF-88 that he met the physical standards for retirement was not authorized to do so according to the Medical Manual. He stated that the non-medical member was supposed to forward the SF-88 to MLC for evaluation, which would then have recommended disposition of his case to CGPC. He alleged that if his records had been properly forwarded to MLC and CGPC, the determination by two Coast Guard doctors that he was unfit for retirement would not have been overruled.

The applicant said that, when he signed form CG-4057, he was agreeing with his physician's finding that he was not physically qualified for retirement; he was not agreeing with the non-medical member's erroneous mark. Because of the non-medical member's mark, the applicant attached a signed statement to the form, detailing his medical conditions and asking to be extended so that his conditions could be properly evaluated.

The applicant said that the lack of sick leave papers in his record does not prove that he was fit for duty because "the Coast Guard is very poor in issuing sick leave papers." For instance, he alleged, when he was injected with steroids for his carpal tunnel syndrome, he went on sick leave for three weeks upon his doctor's recommendation, but this absence was not documented in his personnel record even though it appears in his medical record. Furthermore, the applicant named three other members who worked in office jobs despite their disabilities and were later processed for medical retirements. One, he stated, the chief of a dining facility, was found unfit for duty by the physician conducting his examination for retirement due to a foot problem. That member was given a medical board and 20 percent disability rating even though he continued to perform his

¹ The applicant also indicated that the 40 percent disability rating he received from the DVA does not include a rating for his knee injury because, although he injured his knee while on active duty, he treated it himself with analgesics and never reported it to Coast Guard medical staff.

duty as chief of the dining facility until his retirement.² He stated that the other two named members were similarly assigned disability ratings despite working up to the day they retired. He alleged that the only reason he was not similarly processed and assigned a disability rating was because his SF-88 was not properly forwarded to MLC for review.

The applicant further stated that he did not fail to provide his medical records to the Coast Guard. He stated that, in fact, his medical records were mailed to CGPC on October 17, 199x. He explained that the medical records he provided with his application to the BCMR are true copies that were made for him by the medical staff after he retired.

The applicant included with his response an affidavit signed by a Coast Guard colleague, who stated that the applicant had performed his duty superbly and rarely complained despite “constant pain in his hand.” The affiant stated that about 90 percent of the applicant’s work was on the computer and that “[t]he price he paid was wearing a brace thru pain the entire time.”

APPLICABLE STATUTES AND REGULATIONS

Disability Retirement Statute

Under 10 U.S.C. § 1201(a), “[u]pon a determination by the Secretary concerned that a member [entitled to basic pay] is unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay ... the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).” [Emphasis added.]

Under 10 U.S.C. § 1201(b), the “Required Determinations of Disability” are as follows:

- (1) based upon accepted medical principles, the disability is of a permanent nature and stable;

² The applicant submitted copies of this member’s medical records. The records indicate that the member was examined and given an IMB after his physician found that he was not fit for duty due to plantar fasciitis and limited him to duty not requiring a significant amount of standing, walking, or running. The physician wrote on the SF-88 that the member was referred for a medical board. The IMB found the member not fit for duty and referred him to a Central Physical Evaluation Board (CPEB), which similarly limited his activity and set his disability rating at 20 percent. As a result the member received permanent physical disability retirement orders.

- (2) the disability is not the result of the member's intentional misconduct ...; and
- (3) either
 - (A) the member has at least 20 years of service computed under section 1208 of this title; or
 - (B) 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; and either
 - (i) the member has at least eight years of [active duty] service ...;
 - (ii) the disability is the proximate result of performing active duty;
 - (iii) the disability was incurred in the line of duty in time of war or national emergency; or
 - (iv) the disability was incurred in the line of duty after September 14, 1978.

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

Article 12.A.10. requires officers to undergo a physical examination prior to retirement. Article 12.A.10.e. of the Personnel Manual provides the following:

- (1) If an officer is found qualified for separation/release and agrees with the finding, the officer shall be processed for separation/release as scheduled.
- (2) If an officer is found qualified for separation/release and disagrees with the finding, . . . [t]he officer shall then be processed in accordance with Chapter 3 of the Medical Manual
- (3) If there is a question about the unfitness of an officer to perform duties and the officer agrees with the condition, . . . [t]he officer shall then be processed in accordance with Chapter 3 of the Physical Disability Evaluation System Manual. . . .

