

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-128

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on May 26, 2004, upon receipt of the applicant's military records.

This final decision, dated March 17, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a Reservist who injured his wrist while plowing snow on base on November 19, 2000, argued that, following his injury, his command should have placed him on active duty so that he could be processed under the Coast Guard's Physical Disability Evaluation System (PDES) for a disability retirement. Instead, the applicant stated, his command erroneously left him on inactive duty and did not allow him to drill because he was not fit for duty. Therefore, he alleged, he lost retirement points and pay. He asked the Board to award him retirement points, lost pay, and a disability retirement. He alleged that as a result of his injury he has "lost 50% usage of [his] left wrist, which has affected [his] civilian occupation, including the loss of one job."

The applicant alleged that after his snow plow hit a raised manhole cover on November 19, 2000, a health services technician at his Group's medical clinic directed him to seek treatment at a hospital run by the Department of Veterans' Affairs (DVA). On November 25, 2000, x-rays were taken at the hospital, and he was advised that his wrist was just bruised and told to take aspirin. However, his wrist continued to hurt.

On July 12, 2001, after he complained about his wrist at the Group clinic, he received orders to return to the DVA hospital, where more x-rays were taken and he was advised to make a follow-up appointment with a doctor to review the report. On July 24, 2001, Dr. N told him that the new x-rays "showed a separation of the bones," which should have been discovered when the first set of x-rays was taken. Dr. N prescribed a wrist splint and ordered an MRI of the wrist. His command issued orders for the MRI, but in August and early September 2001, he was told that the hospital's MRI equipment was inoperative. The MRI was finally done on September 17, 2001, and he was advised to contact the orthopedic clinic in two or three weeks to learn the results. The applicant alleged that when he called the clinic on October 3, 2001, he was told that his case "was in a consult status" but that an answer should be forthcoming within a month.

On October 12, 2001, the applicant stated, he obtained orders from his command to attend an appointment at the orthopedic clinic on October 23, 2001. There he was told that the damage to his wrist—the cartilage was separated from the bone—could not be repaired at the DVA hospital. He was therefore referred to a special hand clinic and received orders from his command to attend an appointment there on December 17, 2001. Dr. B at the hand clinic took more x-rays and advised him to return on January 18, 2002. On January 18, 2002, Dr. B advised him that the wrist required surgery. After authorization was received from the DVA hospital and orders were received from the applicant's command, the surgery was performed on April 15, 2002. Thereafter, the applicant received physical therapy for his wrist.

The applicant alleged that his last follow-up visit with Dr. B on October 8, 2002, he was told that he "would never be able to do the job [he] was doing for the Coast Guard because of the limited motion [he] had in the left wrist." Not until January 16, 2003, however, did the Coast Guard begin PDES processing by sending him to the Bethesda Naval Hospital for further tests and an Initial Medical Board (IMB). Those doctors issued an IMB report stating that he was not fit for duty. On May 22, 2003, the applicant alleged, a health services technician at his unit informed him that the report had been forwarded to the Coast Guard's Central Physical Evaluation Board (CPEB). On July 15, 2003, he received the CPEB's report, which stated that he was fit for duty. The applicant stated that, on August 10, 2003, with the assistance of his assigned counsel, LT G, he submitted a rebuttal to the CPEB report and requested a hearing before the Formal Physical Evaluation Board (FPEB).

On October 26, 2003, the applicant alleged, his counsel informed him that he should return to drilling because the CPEB had found him fit for duty. On October 29, 2003, the applicant alleged, his counsel advised him to accept the CPEB's findings and report back for duty. The applicant alleged that he asked his counsel about his entitlement to back pay and retirement points. His counsel told him that he did not know, but would find out and let the applicant know.

On November 14, 2003, the applicant stated, he was told that he “was not entitled to back pay or points due to the fact that there had never been an NOE¹ and the fact that [he] did not drill.” In addition, he was told that he erred “by going outside the system for medical treatment” even though he had only done what he was told to do.

On November 21, 2003, the applicant alleged, his counsel called him and told him that “the Captain of the Board was attempting to reverse the decision. He stated a new board was to convene with all new members.” A copy of the decision was faxed to a yeoman at his unit, who told him that he could not drill because he “was still listed as NFFD [not fit for duty].”

The applicant alleged that on May 1, 2004, he received papers showing that he had been discharged from the Reserve, even though his then current enlistment contract ran through January 13, 2007.

