

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-036

FINAL DECISION

ANDREWS, Deputy Chair:

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 completed on February 5, 2001, upon receipt of the applicant's military and medical records.

This final decision, dated February 28, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant is a former seaman apprentice (SA; pay grade E-2) who enlisted in the Coast Guard on . She asked the Board to correct her records to show that she was discharged on July 16, 1999, as a result of a medical board finding that she was not fit for duty because of a physical disability, scoliosis. Currently, her discharge form, DD 214, shows that she was discharged for "miscellaneous/general reasons."

APPLICANT'S ALLEGATIONS

The applicant alleged that she began experiencing pain radiating down her legs while still in boot camp. She was examined and found to have scoliosis and a pinched nerve in her back, but the medical staff told her that the pain was not severe and would probably go away.

The applicant alleged that after she graduated from boot camp and was sent to her first station, she continued to experience back pain and was examined by a Dr. S, who determined that her condition was severe enough to warrant processing under the Physical Disability Evaluation System (PDES). Dr. S also referred her to a specialist, Dr.

K. The specialist found that she had a rib prominence and paralumbar prominence on the left side and that her curve was 36 degrees.

The applicant alleged that her command started the medical board process and made plans to ship her to _____ to consult with a spinal surgeon. However, three days before she was to leave, she was told that she would be administratively separated due to a pre-existing medical condition. She alleged that this decision was unjust because she “was well out of the time frame for that type of discharge.” Moreover, she argued, if her condition was pre-existing, it would have been noticed during her pre-enlistment medical evaluation since it is “noticeable with the naked eye.”

The applicant also argued that she should have been discharged when the problem was discovered in boot camp. She alleged that she sought treatment for her pain 27 times during nine months in the service and was repeatedly confined to quarters or placed on light duty. Because she was not discharged promptly, she alleged, she has been permanently impaired. Before starting boot camp, she had no pain, but now she “will never be pain free.”

The applicant further alleged that before her discharge, she suffered from abdominal pain and was found to have an ovarian cyst. A doctor arranged for her to undergo laproscopy on _____, to see if there was scarring and to check her intestines. Therefore, her pending discharge date of _____, was cancelled. However, on _____, she discovered that her laproscopy had been cancelled and that her discharge as of _____, would go forward. She alleged that she should not have been discharged until after her laproscopy and after she had consulted the spinal surgeon.

The applicant alleged that because her command failed to have her evaluated by a medical board under the PDES, she has received no compensation from the Coast Guard for her debilitating scoliosis, and she was discharged before she could be treated for her ovarian problems.

In support of her allegation, the applicant submitted copies of some of her medical and military records. In addition, she submitted several letters from family members, who stated that prior to joining the Coast Guard she was a very healthy, athletic woman who had never complained about her back. They stated that they were shocked by her severe back pain and disability, which they first noticed when they attended her graduation from boot camp.

SUMMARY OF THE RECORD

On _____, the applicant underwent a physical examination prior to her enlistment. No problem with her spine was noticed.

On _____, the applicant enlisted in the Coast Guard and began boot camp. She was treated for a chlamydial infection. On November 6, 1998, she sought treatment for back pain. On _____, a lumbar spine x-ray revealed “scoliosis to the left” and

“pseudoarthritis of the left transverse process of L5-S1.” The applicant continued to visit the clinic often for her back pain.

The applicant graduated from boot camp and was stationed at a remote site. She continued to suffer from back pain. On _____, Dr. S noted in her record that she should be administratively discharged because of her spinal deviation and scoliosis.

On _____, the applicant was evaluated by Dr. K, an orthopedic surgeon. He reported that she told him she began to experience pain in her legs during boot camp. After about a month, the pain “resolved and has become isolated in her back.” Dr. K reported to Dr. S that the applicant had scoliosis, a rib prominence, and paralumbar prominence on the left side. He reported that her “thoracolumbar curve measured from T5 to L1 was 36 degrees.” He stated that when she was standing, she had a “notable kyphotic deformity,” which she can overcome to stand straighter, though less comfortably. He diagnosed her with “King type III scoliosis.”