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

The Medical Manual governs the disposition of members with physical disabilities. According to Article 3.B.3.a.(1), during the medical examination a member must undergo prior to separation, "the examiner shall consult the appropriate standards of this chapter to determine if any of the defects noted are disqualifying for the purpose of the physical examination." Article 3.F. lists medical conditions that "are normally disqualifying" for administrative retirement from the Service. Persons with "listed conditions or defects (and any other not listed) considered disqualifying shall be referred to an Initial Medical Board" Among those conditions listed in Article 3.F. are malfunction of the acous-

tic nerve, which requires further evaluation, and severe pain or a limited range of motion in the wrist.

According to Article 3.B.3.a.(2), “[w]hen the physical examination of active duty personnel indicates defects which are remediable or which may become potentially disabling unless a specific medical program is followed, the examiner shall clearly state any recommendations ... [and] tentative arrangements for care shall be scheduled, subject to the approval of the examinee’s command.”

According to Article 3.B.3.a.(3), after the physical examination, “the examinee shall be informed that the examiner is not an approving authority for the purpose of the examination and that the findings must be approved by proper authorities.”

According to Article 3.B.3.b.(1)(a), the member’s “command has a major responsibility in ensuring ... that physical examinations are scheduled sufficiently far in advance to permit the review of the findings and correction of medical defects prior to the effective date of the action for which the examination is required.”

According to Article 3.B.3.b.(1)(c), “[w]hen the medical examiner recommends further tests or evaluation, ... the command will ensure that these tests or examinations are completed When a necessary test, evaluation, or program can be completed within a 60 day period, the unit may hold the SF-88 to permit the forwarding of results. In all cases the command shall endorse the SF-88 to indicate what action has been taken and forward the report to the reviewing authority if the 60 day period cannot be met or has elapsed.”

According to Article 3.B.3.c., MLC “acts as the reviewing authority for physical examinations performed on personnel assigned to their areas.” MLC must review each SF-88 carefully “to determine whether the findings reported indicate the examinee does or does not meet the appropriate physical standards. If further medical evaluation is required to determine that the examinee does meet the standards, or to resolve doubtful findings, the reviewing authority shall direct the commanding officer ... to obtain the evaluation and shall provide such assistance as may be required.”

According to Article 3.B.3.d., when a member meets the appropriate physical standards, MLC is supposed to forward the physical examination back to the member’s command for inclusion in his medical records. However, when a member “is not physically qualified for the purpose of the examination, ... the reviewing authority will arrange for the examinee to be evaluated by a medical board”

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.

According to Article 3.B.6., which is entitled “Separation Not Appropriate by Reason of Physical Disability,”

[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.

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 4.B.6.c. provides instructions for completing the SF-88 Report of Medical Examination. Article 4.B.6.c.(44) instructs the examining physician in block 74 of the SF-88 to “[l]ist ALL defects in order to protect the Government in the event of future disability compensation claims. All defects listed which are

not considered disqualifying shall be so indicated by the abbreviation NCD (Not Considered Disqualifying). When an individual has a disease or other physical condition that, although not disqualifying, requires medical or dental treatment clearly state the nature of the condition and the need for treatment." In block 75, the physician is supposed to indicate any recommendations and "[s]pecify the particular type of further medical or dental specialist examination indicated." If the member is not fit for the purpose of the examination, the physician is supposed to list the disqualifying defects by number in block 78.

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."

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

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

b. The law that provides for disability retirement or separation (Chapter 61, Title 10, U.S. Code) is designed to compensate members whose military service is terminated due to a physical disability that has rendered the member 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 service member, because of disability, was physically unable to perform adequately the duties of office, grade, rank or rating; 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) Service members who are 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 the duties of their office, grade, rank or rating.

c. If the evidence establishes that service members adequately performed the duties of their office, grade, rank or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments.

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i. The existence of a physical defect or condition that is ratable under the standard schedule of rating disabilities in use by the [Department of Veterans Affairs] 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 the member unfit for military 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. The applicant alleged that he was not fit for duty at the time of his retirement and that he was wrongly denied proper medical examinations and evaluation by a medical board because of administrative error. He further alleged that the Coast Guard unjustly ordered his retirement without permitting further medical evaluation because it had mistakenly promoted a member to the rank of xxxx to fill his place. He alleged that the Coast Guard may have acted out of racial prejudice because he is Hispanic. The applicant asked that he be returned to active duty so that his medical conditions can be evaluated and treated or that his record be corrected to show that he was retired due to a medical disability.