In support of his allegations, the applicant submitted a Coast Guard mishap report, which shows that he injured his left wrist on November 19, 2000, when the bucket of his snow plow hit a raised manhole cover and the resulting jerk on the steering wheel “snapped” his left wrist.

The applicant also submitted copies of email messages. One, dated April 18, 2002, is from a chief health services technician at the Maintenance and Logistics Command. It states that the command could not issue an NOE after the applicant’s surgery “because the NOE would have to be in effect from the time of the original injury and he would have to be NFFD from that time. Apparently he was FFD and went back to his civilian job and once he does that it negates any fault/claim on the Coast Guard. Also

¹ According to Article 7.E.9. of the Reserve Policy Manual (RPM) in effect when the applicant was injured, an “NOE” is a letter constituting “Disability Orders and Notice of Eligibility for Disability Benefits.” According to RPM Article 7.E.4. and ALDIST 242/99, when a reservist was injured while serving on inactive duty or active duty for a period of 30 days or less, the command must “[n]otify the servicing [Integrated Support Command] immediately. If the member will be FFD before the end of the duty period, a NOE will not be issued. If the member will not be FFD by the end of the duty period, a NOE will be issued to cover additional time following the original duty period. Members are authorized treatment and medication for only the condition covered by the NOE. After the NOE is issued, members shall not perform IDT or active duty until declared FFD.”

According to RPM Article 7.E.5., only the commanding officer of the ISC could issue an NOE. If the member is not declared FFD within ten weeks, an Initial Medical Board would be convened, and the NOE was only extended if the IMB determines that the injury would improve. According to Article 7.E.6., “members on an NOE may be eligible for military pay and allowances,” in accordance with 37 U.S.C. § 204(g) and (h). ... Pay and allowances are not authorized to extend beyond a 6 month period unless determined by COMDT (G-WTR) to be in the interest of fairness and equity to the member.” Under Article 7.E.7., the medical bills of a reservist with an NOE were “paid in the same manner as for [active duty personnel].”

the member has approximately seven days after coming off his [drill] time to come back to the Coast Guard and let them know he is not healed and request further evaluation. Theoretically speaking, once he left the Coast Guard FFD and went back to his civilian job we do not know if he re-injured it on his civilian job. ... In any event we still need to gather all pertinent paper work and arrange for a Coast Guard medical appointment for FFD/med board determination."

Another email message, dated April 23, 2002, is from a lieutenant commander, LCDR P, who stated that the applicant was "[n]ot eligible for orders to cover his surgery time and convalescent period. Since no NOE was done originally. And since he has been drilling and going to his civilian job, how can we/he guarantee that it was not reinjured somewhere else. His medical bills are being covered by the VA. They are treating him as a vet." LCDR P further stated that the applicant could not drill until he was fit for duty and that there would be "[n]o medical board because this happened during a drill, not while on extended active duty." LCDR P noted that the applicant was not happy with these decisions and as he had done what he was told to do and that "[w]e'll have to remember that when a reservist gets injured and may be long term we must do an NOE. This retains them on active [duty] until they are [fit for duty]."

A third email message, dated May 1, 2002, is from a lieutenant commander at the Integrated Support Command (ISC), who stated the following with respect to the applicant's case:

1. A NOE should have been requested immediately following the accident. This is always one of the items we include in the annual [yeoman] conference ...
2. A NOE which could have included pay & allowances was not requested. ... Several e-mails beginning with that of 8/10/01 from [HS1 C] did however ensure, under ALCOAST 093/00, that [the applicant's] medical costs would have been paid by [the Coast Guard]. In those e-mails he was listed as FFFD. Given he was FFFD, a NOE for pay & allowances would not have been issued anyway.
3. [The applicant's] needs were being taken care of by the service until he made the choice to go out of the system & use, for a second time, the VA system. Based on that decision, the service will not be paying for any additional medical care associated with that particular injury. Moreover he also, with that decision, placed himself beyond getting pay & allowance for time lost due to that injury. Having said that, however, both [the Maintenance and Logistics Command and Headquarters] are agreed that a NOE this long after the fact would not have been issued.

Group Xxxxx did well last August [2001] to get [the applicant] back in the system & have his medical costs covered by the service. With his recent decision to go back to the VA & have them cover the costs he placed himself outside of our system which includes the service paying for his medical costs—and pay & allowance is beyond the question. He is, by his own decision, on his own w/ regard to this injury. ...

In another email, dated June 29, 2003, the Senior Reserve Officer at Group Xxxxx inquired about the status of the applicant's PDES processing. He stated that the applicant's medical bills from the hand clinic and a private hospital had not been paid

and that the applicant was receiving delinquency notices. He also stated that the applicant was frustrated and was “strongly considering going outside the Coast Guard for assistance.”

