DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-172

DECISION OF THE DEPUTY GENERAL COUNSEL ACTING UNDER DELEGATED AUTHORITY

✓ I approve the recommended Order of the Board.

_____ I disapprove the recommended Order of the Board.

_____ I concur in the relief recommended by the Board.

Date: Feb. 9, 2001

[redacted]
Deputy General Counsel
as designated to act for the
Secretary of Transportation

DEPARTMENT OF TRANSPORTATION
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Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 1999-172

FINAL DECISION

[redacted] **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. The application was filed on August 30, 1999, and completed on March 10, 2000, upon receipt of the applicant's military and medical records.

This final decision, dated February 8, 2001, 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 [redacted] pay grade E-6) in the Coast Guard Reserve, asked the Board to correct her records to show that she was not fit for full duty (NFFD) on September 12, 1996, and to order the Coast Guard to convene a Physical Evaluation Board (PEB) to review her case so that she would be retired by reason of physical disability.

APPLICANT'S ALLEGATIONS

The applicant alleged that she suffered seizure symptoms and her first grand mal seizure while she was serving on a one-year temporary active duty contract (TEMAC) from November 1, 1990, to October 16, 1991. She alleged that in 1992, while again serving on extended TEMAC, she experienced more seizures and was referred for tests to the Neurological Department at [redacted] Naval Hospital. A Navy doctor diagnosed her with "generalized seizure secondary to partial complex seizures" and found her to be NFFD. She remained on TEMAC while her case was reviewed by an Initial Medical Board (IMB) and PEB. However, on April 30, 1993, the PEB found her to be fit for full duty (FFD), apparently because as a [redacted] she could perform office work and not be assigned to sea duty. Therefore, she was not medically retired and continued to drill and perform short-term TEMAC assignments.

In August 1996, the applicant alleged, during a 60-day period of TEMAC, she went to a Coast Guard clinic to request an MRI and a prescription refill for her anti-seizure medication. The clinic's doctor told her that because her seizures were not being controlled by the medication, she was NFFD and would be discharged. He referred her to [redacted] Naval Hospital for a second opinion and determination of her fitness for duty.

On September 12, 1996, the applicant alleged, she was interviewed by a doctor in the Neurological Department at the hospital. Based on that interview, he found that she had suffered two generalized seizures within the past year and diagnosed her with "complex partial seizures ... not always completely controllable." However, she alleged, the doctor deferred to the findings of the 1993 PEB and found her FFD. Based on that erroneous finding, the applicant alleged, she was improperly released from active duty when her TEMAC ended on September 30, 1996, contrary to regulation.

The applicant alleged that in November 1996, concerned about her health and fluctuating status, she requested evaluation by another IMB. Because of her request, her command at the Integrated Support Command (ISC) placed her in an NFFD status, which prohibited her from drilling. On February 13, 1997, she became concerned that her inability to drill would prevent her from completing a satisfactory year for retirement purposes and asked her command for a formal decision concerning her status.

On March 17, 1997, she alleged, her command informed her that the FFD findings of the 1993 PEB and the doctor at [redacted] Naval Hospital who interviewed her on September 12, 1996, were final. Her command also stated that the doctor conducting the IMB for her would confirm the FFD determination.

On March 21, 1997, the IMB found the applicant NFFD. The doctors found her prognosis to be poor because she would continue to experience seizures despite medication. The IMB referred her for a second PEB. On April 18, 1997, the convening authority approved the findings of the IMB and forwarded the report to the applicant's command.

On July 1, 1997, the applicant alleged, her command informed her that no action would be taken on the IMB findings because the Coast Guard Personnel Command (CGPC) determined that the ISC district commander, who convened the IMB, had no authority to do so. The applicant alleged that her command knew about the IMB as early as November 1996 and should have acted earlier if the IMB was being conducted without proper authority. Her command also stated that "no apparent disability exists."

