

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-071

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 April 12, 1999, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated January 31, 2000, 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 xxxxxxxxxx who retired from the Coast Guard on January 31, 1998, asked the Board to correct his record to show that he was retired by reason of physical disability.

APPLICANT'S ALLEGATIONS

The applicant alleged that, while on active duty, he suffered from several debilitating medical conditions because of which he frequently consulted doctors and lost time from duty. Therefore, he argued, he should have been found unfit for duty and retired by reason of physical disability.

The applicant alleged that he applied for medical benefits from the Department of Veterans Affairs (DVA) on the first day of his retirement from the Coast Guard, February 1, 199x. He alleged that the DVA completed action on his application on February 12, 199x, and awarded him a 30 percent combined disability rating: 10 percent for hydronephrosis, 10 percent for a prostate gland con-

dition, and 10 percent for hypertension. He alleged that the DVA also found service connection for the following medical conditions, although he was not found to be disabled by them: sinusitis, nasal swelling, benign growth in genitourinary area, diverticulitis, varicose veins, foot condition, and hearing loss.

SUMMARY OF THE RECORD

The applicant received his commission as an ensign in the Coast Guard in 196x. He graduated from xxxxx while serving on active duty and rose to the rank of xxx on August 1, 199x. In his most recent annual officer evaluation reports (OERs), the applicant has received marks of 6 (on a scale of 1 to 7, with 7 being the highest possible mark) in the category "Health and Well-Being" and the highest mark, "Recommended for Flag selection at next Board," on the comparison scale. The last annual OER in his record covers the period June 1, 199x to May 31, 199x. In that OER, he received an average mark of 6.9 for all evaluation categories. In addition, his reporting officer's comments indicate that the applicant had won a personal fitness award.

There is evidence in the applicant's military medical record that he suffered at various times during his career from all of the conditions for which the DVA granted service connection. During the year prior to his retirement, the applicant's medical records reflect the following conditions, evaluations, and treatments:

On January 30, 199x, one year prior to his retirement, the applicant consulted Dr. x at the Integrated Support Command (ISC) Medical Clinic in xxxx. The applicant told Dr. x that he was doing well and had no complaints but needed his prescriptions for hypertension and high cholesterol medications refilled. His diastolic blood pressure was 86 mm Hg.¹

On April 24, 199x, the applicant sought treatment for his allergies and was prescribed an inhaler and drops by Dr. x. The results of a prostate exam were normal, and a blood test showed his long-standing high cholesterol level.

On June 24, 199x, the applicant underwent a dental examination.

On August 6, 199x, the applicant consulted Dr. x, who noted that he had no complaints but needed his prescription for his high cholesterol medication

¹ Blood pressure is normally shown as two numbers, such as 110/80. The first number is the person's systolic pressure; the second is the diastolic pressure, which is measured in millimeters (mm) of mercury (Hg). Diastolic pressure consistently above 90 mm Hg is "normally disqualifying" for retention on active duty or administrative retirement. Medical Manual, Chapter 3.F.8.c.(2)(a).

refilled. His diastolic blood pressure was 84 mm Hg.

On August 6, 199x, the applicant underwent a periodontal exam. He was advised to floss.

On October 8, 199x, the applicant underwent an annual physical examination at the ISC clinic. On the Report of Medical History, which he filled out beforehand, he indicated that he suffered from chronic high cholesterol, chronic high blood pressure, chronic enlarged prostate, chronic food and seasonal plant allergies, a bunion on his right foot, flat feet, kidney stones, and high-frequency hearing loss. His examining physician, Dr. x, noted that he had passed three kidney stones, the last one five years earlier and that his high blood pressure was controlled by medication. He also noted the applicant's high-frequency hearing loss, which was confirmed by an audiogram, allergies, and foot problems. He marked all of the conditions "NCNS," which means that no symptoms were noticeable at that time. The results of the applicant's urinalysis, rectal examination, and stress test were normal, and blood tests revealed his continuing high HDL cholesterol level. His diastolic blood pressure was 74 mm Hg.