3. The Coast Guard made several administrative errors in processing the applicant for retirement. The examining physician failed to complete important blocks on the applicant's SF-88. The applicant's command failed to ensure that his conditions were further evaluated at the recommendation of the examining physician, as required by Article 3.B.3.b.(1)(c) of the Medical Manual. His SF-88 was not forwarded to MLC for review, as required by Article 3.B.3.c. When his command realized that his conditions could not be further evaluated

prior to his scheduled date of retirement, September 1, 199x, his pay was continued, but his command failed to notify CGPC and thereby caused another member to be promoted to xxxx before the applicant was retired.

4. In light of these errors, the Board must determine whether the outcome – non-medical retirement – might have been different had any of the errors not been made.

5. According to Article 3.F. of the Medical Manual, if a member is found to have a “disqualifying” physical impairment during a medical examination, a medical board “shall” be held to determine the member’s disposition. However, Article 3.B.6. states that the Coast Guard shall convene an IMB for members with disqualifying impairments who are being separated for reasons other than a disability only if the requirements of Article 2.C.2.b. of the PDES Manual are met. That article requires members to prove by a preponderance of the evidence that they are not fit for duty because of a disability. It also states that members such as the applicant, who are being processed for separation for reasons other than physical disability, shall not be referred to a medical board “unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating.” Therefore, the Board finds that, to prove that the Coast Guard erred by not convening a medical board to evaluate him for disability discharge, the applicant must prove that, at the time of his release from active duty, he had a disqualifying physical impairment which rendered him unfit for duty or his physical condition reasonably prompted doubt as to his fitness for duty.

6. The applicant’s record indicates that he volunteered for retirement and that his separation was not initiated due to a physical disability. Although his examining physician indicated he was not fit for retirement and ordered further evaluations, the applicant satisfactorily performed active duty service until the day of his retirement, which creates a presumption of fitness for duty under Article 2.C.2.b.(1) of the PDES Manual. Evidence that the applicant may have taken sick leave due to his conditions in the past does not prove that he could not perform the duties of his rank and office at the time of his retirement. Furthermore, the Board notes that after his retirement, the applicant requested that he be reenlisted to serve a three-year term as the supply officer at a nearby unit. In light of these facts, the Board is convinced that even if no administrative errors had been made in processing the applicant for retirement, he would not have been awarded a physical disability retirement, under Articles 3.B.6. and 3.F.1.c. of the Medical Manual and Article 2.C.2.b. of the PDES Manual. The applicant has not proved by a preponderance of the evidence that he was unfit for duty at the time of his retirement or that his condition “reasonably prompted doubt as to his fitness for duty.”

7. Having a ratable disability under the DVA system does not entitle a member of the Coast Guard to a physical disability retirement or to a medical board. Title 10, U.S.C. § 1201(a) provides the minimum statutory requirements a member of the Coast Guard must meet before the Secretary may award him or her a physical disability retirement. The Coast Guard's regulations create additional requirements that must be met before members are entitled to a physical disability retirement. Pursuant to Article 2.C.2.i. of the PDES Manual, the fact that the applicant's conditions are ratable disabilities under the DVA rating systems does not prove that he would have been found unfit for duty by a medical board. As the Chief Counsel pointed out, the Court of Federal Claims has held that "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The [DVA] determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. . . . The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. . . . Accordingly, [DVA] ratings are not determinative of issues involved in military disability retirement cases." Lord v. United States, 2 Cl. Ct. 749, 754 (1983).

8. The applicant alleged that he was denied a medical board and physical disability retirement because he is Hispanic. Apart from his own allegations and anecdotes, the applicant presented no evidence of such racial prejudice.

9. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard erred or committed injustice by not convening a medical board to evaluate his conditions or by not awarding him a physical disability discharge.

10. Regardless of the pain the applicant suffered while he served on active duty, he has not established by the preponderance of the evidence that his conditions at the time of his discharge rendered him unfit to perform his duty. A veteran's remedy for loss of income due to a service-connected condition that becomes significantly disabling after his discharge lies with the DVA.

11. Therefore, the applicant's request for correction should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of retired XXXXX, USCG, is hereby denied.

Harold C. Davis, M.D.

John A. Kern

Betsy L. Wolf