Therefore, the applicant alleged, she was improperly denied a PEB and would have been medically retired because of her epilepsy if the Coast Guard had acted in accordance with regulation.[1]

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[1] Epilepsy is an umbrella term for recurring seizures of various types and etiologies.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve in 1979. She served on TEMAC continuously from the middle of May 1982 through January 1993. Her record shows that she performed 11 days of active duty in February 1983. On February 22, 1983, apparently while serving on active duty, the applicant sought medical help for a severe headache in her right temple that had lasted for about 5 days. Migraine medication had provided no relief. A chief warrant officer at the naval medical center she visited concluded her condition was "possibly TMJ" (temporal mandibular joint syndrome).

The applicant was released from active duty in February 1983 but served on TEMAC for another three months in the summer of 1983. In 1984, 1985, and 1986, she performed drills and occasional active duty for periods of two weeks or less. On April 20, 1985, she underwent a tri-annual physical examination. On a Report of Medical History for the examination, she reported no history of epilepsy, fits, or headaches.

In August 1986, the applicant transferred to the Army Reserve. From August 1986 through September 1988, she performed drills and occasional training, as well as a one-month TEMAC in August 1987. From October 3, 1988, through March 31, 1989, she served continuous active duty on a six-month TEMAC. After her release, she continued to perform drills and annual training.

On May 3, 1989, the applicant consulted Dr. M, a doctor in the Marine Corps. He reported that she had "EEG documented simple partial seizures ... . Now having no spells at all. Allergic to Dilantin, also made her spacey. [Patient] is extremely reluctant to take medication now. I have advised her that she is at risk for focal status and secondarily generalized seizures—she still prefers to hold off on medication. She will let me know if seizures recur. I will arrange an MRI for her as recommended by [another doctor]."

On August 1, 1989, the applicant underwent a physical examination preparatory to reenlisting in the Coast Guard Reserve. On the Report of Medical History, the applicant indicated that she had no history of epilepsy, fits, or headaches. On August 27, 1989, the applicant was transferred from the Army Reserve back to the Coast Guard reserve and began serving on TEMAC. She served on active duty for 18 continuous months, through March 8, 1991.

On March 29, 1991, while serving on TEMAC, the applicant had a grand mal seizure, which was treated at the [redacted] The doctor reported that she had a history of complex partial seizures that were "w/u" in 1989.

On May 29, 1991, the applicant underwent a physical examination preparatory to her release from active duty. On the Report of Medical History, the applicant indicated that she had no history of epilepsy, fits, or headaches.

On November 1, 1991, while not serving on TEMAC, the applicant was admitted to [redacted] after suffering a grand mal seizure. She was prescribed Dilantin.

On February 12, 1992, the applicant began serving on a six and one-half month TEMAC. On July 2, 1992, the applicant told sought a referral for an MRI because of her continuing complex partial seizures. The applicant was seen by Dr. B, who noted that she reported having been first diagnosed with petit mal seizures in 1989, which had progressed to complex partial seizures and a grand mal seizure about two years previously. The applicant also told the doctor she had been experiencing increased seizure activity over the past two weeks. Dr. B diagnosed "probably idiopathic epilepsy."[2] Her command convened an IMB to determine her fitness for duty.

On July 25, 1992, an IMB was conducted for the applicant by doctors at the naval hospital in [redacted] The IMB found that she had been on continuous active duty since August 1989, except for an 8-month hiatus from June 1991 through February 1992, and that her "seizure history date[d] back to Dec[ember] 1990." Her seizures recurred "on a regular basis" and "peaked" with a grand mal seizure on March 29, 1991, when her husband could not awaken her. The IMB also reported that her second grand mal occurred on November 5, 1991, when she collapsed in her grandmother's kitchen. On that occasion, she was prescribed Dilantin by a doctor in the emergency room but stopped taking it after two weeks because it caused drowsiness, slurred speech, and vomiting. Thereafter, she suffered more complex partial seizures and was prescribed Tegretol by her civilian neurologist, Dr. S. The IMB indicated that an MRI had revealed more than the expected amount of cerebral cortical atrophy, but her EEGs were normal. The IMB noted that a spinal tap was still pending.