Dr. K also stated that her condition “likely represents a case of adolescent scoliosis that was missed during her youth and now she has exacerbated symptoms after participating more in the higher physical demands of boot camp.” He determined that it must be a pre-existing condition because, “[a]lthough [he did] not know what her curve was about five months ago, it is unlikely that it has progressed significantly from normal to this measured 36 degrees thoracolumbar curvature over that short of a time frame.” He indicated that he could not predict whether her scoliosis would progress because of her age and degree of curvature. He stated that curves of less than 30 degrees rarely progress (get worse), and curves of 50 or more degrees usually progress. He recommended that she be followed by a specialist who is “more astute at spine intervention.” He stated that her condition did not warrant surgery.

On _____, Dr. S reported that her scoliosis and pain were severe enough to warrant processing by a medical board. She was referred for physical therapy. On _____, she was evaluated by a psychologist and found to be depressed because of her back pain and stress.

On _____, Dr. S recommended that the applicant be administratively discharged in accordance with Article 12.B. of the Personnel Manual because of her pre-existing disqualifying medical condition. He stated that her scoliosis was “obviously congenital” and that Coast Guard standards prohibit enlistment or retention of anyone with spinal curvature greater than 22 degrees.

Also on _____, the applicant sought treatment for pelvic pain, which she reported had occurred periodically during the previous three years. An ultrasound revealed a small cyst in one of her ovaries. She was also treated for a

On _____, the applicant's commanding officer recommended to CGPC that the applicant be administratively discharged. He stated that because her condition was pre-existing and disqualifying for enlistment, she was not entitled to an Initial Medical Board (IMB). There is no evidence in the record indicating that the applicant was informed of this recommendation or given the opportunity to submit a statement in her own behalf.

On _____, the applicant was again evaluated for recurring sharp pains in her lower abdomen. She told the doctor that the pains had been occurring occasionally over the past few years. The doctor reported that her pain was characteristic of scarring secondary to _____ and scheduled "a diagnostic laparoscopy to look for sources of pain."

On _____, CGPC ordered the applicant's command to discharge her administratively no later than _____, in accordance with Article 12.B.12. of the Personnel Manual.

On _____, the applicant signed acknowledgments of having been counseled about Article 12.B.53. of the Personnel Manual, which concerns members' rights upon separation, and Article 12.B.3., which concerns the type of discharge (honorable, general, etc.), the reason for discharge (disability, convenience of the government, expiration of enlistment, etc.), and the reenlistment code.

On _____, the applicant's command informed CGPC that she would not be discharged on _____ because she was undergoing medical treatment unrelated to the condition for which she was being discharged.

On _____, her command further informed CGPC about the nature of the medical treatment (the diagnostic laparoscopy) and that she would have a follow-up appointment on _____.

On _____, CGPC informed the applicant's command that it had reviewed her situation, that the surgery was not authorized, and that she was fit for separation. CGPC advised her command to refer her to the Department of Veterans' Affairs (DVA) for treatment of her medical conditions.

On _____, the applicant underwent a physical examination prior to being discharged. The clinical evaluation showed that abdomen, pelvis, and spine had "abnormal" conditions; her abdomen was tender upon deep palpation. Her gynecological examination suggested pelvic scarring; and her spine showed a "moderately prominent kyphotic deformity." The doctor reported that her "moderate" scoliosis was symptomatic and considered disqualifying for dis-

charge, but her intermittent pelvic pain was not. Nevertheless, the doctor and a senior chief health services technician found her to be qualified for discharge.

On _____, the applicant was discharged under Article 12.B.12. of the Personnel Manual for “miscellaneous/general reasons” with an RE-4 reenlistment code (not eligible to reenlist). Prior to her discharge, she was given a copy of the report of the physical evaluation, which found her fit for discharge. She objected to it and stated that her abdominal pain was severe.