SUMMARY OF THE RECORD

On July 25, 1966, the applicant enlisted in the Coast Guard and performed four years of active duty followed by two years in the Reserve, during which he did not drill. The applicant reenlisted in the Reserve, however, on May 19, 1976, and thereafter drilled regularly and advanced to the rate of machinery technician first class.

On November 19, 2000, while operating a plow to clear snow from a base parking lot, the applicant injured his left wrist when the bucket hit a raised manhole cover. He reported his wrist pain to the Group clinic the next day, and had the wrist x-rayed a few days later. Apparently, no serious injury was discovered at the time. His command did not issue an NOE or notify the ISC. Moreover, the applicant continued to drill regularly for the next 17 months, and he completed satisfactory years of service toward retirement on May 18, 2001, and May 18, 2002.

In July 2001, the applicant complained about continuing problems with his wrist. An MRI revealed “scapholunate widening and scaphoid subluxation.” He was referred to a hand specialist. On April 15, 2002, the applicant underwent surgery on the wrist, which included a “scaphoid excision and four corner fusion using right iliac crest bone graft.” While convalescing, the applicant was determined to be not fit for duty (NFFD). He underwent physical therapy, but at his final follow-up appointment on October 8, 2002, he was advised that the condition of his wrist left him permanently NFFD as a mechanic. The surgeon noted that the applicant’s neurovascular exam was normal but that he still had “tightness in his left wrist with prolonged use or prolonged therapeutic exercises, but no real pain in his left wrist now, as it did preoperatively.” The doctor had tested the applicant’s right and left wrists and hands and noted the following differences:

Test	Right Wrist & Hand	Left Wrist & Hand
Dorsiflexion of wrist	64°	44°
Palmar flexion of wrist	62°	14°
Pronation	68°	73°
Supination	77°	45°
Ulnar deviation	34°	25°
Radial deviation	26°	0°
Grip strength	50 kg	16 kg
Grip strength, key pinch	10 kg	10.5 kg
Flexion lag of index finger	0 cm	0.3 cm
Flexion lag of other fingers	0 cm	0 cm

On January 22, 2003, the applicant was evaluated by an IMB at Bethesda Naval Hospital. The IMB noted that the applicant's diagnosis was "left wrist scaphoid excision for corner fusion for chronic scapholunate ligament rupture." The IMB report stated that the applicant had been NFFD since the surgery and that the applicant "report[ed] left wrist pain associated with any strenuous activity, especially with wrist flexion." The IMB found that the wrist had "decreased strength and markedly decreased flexibility ... [which] makes it difficult for him to perform his military duties as a diesel mechanic." The IMB compared the applicant's left wrist and hand to his dominant right wrist and hand and noted the following differences:

Test	Right Wrist & Hand	Left Wrist & Hand
Range of motion in wrist	45°	25°
Flexion of wrist	65°	15°
Ulnar deviation	10°	5°
Radial deviation	15°	10°
Grip strength, position 1	22 kg	12 kg
Grip strength, position 3	45 kg	20 kg
Grip strength, position 5	40 kg	18 kg
Flexion lag of index finger	0 cm	1 cm
Flexion lag of middle finger	0 cm	0.5 cm

The IMB report stated that x-rays showed that the surgery had resulted in a "well consolidated, four corner fusion" and that tests showed "pain only associated with heavy activity, but markedly limited motion and strength." It also stated that "[i]t is the opinion of the Board that the subject will not be fit for full duty. Because he may have a permanent partial disability, it is recommended that this case be referred to the Physical Evaluation Board for adjudication." The IMB report also states that the applicant had been informed of the findings and "does not desire to submit a statement in rebuttal."

On March 4, 2003, the applicant did submit a statement in which he wrote that he agreed with the IMB report but wanted to note that he had been injured while drilling and that "[d]ue to nature and extent of injuries, [he was] not given current duty status, not issued NOE."

On March 5, 2003, the applicant's commanding officer forwarded the IMB report to the Central Physical Evaluation Board (CPEB). He concurred with the IMB's finding that the applicant was not fit for duty. He stated that the applicant normally worked on "small engine repair" in the engineering department but "has been unable to drill for the past six months due to the nature of his injuries and his inability to perform at his normal duties associated with his rank and rating."