The IMB concluded that although the applicant continued to suffer complex partial seizures, her condition was "controlled" by medication. The IMB also concluded that "[t]his happened while member was a Reservist serving on 232 days of active duty" and that she was not fit for sea duty. The IMB reported that the applicant "knows she has to be seizure free for a period of one year and have permission from the Department of Motor Vehicles to drive. [She] should not swim alone, be on heights alone, or operate any heavy machinery."

On August 25, 1992, the applicant was seen by Dr. C, at the naval hospital. He wrote in her record that she "developed complex partial seizures [in] 1983 [but] was told it was TMJ causing [headaches] & deja vu, nauseated feeling —> 4 times all together in periods of stress only. Had first grand mal seizure Nov[ember] 5, [19]91, when came to grandmother ... ."

[2] Idiopathic epilepsy is epilepsy of unknown origin in which seizures usually begin between ages 2 and 14. Seizures that begin after age 25 are usually caused by some kind of brain trauma, such as a head injury, stroke, or tumor.

On September 28, 1992, the applicant was seen again by Dr. C, who noted that she reported a previous grand mal seizure in March 1991 and was treated at a community hospital. However, Dr. C wrote, this episode was "never w/u."

On November 25, 1992, the convening authority approved the report of the IMB and forwarded the report of the IMB to the Commandant with no mention of whether her condition was service connected. He stated that the applicant was serving as the [redacted] staff and that she was able to perform all the job assignments of her rating. The applicant was retained on active duty pending her PEB.

On March 17, 1993, the PEB met and found the applicant FFD. Its report lists no disabilities whatsoever and fails to indicate in the space provided whether her condition was incurred or aggravated while she served on active duty. The proceedings were reviewed by the Office of the Chief Counsel, which found the proceedings to be correct and the findings to be supported by the evidence of record. On April 28, 1993, the Chief of the Coast Guard's Physical Disability Evaluation System (PDES) approved the findings and recommendations of the PEB and directed that the applicant not be retired or separated by reason of physical disability. The applicant was informed of the results of the PEB on April 30, 1993.

On August 26, 1996, while serving on a 61-day TEMAC at a recruiting center, the applicant consulted with a Coast Guard doctor, Dr. A, after suffering a "partial grand mal" seizure. She stated that her neurologist had recommended that she undergo surgery and that she wanted a second opinion. He referred her to the Neurological Department of the naval hospital, and placed her in an NFFD status for 30 days.

On September 12, 1996, the applicant was seen by Dr. J, a neurologist at the Navy hospital. In her report, Dr. J wrote that because of the applicant's seizures, Dr. A had reported her to the Department of Motor Vehicles, so she could not longer drive a car. Dr. J also reported that the applicant's "complex partial seizures are not always completely controllable" despite medications. Dr. J concluded that she "has been found fit for duty by [1993] PEB for her grand mal seizure already. Need[s] to be on the medication which is prescribed by her civilian neurologist, as long as she takes medication, she is fit. If [she] has 2 generalized seizure[s] in 1 yr. maybe can resubmit Board."

On September 30, 1996, the applicant was released from active duty upon the termination of her TEMAC. There is no evidence in the record that she underwent a physical examination prior to her release. On October 2, 1996, she was informed that because she had been found FFD, her command would not convene an IMB. On October 6, 1996, based in part on Dr. J's recommendation, Dr. A also found the applicant FFD but recommended that an IMB be convened for her. In November 1996, her command apparently agreed to initiate an IMB. While the IMB was pending, her status was changed to NFFD by Dr. A.

On February 13, 1997, the applicant wrote the commanding officer of her duty station, who was the [redacted] requesting that he advise her of her duty status, as she had received conflicting information from various Coast Guard offices. She also questioned why she had been released from active duty in September if she was NFFD.

On March 13, 1997, the [redacted] responded to the applicant's inquiry, stating that she was a member of the Selected Reserve assigned to [redacted] and that her "most recent drill date was 01 February 1997." The director stated that she was properly released from active duty upon the termination of her TEMAC on September 30, 1996, because she was found FFD on September 12, 1996, and because this opinion was confirmed on October 6, 1996, "by a medical officer who was well acquainted with your medical history."