On July 27, 2000, the DVA informed the applicant that she had been found 10 percent disabled by service-connected scoliosis because her scoliosis, which pre-existed her enlistment, had been “permanently worsened as a result of service.” Her pelvic pain was found not to be service connected because she suffered from chronic pelvic pain prior to her enlistment and the condition did not worsen during her service.

On January 22, 2001, the applicant’s curvature was found to have progressed to 42 degrees.

VIEWS OF THE COAST GUARD

On September 25, 2001, the Chief Counsel of the Coast Guard advised the BCMR that “granting of an initial medical board (IMB) in this case is appropriate only if Applicant continues to request an IMB after being [made] fully aware of the likely outcome and negative impact of such board.”

The Chief Counsel admitted that regulations require members who are rendered unfit for duty to be evaluated by an IMB even if the medical condition that renders them unfit existed prior to their enlistment. He stated that an administrative separation might have been ordered because the applicant wanted to be separated expeditiously. Nevertheless, it is unclear why the applicant was administratively separated when it is clear that her scoliosis caused her discharge. Therefore, the Board could order the Coast Guard to convene an IMB for the applicant. However, he argued that such relief was not necessarily in the applicant’s interest because

in the event that the Coast Guard finds service aggravation and assigns Applicant a disability rating, the disability rating may likely be no higher than 10%, and the severance pay she receives for the disability will offset her [DVA] benefits. Most importantly, however, Applicant should be aware that the Coast Guard may likely find no service aggravation and such documentation, although not likely, may cause a discontinuance of her [DVA] benefits if the [DVA] becomes aware of the Coast Guard action and reevaluates her case. In short, Applicant has nothing to gain and while the risk may be small, Applicant may lose the disability benefits she presently receives if the relief she requests is granted.

The Chief Counsel stated that, under Chapter 2.A.4. of the PDES Manual, to convince an IMB that her condition was aggravated by her service the applicant “must

show a ‘measurable or demonstrated increase in the level of her impairment in excess of that due to the natural progress of a disease or injury.’ “Simply demonstrating that the member started experiencing pain after joining the Coast Guard does not satisfy the requirement to demonstrate that the preexisting scoliosis condition was aggravated by Coast Guard service.” He alleged that, even though her pain began and increased while she was in the service, there is no evidence that her condition was actually aggravated while she was in the service. He pointed out that Dr. S found that it was unlikely that her activity in the Coast Guard had caused her curvature to increase.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On September 26, 2001, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited her to respond within 15 days. She requested an extension and responded on October 25, 2000.

The applicant alleged that the Chief Counsel's advisory opinion was "mostly untrue, inaccurate, and manipulative." She alleged that she had never sought an administrative discharge in lieu of a medical board. She alleged that she was never told she would be administratively, instead of medically, separated until three days before her discharge. She was told that an administrative discharge was allowed because of the "time frame," but she later discovered this was not true.

The applicant also alleged that there is evidence in her record that her scoliosis was aggravated while she was serving on active duty. She pointed out that her spine was found to be normal prior to her enlistment on . She further pointed out that, although her scoliosis was discovered in November , she was allowed to remain in the service. Therefore, presumably at that time it was not severe enough to mandate her discharge or to prohibit her assignment to a remote site. Moreover, although on , her curvature measured 36 degrees, by January 22, 2001, it was 42 degrees.

The applicant included with her response a copy of her most recent x-ray.

Because the applicant's written response to the advisory opinion did not indicate that she understood the Chief Counsel's statement about the risk PDES processing might pose and did not expressly state whether she wanted such processing, the Deputy Chair of the BCMR telephoned the applicant on two occasions to discuss the matter with her. On both occasions, the applicant stated that she understood the Chief Counsel's statements but, nevertheless, wanted to have her case evaluated by a medical board. She stated that her primary concern was that the Coast Guard improve its screening of recruits so that others would not have to undergo the pain and stress she had. She alleged that if the Coast Guard had properly screened her in , she would not have been enlisted, would not have gone through the rigors of boot camp, and would not have suffered so much back pain. The applicant also stated that she is currently employed and is not interested in being recalled to active duty.