On July 15, 2003, the CPEB found that the applicant was fit for duty.² On August 10, 2003, the applicant asked the CPEB to reconsider its decision. He stated that he did not understand how he could be found FFD in light of his doctors' reports, copies of which he submitted. He stated that he had "only about a 40% use of [his] left hand and wrist" and argued that the safety of his shipmates might be compromised if he were ever mobilized in an emergency. He noted that he had served during the Vietnam War and served in Saudi Arabia during Desert Storm and that he did not believe he was being treated fairly since he was permanently disabled from an injury incurred on active duty. He alleged that if his command had completed the proper paperwork, he "would not have been put through all the aggravation and tension [he had] incurred." He alleged that the stress had affected his civilian job "through lost time and wages" and that the restricted motion and strength of his left wrist and hand affected his use of the computer and his ability to pick up and carry things.

On December 11, 2003, the CPEB reconsidered the applicant's case³ and found that the applicant was not fit for duty and recommended that he be separated with a disability rating of zero percent and severance pay. The applicant was assigned counsel to advise him about his right to object to the CPEB and demand a hearing before the Formal Physical Evaluation Board (FPEB). After consulting with counsel, the applicant accepted the findings of the CPEB but asked that he be transferred to the Standby Reserve (Inactive Status) instead of being separated, even though he would waive his right to severance pay. On May 1, 2004, he was transferred to the Standby Reserve.

² A copy of the CPEB report is not in the record, but the applicant and the Coast Guard state this.

³ A copy of the CPEB report is not in the record, but the applicant and the Coast Guard state this.

VIEWS OF THE COAST GUARD

On November 5, 2004, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request but grant alternate relief. The JAG based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

Regarding the applicant's request for a disability retirement, CGPC stated that because the applicant agreed with the zero percent disability rating recommended by the CPEB prior to his transfer to inactive status, the Board should not grant his request for a disability retirement. CGPC argued that the applicant has failed to overcome the presumption that the CPEB acted correctly in awarding him the zero percent disability rating.

Regarding the applicant's request for retirement points, CGPC stated that reservists who are NFFD may not drill, and they receive retirement points only for membership (15 points annually) and for completing authorized correspondence courses. CGPC stated that after the applicant became NFFD following his surgery, he completed no correspondence courses and so received only membership points. CGPC stated that under 10 U.S.C. § 12732, aside from membership points, retirement points may only be awarded for duty performed, and the applicant failed to complete any authorized correspondence courses while he was NFFD. Therefore, CGPC argued, the Board should not award the applicant any retirement points for the period following his surgery.

CGPC stated that the Reserve Incapacitation System is intended to permit treatment of injuries incurred in the line of duty until the reservist becomes fit for duty or is processed through the PDES and separated, pursuant to 10 U.S.C. § 1074a. CGPC stated that an NOE is used "to document entitlement to health care and to establish a member's entitlement to incapacitation pay" under this system. CGPC admitted that the Coast Guard erred in not preparing an NOE "once the injury ... was found to be more serious than the original diagnosis." However, CGPC noted, even though an NOE was not issued, the applicant received medical treatment when he requested it. CGPC stated that the DVA "serves as the primary care manager for Coast Guard personnel in the Xxxxx area."

CGPC stated that in addition to issuing an NOE, the applicant's command should have initiated an IMB ten weeks after the condition of the applicant's wrist was discovered. Because the command failed to do these things timely, the applicant's IMB and PDES processing were delayed by more than a year. Moreover, CGPC stated, proper management by the command and the ISC "would also have resulted in counseling to Applicant on his prospective entitlement to Reserve Incapacitation Pay, and the procedures by which he would document lost civilian income."

CGPC stated that the Reserve Incapacitation System entitles reservists injured in the line of duty to receive incapacitation pay, pursuant to 37 U.S.C. § 204(g), (h), and (i). However, Congress limited incapacitation pay to six months and required that it be offset by civilian income and not exceed the amount the reservist would have earned if he had served on active duty for that period. Therefore, CGPC stated, a reservist “who can demonstrate a loss of civilian income as a result of an injury incurred in the line of duty can submit a claim to the Coast Guard for incapacitation pay.”

CGPC stated that although in a letter dated April 9, 2004, the applicant alleged that he had missed six weeks of work from his civilian job following his surgery, he has not provided any documentation of “a loss of nonmilitary or self-employment income” between the date of his injury and his transfer to inactive status. Moreover, CGPC argued, because the applicant was regularly drilling until his surgery in April 2002, he would not have been entitled to incapacitation pay prior to April 2002 unless he incurred a loss of civilian income. After the applicant was found to be NFFD on May 9, 2002, he “was entitled to the equivalent of active duty pay and allowances for a regular Coast Guard member (pay grade E-6, over 26 years of service) for up to six months following the determination.”