On the Report of Medical Examination (form SF-88), Dr. x indicated that the applicant had a mass in his left testicle, high blood pressure, high cholesterol, and high-frequency hearing loss, but that all of these conditions were "NCNS." Dr. x referred the applicant to a urologist and ordered a sigmoidoscopy and a sonogram of the testicle but found him qualified for retention on active duty. He did not list any "disqualifying defects" on the report. Dr. x also refilled his prescription for a hypertension medication. The dental report was on the Report of Medical Examination was based on his June 24, 199x, dental examination.

On October 10, 199x, the applicant underwent a sonogram of his testicles. Dr. y reported that the applicant told him he had had a mass in his left testicle for approximately 20 years which had enlarged during the past year and became "painful approximately every two months." The sonogram revealed "multiple cystic structures" in his left testicle and a "fluid collection measuring 2.5 × 4.1 × 3.1 cm" compressing the left testicle.

On October 20, 199x, the ISC Clinic Administrator reviewed the Report of Medical Examination and concurred in Dr. x's finding that the applicant met the standards for retention on active duty.

On October 21, 199x, the applicant was examined by an optometrist.

On October 28, 199x, Dr. x reviewed the results of the sonogram of the applicant's testicles. The applicant underwent surgery to have the mass

removed in December 199x.

On November 3, 199x, the applicant called the ISC clinic asking to have his intravenous pyelography (to check for kidney stones) and sigmoidoscopy (to check his colon) scheduled for the same day. He was told this was impossible, but he was "very persuasive" and "not willing to change." Therefore, he was offered the option of having a barium enema, in lieu of the sigmoidoscopy, although it involves greater risk. He chose to have the barium enema so that the tests could be done the same day.

On November 7, 199x, Dr. z reported the results of the applicant's pyelogram and barium enema. Dr. z reported that the pyelogram showed "[n]o evidence of opaque urinary tract calculi," and that the enema revealed "[d]iverticulitis of the distal colon."

On November 13, 199x, the Commander of the Personnel Command sent a letter to the applicant approving his request to retire. The letter indicates that the applicant had submitted a letter on November 12, 199x, requesting permission to retire. No copy of the applicant's letter appears in his personal data files.

On December 3, 1997, Dr. x reviewed the applicant's x-rays for the barium enema and pyelogram. He noted that the tests showed small calculi in his left kidney and diverticulitis but that these conditions were asymptomatic. The applicant complained of pain while walking caused by his bunion, so Dr. x referred him to a podiatrist.

On December 31, 199x, the applicant was treated by a podiatrist for a painful bunion on his right foot. He was diagnosed with hallux valgus² of the right foot and prescribed a night splint, toe spacer, and custom orthotics and told to return for a follow up in two months.

On January 20, 199x, the applicant underwent a periodontol exam and was advised to floss.

On January 28, 199x, the ISC personnel office emailed the clinic a "friendly reminder" that the applicant was retiring on January 31, 199x, and that his medical record had to be forwarded to Coast Guard headquarters. The same day, a chief health services technician at the clinic placed a form CG-4057 in the applicant's file which is supposed to be signed by a member prior to retirement. The

² This is a condition in which the big toe angles toward the other toes and may cross over or under them.

form permits the member to indicate whether he agrees with the physician's findings on the Report of Medical Examination and to submit a statement in rebuttal. It also informs the member that he is not entitled to disability benefits because he has been found fit for duty. The form is not signed by the applicant. Instead, it indicates at the bottom that "SNM has been released from active duty without an approved physical exam. SNM also failed to check out with medical prior to being released."

On January 29, 199x, the applicant had cavities on his ## 18 and 20 teeth filled with amalgam.

On January 31, 199x, the applicant was honorably retired from the Coast Guard with a narrative reason of separation of "sufficient service for retirement." He had completed 28 years, 7 months, and 27 days of active duty.

On February 26, 199x, the applicant went for a follow-up visit for his testicle surgery to the ISC clinic. The doctor reported that he was doing well and had no complaints concerning the surgery, but he needed a refill for his blood pressure medicine. The applicant's diastolic pressure was 80 mm Hg.