On March 21, 1997, the IMB found the applicant to be NFFD and recommended referring her to a PEB. The IMB reported that the applicant began experiencing petit mal seizures in December 1990 "following periods of stress." The IMB reported that she was taking Depakote (250 mg. TID) and that since 1990, she had been prescribed, at various times, Dilantin, Tegretol, Felbatal, Neurontin, and Lamictal, but they were discontinued due to ineffectiveness or side effects. The IMB found that the applicant suffered, on average, four or five grand mal seizures per year, in addition to multiple petit mal seizures. The IMB found that she had suffered four grand mal seizures over the past year and was being referred to the Epileptology Center at [redacted] "for consideration of possible surgical intervention." The IMB found that her prognosis was poor and that she was not able to perform the duties of her rate because she was not permitted to drive. It also found that she would probably not become FFD and recommended that she be medically retired.

On April 4, 1997, the applicant's commanding officer endorsed the report of the IMB. He stated that she was able to perform "all duties assigned to her in a satisfactory manner, with the exception of driving." He recommended that she be referred to a PEB. On April 18, 1997, the convening authority approved the report of the IMB and forwarded it to CGPC for a PEB.

On September 3, 1997, CGPC sent a letter to the applicant informing her that the district commander who convened her IMB had no authority to do so. Therefore, because her record indicated that she was found FFD by a PEB in 1993 and at the termination of her TEMAC in September 1996, the report of her IMB would be filed without further action.

On October 29, 1999, the Social Security Administration (SSA) informed the applicant that, as a result of her appeal of a determination that she was not disabled and based on a hearing, she was deemed disabled as of October 1, 1996. The SSA concluded that she had not been gainfully employed since that date and that her seizure disorder was deemed "severe" under SSA regulations, which requires "major motor seizures documented by EEG and by detailed description of a typical seizure pattern, occurring more frequently than once a month, in

spite of three months of prescribed treatment, with daytime and nighttime episodes, which interfere significantly with activity during the day."

On April 7, 2000, the Coast Guard notified the applicant that she had completed at least 20 years of satisfactory federal service and therefore would be eligible to receive retirement pay upon reaching age 60 on December 22, 2011.

VIEWS OF THE COAST GUARD

On September 20, 2000, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief.

The Chief Counsel argued that the FFD determination of the 1993 PEB was correct and remains correct because, although she is unfit for sea duty, the applicant is able to "perform all the job assignments of her rating."

The Chief Counsel stated that CGPC's determination that the applicant's district commander was without authority to convene the IMB in March 1997 was correct because only service-connected medical conditions may be reviewed under the PDES. The Chief Counsel stated that there is no evidence that the ISC district commander made a service-connection determination prior to initiating the applicant's IMB. Because of this lack of evidence, he alleged, CGPC was required to make that determination in his place. He stated that "service-connection analysis for Reserve members of the Coast Guard is [necessary] to ensure that only injuries or disabilities directly associated with a member's service as a reserve member of the U.S. Armed Forces is compensated." He alleged that Reservists are treated differently than members of the regular Coast Guard in this respect because they "are 'on-duty' for very limited periods and must, therefore, demonstrate that their injury or disability was directly related to their limited military service time," whereas for members of the regular Coast Guard, medical conditions are presumed to be service connected unless rebutted by clear and convincing evidence.

The Chief Counsel alleged that CGPC properly determined that the applicant's epilepsy was not service-related and dismissed her IMB. He argued that CGPC's determination was correct because the applicant's "medical record does not support [her allegation of service connection] because her condition was neither created nor aggravated by her occasional drilling in the Coast Guard Reserve." He stated that under Article 2.A.47. of the PDES Manual, "service-connected" disabilities are those that are "incurred or aggravated in the line of duty." The Chief Counsel argued that to be eligible for review under the PDES, the applicant would have to prove that "'but for' her reserve duty, her seizures would not have occurred." The Chief Counsel further argued that, although her district commander should have made a service-connection determination before convening the IMB, his failure to do so was harmless because it led to the extension of her TEMAC.