CGPC stated that the applicant’s request for active duty back pay, retirement points, and a disability retirement “are not appropriate forms of relief given law and policy in effect since the time of [his] injury.” Instead, CGPC stated, the applicant may be entitled to incapacitation pay if he in fact lost civilian income following his injury. CGPC recommended that the applicant’s record be corrected by the issuance of an “NOE for the period 9 May 2002 (date he was found not fit for duty by his command) to 1 May 2004 (the date on which he was removed from active status in the Coast Guard Reserve).” Upon issuance of the NOE, CGPC stated, the applicant “would be entitled to Reserve Incapacitation Pay for the first six months in which he was not fit for duty, in accordance with 37 U.S.C. § 204(g). The amount paid would be reduced by civilian income earned during the period.”

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On November 8, 2004, the BCMR sent the applicant a copy of the Chief Counsel’s advisory opinion and invited him to respond within 30 days. The applicant responded on December 7, 2004.

The applicant stated that he did not challenge the recommendation of the CPEB because his Coast Guard counsel advised him that accepting the recommendation “was the best way to handle this situation.” The applicant argued that the zero percent rating is completely inconsistent with his doctors’ findings that his wrist is totally disabled.

He noted that the members of the CPEB only reviewed his records and did not actually examine his wrist as his doctors did.

Furthermore, the applicant argued that the Coast Guard failed to counsel him and “did not give [him] the information [he] needed to acquire the proper information so that [he] could follow up with all the documentation required to establish [his] entitlement to incapacitation pay.” He stated that he would have kept documentation of his loss of civilian income had he been timely informed that it was needed.

Regarding his request for retirement points, the applicant argued that his request is not “out of line” because but for his injury, he would still be drilling since his enlistment was not due to end for several years. He argued that he “should not be punished” for getting injured in the line of duty.

SUMMARY OF APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1204 provides the following for members on active duty for periods of 30 days or less or on inactive duty training:

Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that--

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

(2) the disability--

• • •

(B) is a result of an injury, illness, or disease incurred or aggravated in line of duty after September 23, 1996--

(i) while performing active duty or inactive-duty training;

• • •

(3) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(4) 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.

Title 37 U.S.C. § 204 provides the following:

(g)(1) A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uni-

formed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated -

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance in an inactive status at an educational institution under the sponsorship of an armed force or the Public Health Service);

• • •

(2) In the case of a member who receives earned income from nonmilitary employment or self-employment performed in any month in which the member is otherwise entitled to pay and allowances under paragraph (1), the total pay and allowances shall be reduced by the amount of such income. In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

(h)(1) A member of a reserve component of a uniformed service who is physically able to perform his military duties, is entitled, upon request, to a portion of the monthly pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for each month for which the member demonstrates a loss of earned income from nonmilitary employment or self-employment as a result of an injury, illness, or disease incurred or aggravated -

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance in an inactive status at an educational institution under the sponsorship of an armed force or the Public Health Service);

• • •

(2) The monthly entitlement may not exceed the member's demonstrated loss of earned income from nonmilitary or self-employment. In calculating such loss of income, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

(i)(1) The total amount of pay and allowances paid under subsections (g) and (h) and compensation paid under section 206(a) of this title for any period may not exceed the amount of pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for that period.

(2) Pay and allowances may not be paid under subsection (g) or (h) for a period of more than six months. The Secretary concerned may extend such period in any case if the Secretary determines that it is in the interests of fairness and equity to do so.

Provisions of the Reserve Policy Manual

In May 2003, after the applicant's injury and IMB but before the first CPEB, the Reserve Policy Manual (RPM) was amended. The regulations for the Reserve Incapacitation System now appear in Article 6 of the RPM. Article 6.A.1. provides that

[m]edical and dental care shall be provided for reservists incurring or aggravating an injury, illness, or disease in the line of duty, and physical examinations shall be authorized to determine fitness for duty or disability processing. Pay and allowances shall be author-

ized, to the extent permitted by law, for reservists who are not medically qualified to perform military duties, because of an injury, illness, or disease incurred or aggravated in the line of duty. Pay and allowances shall also be authorized, to the extent permitted by law, for reservists who are fit to perform military duties but experience a loss of earned income because of an injury, illness, or disease incurred or aggravated in the line of duty.