APPLICABLE STATUTES AND REGULATIONS

Disability Statutes

Title 10 U.S.C. § 1201(b) provides that members who have served on active duty for more than 30 continuous days but less than eight years may be medically retired if the disability is at least 30 percent under the DVA's rating schedule and is "the proximate result of performing active duty" or "incurred in the line of duty." Under 10 U.S.C. § 1203(b), such members whose disabilities are less than 30 percent may receive severance

pay. However, the DVA offsets any severance payments by the Coast Guard when it awards disability benefits.

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

Under Article 12.B.5.b., a member with less than eight years of active service who is being discharged and is ineligible to reenlist must be notified and allowed to submit a written appeal to the Personnel Command.

Under Article 12.B.6., before being discharged, every member must be given a complete physical examination in accordance with the Coast Guard Medical Manual, COMDTINST M6000.1 (series). The member must be given a copy of the examination report (form SF-88) and sign another form indicating whether she agrees or disagrees with the findings. Article 12.B.6.b. If the member disagrees with the findings, the report and the member's statement objecting to the findings are forwarded to CGPC for review, and the member may be retained on active duty until the review is complete. Article 12.B.6.c.

Under Article 12.B.6.d.3., if the physical examination indicates that the member has a permanent, disqualifying physical impairment, a medical board must be convened and the member must be retained in service until processing under the PDES is complete.

Under Article 12.B.12.a.5.c., a member may be administratively discharged for the convenience of the government if the member is "undergoing recruit training in an original enlistment [and] has fewer than 60 days' active service [and] has a physical disability not incurred in or aggravated by a period of active military service; i.e., the defect existed before the member entered the Service."

Article 12.B.15.b. provides that CGPC may "direct or authorize a discharge for physical disability not incurred in or aggravated by a period of active military service through final action on a physical evaluation board" if a medical board finds that the member is unfit for duty and that her physical disability was neither incurred in nor aggravated by a period of active military service." However, the member must be "fully informed of his or her right to a full, fair hearing and ... state[] in writing he or she does not demand such a hearing." If the member does not demand a hearing, she must sign a statement acknowledging that she "may be separated from the United States Coast Guard in the near future without further hearing and without disability, retirement, or severance pay, and any compensation whatsoever."

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

According to Chapter 3.B.3.a.(1) of the Medical Manual, 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 reten-

tion in 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 “more than moderate” kyphosis and scoliosis “with over two inches of deviation of tips of spinous processes from the midline.”¹ Persons whose curvature is greater than 20 degrees may not enlist in the Coast Guard. Chapter 3.D.37.c.(4).

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 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.”

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 [CGPC]. . . .

. . . Commander [CGPC] 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 M1850.2B)

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

¹ The record does not contain a doctor’s measurement of the applicant’s spinal deviation.

a. The sole standard 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 3.D.3.8. provides that an IMB must be initiated for a member “in any situation where fitness for continuation of active duty is in question.”

The PDES Manual governs the separation of members due to physical disability. Article 2.A.23. defines “incurrence of disability” as the moment “when the physical disability is contracted or suffered as distinguished from a later date when the member’s physical impairment is diagnosed or renders the member unfit for duty. ... Further, physical disability due to the natural progress of disease or injury is incurred when the disease or injury causing the disability is contracted.”

Article 2.A.41. defines “proximate result of military service” as occurring when an injury or disease or aggravation thereof “may reasonably be regarded as an incident of military service or may reasonably be assumed to be the effect of military service.”

Article 2.A.47. defines being “unfit for continued duty” as the “status of an individual member who is physically and/or mentally unable to perform the duties of office, grade, rank, or rating because of physical disability incurred while entitled to basic pay. The status of unfitness applies to individuals unable to perform specialized duty, such as duty involving flying or diving, only if the performance of the specialized duty is a requirement of the member’s enlisted rating.”