On August 26, 199x, the DVA awarded the applicant a 20-percent combined disability rating due to his prostate gland condition (10 percent) and hypertension (10 percent). Other conditions, including kidney stones, were determined to be service-connected but not disabling. On February 12, 199x, the DVA amended its findings by granting service connection for hydronephrosis and increasing his combined disability rating to 30 percent because of it.

VIEWS OF THE COAST GUARD

On November 24, 1999, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief.

The Chief Counsel stated that the record shows that the applicant received a proper pre-retirement medical examination on October 20, 199x, and was found fit for retention and therefore fit for voluntary retirement by reason of his 28 years on active duty.

Citing Article 1.A. of the Physical Disability Evaluation (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, the Chief

Counsel 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 Articles 2.C.2.b.1. and 2.C.2.c., 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 proved by a preponderance of the 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 “in a highly satisfactory manner” until his retirement. The applicant, the Chief Counsel argued, did not provide sufficient evidence to rebut the presumption that he was fit for duty at the time of his retirement.

The Chief Counsel alleged that because the applicant was found fit for retirement during his pre-retirement physical, there was no basis to evaluate him for a physical disability retirement. Furthermore, he alleged, the applicant has not provided substantial evidence to rebut the presumption that the Coast Guard doctors who found him fit for retention (retirement) carried out their duties correctly, lawfully, and in good faith.

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 February 199x that the applicant was 10 percent disabled due to hydronephrosis does not prove that he was disabled by that condition on the date of his retirement, January 31, 199x.

In conclusion, the Chief Counsel argued, the applicant has not proved that

his voluntary retirement was in error or unjust, and the Board should deny relief consistent with its decision in BCMR Docket No. 1998-070.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On November 30, 1999, the Chairman sent copies of the Chief Counsel's advisory opinion to the applicant and invited him to respond within 15 days. The applicant responded on December 9, 1999.

The applicant alleged that he never had a retirement physical. He stated that the physical examination he underwent on October 8, 199x, was a "regularly scheduled, routine physical examination that was never even finally approved." The applicant alleged that a regular physical is very different "in fact if not in law" from a retirement physical. The former, he alleged, tends to minimize problems and present an optimistic view of the member's health. The latter, he alleged, "tends to document every existing and potential diagnosis in great detail, so as to protect the member in seeking service connection determinations from the VA." Furthermore, he alleged, the Chief Counsel's statement that he never "checked out with medical" before his retirement was news to him because he was "at medical on at least a weekly basis in December 199x and January 199x." He further stated that, if the report on his examination was not available for review, it was not due to anything he had done or failed to do.

The applicant alleged that his final officer evaluation report (OER), for the period June 199x through January 199x, would have documented his diminished performance due to health problems, but his reporting officer never submitted the OER to Coast Guard headquarters.

Regarding his unfitness for duty, the applicant alleged that he has "passed a continuous series of kidney stones" since 198x. He stated that x-rays taken in the fall of 199x showed kidney stones in his right kidney and ureter. He alleged that he had previously been hospitalized because of kidney stones and that his records show he was "not available for worldwide, unrestricted service because of the probability of an attack with no advance warning."

The applicant also stated that in December 199x he had a benign testicular mass removed that had restricted his movement for months. He alleged that the incision was still swollen and unhealed on the day of his retirement and that the condition has reappeared and will require further surgery.

Furthermore, the applicant alleged, he suffered from foot pain for years. The podiatrist he was referred to by the Coast Guard recommended that he undergo surgery to correct the underlying problem.

Regarding his DVA disability rating, the applicant alleged that because the DVA and the Coast Guard use the same rating schedule, the Coast Guard cannot reasonably say there is nothing wrong with him when the DVA has found "a dozen service-connected, ratable and compensable conditions."

The applicant alleged that he was not fit for duty at the time he retired but he continued to work because being chief of staff of the xxxx District "is not the type of job where you take a day off because you don't feel well, your foot hurts or you are having trouble walking because of a swollen scrotum." Taking time off, he alleged, would have "wreak[ed] havoc" with his staff. Therefore, he alleged, his continuing performance of duty says more about his "strong sense of duty" than about his fitness. Finally, the applicant alleged, a xxxxx who was serving as xxxxxx of the Coast Guard received a disability retirement "despite never having missed a day of duty for medical reasons." Therefore, he argued, continued performance of duty cannot disqualify a member for a disability retirement.