Under Article 6.A.2, “earned income” is defined as “[i]ncome from nonmilitary employment, including self-employment. This includes normal wages, salaries, professional fees, tips, or other compensation for personal services actually rendered, as well as income from taxable unemployment benefits, income protection plans, vacation pay, and sick leave that the member elects to receive.”

Under Article 6.A.3.a., a “reservist who incurs or aggravates an injury, illness, or disease in the line of duty is entitled to medical and/or dental treatment as authorized by 10 U.S.C. 1074 or 1074a in an approved medical treatment facility or authorized civilian healthcare provider.” Article 6.A.3.b. provides the following:

Medical and dental care shall be provided until the member is found fit for military duty, or the injury, illness, or disease cannot be materially improved by further hospitalization or treatment and the member has been separated or retired as the result of a Coast Guard Physical Disability Evaluation System (PDES) determination (See Physical Disability Evaluation System, COMDTINST M1850.2 (series)). Each case in which the member is projected to remain incapacitated for more than six months shall be referred to the PDES.

According to Article 6.A.4. of the RPM,

b. A reservist who is unable to perform military duties due to an injury, illness, or disease incurred or aggravated in the line of duty is entitled to full pay and allowances, including all incentive and special pays to which entitled, if otherwise eligible, less any earned income as provided under 37 U.S.C. 204(g). A member in receipt of incapacitation pay who is unable to perform military duties, i.e., Not Fit For Duty (NFFD), shall not be allowed to attend IDT periods or ADT, and shall not acquire retirement points by performing IDT or ADT. However, he or she may earn retirement points in order to satisfy the requirements for a qualifying year of service by completing authorized correspondence courses.

c. A reservist who is able to perform military duties but demonstrates a loss of earned income as a result of an injury, illness, or disease incurred or aggravated in the line of duty is entitled to pay and allowances, including all incentive and special pay to which entitled, if otherwise eligible, but not to exceed the amount of the demonstrated loss of earned income or the amount equal that provided by law or regulation for an active duty member of corresponding grade and length of service, whichever is less. ...

d. Pay and allowances shall be paid only during the period a member remains not fit for military duties or demonstrates a loss of earned income as a result of an injury, illness, or disease incurred or aggravated in the line of duty. The member's entitlement to incapacitation pay shall terminate on the date that one of the following actions occurs:

- (1) The member is found FFFD,
- (2) The member no longer demonstrates a loss of earned income,

- (3) The member is separated or retired, or
- (4) Commandant (G-WTR) determines that it is no longer in the interest of fairness and equity to continue pay and allowances under 37 U.S.C. 204(g) or 204(h).

e. Payment in any particular case may not be made for more than six months without review of the case by Commandant (G-WTR) to ensure that continuation of military pay and allowances is warranted. In making the determination whether pay and allowances should continue beyond the initial six months, Commandant (G-WTR) shall consider if the member has resumed his or her civilian occupation, undertaken a new position in the same occupation, or taken a position in a new occupation. These factors are to be used when determining if it is in the interest of fairness and equity to continue benefits.

Under Article 6.B.3.a., a "Notice of Eligibility (NOE) for authorized medical treatment is issued to a reservist not serving on active duty, to document eligibility for medical care as a result of an injury, illness, or disease incurred or aggravated in the line of duty." NOEs should be issued "as soon as possible but not later than three working days after the initial medical evaluation and prognosis is completed." RPM, Art. 6.B.3.b. Under Article 6.b.3.c., "[u]pon determination that the member will require treatment beyond the first three-month period of the NOE, commands shall notify the servicing ISC (pf) and may request extensions in one-month increments. ... ISC (pf)s may not authorize extensions to allow an NOE to exceed six months." Article 6.B.3.d. provides that "[a]s soon as a medical officer or designed authority determines that a reservist is expected to remain incapacitated for more than six months, the case shall be referred to the Coast Guard Physical Disability Evaluation System (PDES)."