Article 2.B.1. states that members are presumed to be fit for duty when they enter the Coast Guard and that “[a]ny increase in the degree of a preservice impairment which occurs during active service is presumed to be due to aggravation unless it is shown to be due to the natural progression of the disease or injury which existed prior to entry on active duty.” Under Article 2.B.2., the presumption of fitness for duty must be overcome by a preponderance of the evidence, and the assumption concerning aggravation must be overcome by clear and convincing evidence.

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 statements by the applicant's Coast Guard doctors suggest that the Coast Guard erred in enlisting her because her spinal curvature was probably noticeable and greater than 20 degrees at the time of her pre-enlistment physical examination. Medical Manual, Chapter 3.D.37.c.(4). The preponderance of the evidence in the record indicates that the applicant's scoliosis was discovered while she was in boot camp and that she had not previously experienced any back pain or other symptoms of scoliosis. It is unclear from the record whether the applicant's back pain would have begun and would have disabled her as much if she had never been enlisted in the Coast Guard. The record indicates that after her scoliosis was discovered in boot camp, the Coast Guard disregarded her condition and assigned her to a remote site, possibly further exacerbating her pain and consequent disability.²

3. The Chief Counsel has admitted that, under Article 12.B.6.d.3. of the Personnel Manual, as well as the provisions of the Medical Manual and the PDES Manual, the applicant was entitled to evaluation by an IMB because of her scoliosis. Her command erred when it determined that she could be administratively discharged without PDES processing simply because her doctors had indicated that her scoliosis probably predated her enlistment.

4. The Board also notes that the record indicates that the applicant was never notified until a few days before her discharge of the Coast Guard's intent to deny her further medical attention and discharge her administratively. There is no evidence that she was notified on or before _____, that her command was initiating an administrative discharge. Nor was she permitted to object and submit a statement on her own behalf, as required under Article 12.B.5.b. of the Personnel Manual.

5. Furthermore, there is no evidence that the applicant's objection to the report of her final physical examination, which was completed on _____, and presented to her on the day of her discharge, was properly reviewed in accordance with Chapter 3.B.5. of the Medical Manual.

6. The applicant has proved by a preponderance of the evidence that, after erroneously enlisting her and retaining her despite her scoliosis and back pain, the Coast Guard essentially ignored its own regulations and denied her due process and proper PDES processing when it discharged her.

7. The Chief Counsel advised the applicant against seeking an IMB because of the chance that it would result in a determination that she had not been disabled, or had

² The Board is not suggesting that the applicant's spinal curvature was increased by her service in the Coast Guard. However, spinal curvature by itself, without pain, is not necessarily disabling. Presumably, the applicant's rigorous activity at boot camp and at her first duty station could increase her pain and thereby increase the degree to which she was disabled by pain.

her disability aggravated, by her service or while she served on active duty and that the DVA would learn of that finding and revoke its determination of service connection. Despite this warning, the applicant has insisted that she wishes to receive due process and undergo PDES processing.

8. While it is true that an IMB could conceivably find that none of the applicant's disability was incurred or aggravated while she served on active duty, it is also at least possible, given the definitions in Article 2.A. of the PDES Manual, that proper processing could result in a disability rating for the applicant. The Board will not speculate upon what action the DVA might take were the results of PDES processing adverse to the applicant. However, if the results of PDES processing were adverse, she would again be entitled to seek relief via this Board.

9. Accordingly, the Board should grant relief by ordering the Coast Guard to convene an IMB for the applicant and process her in accordance with regulation. It is not necessary to revoke her discharge or recall her to active duty to do so.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of _____, USCG, is granted as follows:

Within four months of the date of this decision, the Coast Guard shall convene an IMB to evaluate her condition. Thereafter, the Coast Guard shall process her case in accordance with the PDES Manual and applicable regulation.

George J. Jordan

John A. Kern

David M. Wiegand