COAST GUARD'S RESPONSE TO THE APPLICANT'S STATEMENTS

On December 10, 1999, the BCMR sent the Chief Counsel a copy of the applicant's response to his advisory opinion. On December 22, 1999, the Chief Counsel responded to the applicant's further allegations.

The Chief Counsel stated that the applicant's allegation that a regular physical is different "in fact if not in law" from a retirement physical is "contrary to the facts and the applicable law." Citing Article 12.A.10.c. of the Personnel Manual, he argued that a regular, quadrennial physical is "sufficient for purposes of evaluating the Applicant's fitness for retirement under any law or service regulation." Furthermore, the Chief Counsel stated, Article 3.A.7.c.(1) provides that retirement physicals "shall follow the guidelines set forth for quadrennial physicals." Therefore, he argued, "the Board should not give any legal moment to the allegation regarding Applicant's October 199x physical exam."

Furthermore, the Chief Counsel argued, the three conditions (kidney stones, testicular mass, and right foot deformity) that the applicant alleges should have disqualified him for retention/retirement were evaluated and documented during the October 199x physical examination. Therefore, the Chief Counsel alleged, the applicant has no basis for claiming that a "retirement physical" would have found disqualifying conditions unaddressed by his quadrennial examination.

APPLICANT'S SUPPLEMENTAL RESPONSE

On January 14, 2000, the applicant responded to the Chief Counsel's additional arguments. He stated that when he underwent his regular, quadrennial physical examination on October 8, 199x, he was expecting to continue on active duty until his 30-year mandatory retirement date, June 30, 199x. He did not seek retirement until late November 199x. Therefore, he alleged, he did not know that the physical examination would serve as his retirement physical.

Moreover, the applicant alleged, the factual difference between a quadrennial examination and one conducted for the express purpose of retirement "arises on the part of the examiner, not the examinee." He alleged that physicians complete hundreds of quadrennial examinations and may not refer an examinee for further evaluation because it would cause delay and because they do not believe any harm is done if something is overlooked because the member can always return later. However, he alleged, during a real retirement physical, "the highest level of scrutiny is afforded" because "it is truly a last chance to fully document a member's physical condition."

Finally, the applicant alleged that his quadrennial exam was never "approved," and therefore could not legally qualify as his retirement physical.

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)."

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 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.a. of the Personnel Manual provides that a “physical examination is not required for officers prior to separation (e.g., retirement, resignation, or discharge) or release to inactive duty if they have had a physical examination within 1 year of their separation/release date.”

Article 12.A.10.e. of the Personnel Manual provides the following regarding the “various outcomes of a physical examination for separation/release”:

- (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, Commandant (G-PO-1) and (G-KDE) shall be notified immediately. The officer shall then be processed in accordance with Chapter 3 of the Medical Manual

Article 12.C.3.a. of the Personnel Manual states the following:

If a disability render[ing] a member unfit to perform the duties of his/her grade or rate is found at the examination or develops prior to retirement from the Service, the member may be eligible for a physical disability retirement. However, all physical impairments do not necessarily render a member unfit for service. Many members do in fact serve effectively notwithstanding impairments that may be present.

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

The Medical Manual governs the disposition of members with physical disabilities. According to Chapter 3.A.7.c.(1) of the Medical Manual, the physical examination that a member must undergo within 12 months of separation from active duty “shall follow the guidelines set forth for quadrennial physicals.” However, under Chapter 3.A.7.h., upon attaining the age of 50 years (as the

applicant did in September 1997), such physical examinations are required annually, rather than just quadrennially.

According to Chapter 3.A.9.a., a physical conducted for one purpose, such as retention, can be used for another purpose, such as retirement, if

- (1) the examinee was physically qualified for the purpose of the previous examination and all the required tests and recommendations have been completed;
- (2) the SF-88 used for substitution bears an endorsement from the Reviewing Authority of Commandant (G-KOM), as appropriate, indicating that the examinee was qualified for the purpose of the previous examination;
- (3) there has been no significant change in the examinee's medical status since the previous examination;
- (4) a review of the report of the previous examination indicates that the examinee meets the physical standards of the present requirement;
- (5) the date of the previous examination is within the validity period of the present requirement; and
- (6) all additional tests and procedures to meet the requirements of the current physical examination have been completed.