Article 6.B.4. provides the following instructions for claiming incapacitation pay:

Claims for incapacitation pay shall be submitted to the servicing ISC (pf) via the chain of command. ... If submitting a claim for pay and allowances due to a NFFD status (unable to perform military duties), the member must submit a statement declaring any earned income ... , enclose a copy of the NOE, medical officer's certification ... , and a letter from his or her civilian employer containing:

- (1) The employer's mailing address,
- (2) Supervisor's name and phone number,
- (3) Certification and reason that the member has not returned to work, and
- (4) Documentation of any normal wages, salaries, professional fees, tips, vacation pays, sick leave, disability insurance, or other compensation (if any) that the member has received.
- (5) In the case of a student in receipt of financial aid, certification that the member has not returned to school must be provided,

Article 8.C.1 of the RPM states the following:

As outlined in 10 U.S.C. 12731, a reservist is entitled, upon application, to "non-regular" retired pay if the reservist:

- a. Is at least 60 years of age;
- b. Is not entitled to receive military retired pay under any other provision of law;

- c. Has performed at least 20 years of satisfactory qualifying federal service as computed under section 10 U.S.C. 12732; and
- d. Has performed the last six years of qualifying service as a member of a Reserve component.

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

Article 3.F.1.a. of the Medical Manual states that the physical standards provided in the article must be met for retention in the service. Members with medical conditions that “are normally disqualifying” for retention in the Service shall be referred to an IMB or a waiver shall be requested by their commands. Article 3.F.2. states that the list of “normally disqualifying conditions” contained in the article is neither all-inclusive nor “a mandate that possession of one or more of the listed conditions or physical defects means automatic retirement or separation.” Article 3.F.12.a.(c) of the Medical Manual requires that each wrist have a “total range, extension plus flexion, of 15°.”

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.

DVA Schedule for Rating Disabilities (VASRD)

According to 38 C.F.R. § 4.71a, a veteran may receive a 10% disability rating if he has a limitation of motion in the wrist and dorsiflexion is less than 15° or palmar flexion is limited in line with the forearm.

Physical Disability Evaluation System Manual

Chapter 9.A.8. of the PDES Manual provides that if “a medical condition which causes or contributes to unfitness for military service is of such mild degree that it does not meet the criteria even for the lowest rating provided in the VASRD ... [a] zero percent rating may be applied in such cases.”

FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that because his command failed to issue an NOE at the time of his injury in November 2000, he lost pay and retirement points. The Coast Guard has admitted that the applicant's command should have issued an NOE, if not at the time of his injury then in July 2001, when he complained of continuing pain and the severity of his injury was realized. The applicant alleged that a doctor told him that the injury discovered in July 2001 should have been discovered in November 2000 if the doctors had properly examined the x-rays. The Coast Guard did not dispute this allegation and apparently concedes that the applicant's wrist injury as discovered in July 2001 was incurred while he drilled on November 19, 2000. Therefore, although the applicant apparently managed to drill after his wrist was injured, the Board finds that he has proved by a preponderance of the evidence that his command erred in failing to issue an NOE pursuant to ALDIST 242/99 and Article 7.E.4. of the Reserve Policy Manual in effect at that time.

3. If the applicant's command had issued an NOE in November 2000, he would have been deemed not fit for duty (NFFD) and he would not have been allowed to drill and complete satisfactory years of service in May 2001 and May 2002 except by completing correspondence courses. He would presumably have been counseled about the Reserve Incapacitation System and processed under the PDES much sooner. His PDES processing would likely have been completed in 2001 or early 2002, instead of in 2004. Under Article 7.E.6. of the RPM then in effect, he would have been eligible for incapacitation pay for at least the first six months of his NFFD status.

4. The applicant has alleged that he lost civilian pay and a job because of his wrist condition. However, he submitted no evidence whatsoever to prove how much income he lost or when he lost it or to show how much he earned while he was NFFD.

5. The record indicates that the applicant continued to drill until his surgery in April 2002. After the surgery, the applicant's doctors determined that he was NFFD. If an NOE had been issued, the applicant would have been eligible for incapacitation pay following his surgery. The Coast Guard has admitted that an NOE should have been issued and recommends that the applicant be made eligible for incapacitation pay for six months beginning on May 9, 2002, when he was declared NFFD. The Board finds that the Coast Guard's proposed relief is a fair and equitable resolution of the applicant's claim for lost pay. However, because the applicant's surgery occurred on April 15, 2002, his eligibility for incapacitation pay should begin on that date, as he was certainly NFFD immediately following the surgery. The fact that the Coast Guard did not declare him NFFD until more than three weeks after the surgery, even though the Coast Guard knew the date of his surgery, does not mean that he should not be eligible for incapacitation pay during those three weeks. The Board finds that he is most likely

to have lost civilian income during the weeks immediately after his surgery. Because the applicant was very vague in his allegations about his income and civilian employment, there is no basis in the record for extending his entitlement to incapacitation pay beyond six months.

6. The applicant argued that he should not be required to prove his lost civilian income because he was not timely counseled about the Reserve Incapacitation System. However, the applicant is not required to prove lost income to receive incapacitation pay; under Article 6.B.4. of the RPM, he need only prove actual income. Moreover, the Board will not order the Coast Guard to pay the applicant any amount he claims to have lost. It is reasonable to require the applicant to submit the documentation required by Article 6.B.4.

7. The applicant alleged that the Coast Guard's error prevented him from drilling and therefore asked the Board to award him retirement points. However, the delay in the applicant's PDES processing actually allowed him to continue to drill and complete satisfactory years of retirement in 2001 and 2002. Moreover, under the regulations, when a reservist becomes NFFD, he may only receive membership points (15 per year) and retirement points for completing authorized correspondence courses. The record indicates that the applicant was awarded membership points and that he did not complete any correspondence courses. As a member with more than 25 years in the Reserve, the applicant must certainly have known that he could earn points by completing correspondence courses while NFFD, but he failed to do so. Therefore, the Board finds that the Coast Guard's error in not issuing an NOE, which delayed his PDES processing, did not cause the applicant to lose drill time and retirement points he would have been able to earn had the NOE been timely issued.

8. The applicant alleged that the CPEB erred in awarding him a zero-percent disability rating and that he should have received a higher rating so that he could retire by reason of physical disability. However, Chapter 9.A.8. of the PDES Manual provides that if "a medical condition which causes or contributes to unfitness for military service is of such mild degree that it does not meet the criteria even for the lowest rating provided in the VASRD ... [a] zero percent rating may be applied in such cases." Under the VASRD, a veteran may receive a 10% disability rating only if he has a limitation of motion in the wrist and dorsiflexion is less than 15° or palmar flexion is limited in line with the forearm. The IMB found that the applicant's left wrist had 15° of flexion and a total range of motion of 25°. Under Article 3.F.12.a.(c) of the Medical Manual, a member may be retained in the Service if each wrist has a "total range, extension plus flexion, of 15°." In addition, the Board notes that the applicant is right-handed. Therefore, although the applicant's doctors found him to be NFFD as a mechanic (and the CPEB agreed after the applicant objected to the original finding that he was FFD), the Board finds that the zero-percent rating awarded by the CPEB is consistent with the applicable

regulations. The applicant has not proved by a preponderance of the evidence that the zero-percent rating is erroneous or unjust.

9. Furthermore, the Board notes that the applicant was assigned counsel and admits that after the second determination by the CPEB, he discussed his options with his counsel, accepted the CPEB's findings and recommendation, and chose a course of action he considered to be in his best interest at the time. The applicant apparently chose to be transferred to inactive status and to receive a regular retirement, due to sufficient years of service, when he attains age 60. Under Article 8.C.1.b. of the RPM, the applicant would have forgone his retirement pay for sufficient years of service if he had received medical retirement pay. Presumably, he determined that the retirement pay and allowances he would receive following his chosen course of action were better than those he would receive in accordance with the statutes and regulations if he accepted retirement with a zero-percent disability rating. The record indicates that the Coast Guard granted his request by transferring him to inactive status. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error in advising him of his options under applicable law following the approval of the CPEB's findings and recommendation or in permitting his transfer to the Ready Reserve.

10. Accordingly, the applicant's request for additional retirement points and a retirement from the Coast Guard by reason of physical disability with a higher disability rating should be denied. However, partial relief should be granted by correcting his record to show that he was found NFFD on the day of his surgery; that an NOE was issued from April 15, 2002, until May 1, 2004; and that he was eligible for incapacitation pay for the first six months in which he was not fit for duty, in accordance with 37 U.S.C. § 204(g). If within 180 days of the date of this decision, the applicant documents his civilian income during those six months in accordance with the requirements of Article 6.B.4. of the RPM, the Coast Guard should pay him any amount due in accordance with Article 6.A.4.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted in part.

His record shall be corrected to show that on the date of his wrist surgery, April 15, 2002, he became not fit for duty; that an NOE was issued from that date until May 1, 2004; and that he was eligible for incapacitation pay for the first six months in which he was not fit for duty, in accordance with 37 U.S.C. § 204(g). If within 180 days of the date of this final decision, he submits to the Coast Guard Personnel Command documentation of earned civilian income during the six-month period beginning on April 15, 2002, in accordance with the requirements of Article 6.B.4. of the Reserve Policy Manual, the Coast Guard shall pay him the amount of incapacitation pay due under Article 6.A.4.

No other relief is granted.

Quang D. Nguyen

Kathryn Sinniger

Molly McConville Weber