According to Chapter 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." Chapter 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" Chapter 3.F.6.b. specifies that if a member suffers hearing loss, "[r]etention will be determined on the basis of ability to perform duties of grade or rating." Chapter 3.F.8.c. specifies that to be considered "normally disqualifying," hypertension must result in "[d]iastolic pressure consistently more than 90 mm Hg following an adequate period of therapy" or in "unequivocal impairment of renal function." Chapter 3.F.11.a.(6)(a) stated that having a kidney calculi may be disqualifying if they are bilateral (appearing in both kidneys) or if they are currently causing symptoms and are unresponsive to treatment. Chapter 3.F.11.a.(6) states that hydronephrosis may be disqualifying if it is "[m]ore than mild, or bilateral, or causing continuous or frequent symptoms." Chapter 3.F.12.b.(2)(a) states that hallux valgus may be disqualifying "[w]hen moderately

severe, with exostosis [causing a benign bony growth] or rigidity and pronounced symptoms; or severe arthritic changes." The applicant's "prostate gland condition" and diverticulitis are not listed as potentially disqualifying conditions in Chapter 3.F. of the Medical Manual.

According to Chapter 3.B.3.a.(3), after the physical examination, "the medical examiner will advise the examinee concerning the findings of the physical examination."

According to Chapter 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 Chapter 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.

Chapter 3.F.1.c. of the Medical Manual states the following:

Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) which interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Members considered temporarily or permanently unfit for duty shall be referred to an Initial Medical Board for appropriate

disposition.

Chapter 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.

Chapter 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.

• • •

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 should have been retired by reason of physical disability, rather than by reason of sufficient years of service, due to his several medical conditions, which the DVA determined justified a combined disability rating of 30 percent. Furthermore, he alleged, he never received a proper physical examination for the purpose of retirement, which he alleged is usually conducted more thoroughly than an annual physical in order to document all service-connected medical conditions for which the member may later receive DVA benefits. The applicant also alleged that unfitness for duty is not really a criterion for a disability retirement because he knows of a xxxxxx who received a disability retirement even though he continued to perform his duty up to the day of his retirement.

3. The applicant's argument that he should not be required to prove that he was unfit for duty because he believes that a xxxxxx who received a disability retirement was fit for and performing full duty at the time of his retirement is unpersuasive. A mere allegation that in one instance the regulations governing disability retirement were not followed, even if proven, is insufficient reason for the Board to ignore the regulations.

4. The applicant's October 199x physical examination met the requirements for a proper retirement physical under Chapters 3.A.7. and 3.A.9. of the Medical Manual. The applicant's medical records show that his medical conditions were noted and properly evaluated during the evaluation and follow-up tests. The applicant has failed to prove that at the time of the examination he was suffering from any medical condition that was not properly and thoroughly evaluated and factored into the doctor's determination that he was fit for retention. The applicant's argument that this physical examination was not as thorough as one conducted for the purpose of retirement is disproved by the doctor's notes and the battery of tests he received. Furthermore, the doctor's determination of fitness on the applicant's SF-88 was properly approved by the reviewing authorities.

5. Determinations of physical disability of Coast Guard members are

made by medical boards convened pursuant to the PDES Manual. According to Chapter 3.F.2. 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, Chapter 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 or retiring him by reason of physical disability, the applicant must prove that, at the time of his release from active duty, (a) he had a disqualifying physical impairment which rendered him unfit for duty or (b) his physical condition reasonably prompted doubt as to his fitness for duty.

6. Disqualifying Physical Impairment. Chapter 3.F. of the Medical Manual lists those conditions that are normally considered “disqualifying physical impairments.” None of the applicant’s service-related medical conditions could be considered disqualifying for retention on active duty (or administrative retirement) under the terms of Chapter 3.F. His potentially serious medical conditions were duly noted and evaluated during his October 199x physical examination and were determined not to be symptomatic at that time. In fact, the record indicates that none of his potentially serious medical problems were symptomatic during the year immediately prior to his retirement. All of his conditions were rated 0 percent disabling by the DVA, except for three, which received 10-percent ratings. Regarding these three, the applicant’s medical records indicate the following: (1) During the year prior to his retirement, the applicant’s diastolic blood pressure consistently measured under 90 mm Hg, and his kidney function was not unequivocally impaired; (2) His hydronephrosis was asymptomatic (tests revealed calculi only in his left kidney, and the last time he had painfully passed a kidney stone was several years earlier); and (3) The benign mass in his testicle had been removed, and he made no complaints regarding it during his follow-up visit. Furthermore, his hearing loss was high-frequency only and did not hinder his performance of duty. Likewise, the hallux valgus and bunion on his right foot were noted and treated but did not require limitations on his performance of duty. Therefore, the Board finds that the applicant’s conditions at the time of his discharge did not constitute “disqualifying physical impairments” within the meaning of Chapters 3.F.17 and 3.F.19.c.

7. Fitness for Duty. Article 2-C-2.b.(1) of the PDES Manual states that “[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.” The applicant continued to perform active duty service until the date of his discharge. The applicant may overcome the presumption of fitness, however, if he establishes by a preponderance of the evidence that he was unable to perform his duties adequately. The applicant alleged that at the time of his discharge, he had been missing work because of his conditions. He alleged that an OER covering his final seven months on active duty would have reflected this. However, the record indicates that the applicant adequately performed his duties during his final seven months on active duty. The last OER in his record shows superb performance and the applicant’s receipt of a fitness award. Other than his successful testicle surgery and visit to the podiatrist, his records reflect no absences due to symptomatic medical conditions during his final year on active duty. All medical consultations in 199x other than his visit to the podiatrist were for the purpose of refilling prescriptions and completing his annual physical. The applicant argued that he qualified for a disability retirement because his medical conditions prevented him from being assigned worldwide. However, availability for worldwide assignment is not a requirement of fitness for duty. In light of these facts, the Board finds that the applicant has not proven by the preponderance of the evidence that he was unable to perform his duty adequately or that he was unfit for duty at the time of his retirement.

8. Reasonable Doubt of Fitness for Duty. The applicant voluntarily sought to resign his commission for nonmedical reasons. Article 2-C-2.b.(2) of the PDES Manual states that members who are being administratively separated shall be referred to a medical board if “their physical condition reasonably prompts doubt that they are fit to perform the duties of their office, grade, rank or rating.” At the time of his medical examination in October 199x, all of the applicant’s potentially serious medical conditions were asymptomatic. Moreover, the record shows that he did not complain to his physician about suffering from any symptoms of these conditions during his last year on active duty. The mass in his testicle and the condition of his right foot were evaluated and treated prior to his retirement. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that his physical condition should have prompted doubt regarding his fitness for duty. Thus, he was not entitled to a medical board under the terms of Article 2-C-2.b.(2) of the PDES Manual.

9. Under 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 should have been found unfit for duty. 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).

10. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice by not convening a medical board to evaluate his conditions or by not retiring him by reason of physical disability.

11. Upon the completion of a physical examination, the Coast Guard is supposed to have the member sign a CG-4057 form, on which he indicates agreement or disagreement with the physician's findings. Medical Manual, Chapters 3.B.5. and 4.B.27.c. The CG-4057 also informs the member of his right to submit a statement rebutting those findings and to have that statement and the report of the examination reviewed. The record indicates that the applicant did not sign a CG-4057 form for his October 8, 199x, physical examination. This error deprived him of his right to submit a statement objecting to the finding and to have it reviewed and perhaps reversed. However, in light of the facts set out above, the Board finds that the Coast Guard's failure to notify the applicant of his right to rebut the finding of fitness via the CG-4057 form was harmless error. A further review would not have resulted in the applicant's appearance before a medical board for evaluation or retirement by reason of physical disability; the reviewer would only have confirmed the finding of fitness.

12. Accordingly, 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 XXXXXX,
USCG, is hereby denied.

Edmund T. Sommer, Jr.

Mark A. Tomicich

Betsy L. Wolf