The Chief Counsel argued that the PDES was designed both to "provide benefits for those members whose military service is terminated due to a serious

service-connected disability, and to prevent the arbitrary separation from the service of those members who incur a disabling injury or disease, and yet remain fit for duty." PDES Manual, Article 1.A. He alleged that "[t]he governing statute and the service's regulations were specifically designed to protect the service member's property right in his or her employment."

The Chief Counsel argued that, because members have a property right in their employment that is constitutionally protected under the Fifth Amendment, "the due process afforded a member *recommended for separation* under PDES is constitutionally required and distinct from the due process afforded a member recommended for retention." The due process due the applicant, he argued, is limited to that afforded by 10 U.S.C. § 61, which "provides that the sole basis for a physical disability determination in the Coast Guard is unfitness to perform duty." The Chief Counsel stated that the record supports the finding of the applicant's command on April 4, 1997, that she was fit for duty. He noted that she continued to drill and accumulate sufficient points for satisfactory drill years in 1997, 1998, 1999, and 2000. Therefore, he argued, she should be estopped from arguing that she should have been found NFFD in September 1996. He also alleged that a review of her medical records indicated that "her seizure condition did not materially change during the period 1993 [when the first IMB and PEB met] through 1996 [when she sought a second IMB and PEB]."

Finally, the Chief Counsel argued, the Coast Guard's failure to follow procedure benefited the applicant because, if in November 1996, her command had found her NFFD and determined that her condition was not service connected, she would have been separated from the Coast Guard with insufficient service for retirement and no severance pay, under Article 12.B.16.b. of the Reserve Administration and Training Manual (RATMAN). Thus, he stated, if the Board granted relief by changing her record to show that she was NFFD in 1996, the correction would jeopardize the applicant's 2000 retirement, which was based on 20 years of service, and the Coast Guard would have to recoup monies paid her for drills from 1996 through 2000. Because such results would harm the applicant, he argued, they are prohibited under the Board's governing statute, 10 U.S.C. § 1552(a)(2).

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On September 19, 2000, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited her to respond within 15 days. On November 3, 2000, the Board received the applicant's response.

The applicant argued that the Chief Counsel's contention that her epilepsy is not service connected and that CGPC's denial of a PEB was therefore proper is clearly erroneous because she was serving on a one-year TEMAC when she experienced seizures in December 1990 and was again serving on active duty orders when she experienced her first grand mal seizure on March 29, 1991. She also alleged that her first PEB was conducted without any finding of service connection by the convening authority for the IMB, so CGPC's refusal to convene a PEB on that basis is inconsistent and pretextual. She further alleged that because

she was on active duty for a period of more than 30 days when the Coast Guard first recognized the potential need for an IMB, under regulations, she should have been retained on active duty and no service-connection determination was necessary. Therefore, she argued, the Coast Guard denied her due process when it released her from active duty and ignored the findings of the 1997 IMB, and the errors committed were not harmless.

The applicant alleged that the Coast Guard's errors resulted in one doctor's FFD finding on September 12, 1996—which was based on a 30-minute consultation and a 3-year-old PEB—determining her status instead of the much more thorough review and findings of the IMB. She alleged that the IMB was required under Article 3.F. of the Medical Manual and that, in light of her numerous generalized seizure episodes, she should have been medically retired by a PEB. She also alleged that she should have been retained on active duty pending the outcome of her PEB, as she was in 1993. Moreover, the applicant argued, her command initiated the IMB in November 1997, and CGPC knew of it at the latest in February 1997, when she sent CGPC a copy of her letter requesting clarification of her status. Therefore, since the Coast Guard was informed of the IMB at least six months before it rejected the results but remained silent and allowed the IMB to proceed, the Board should find that CGPC, by its silence, implicitly authorized her command to convene the IMB.

The applicant also alleged that the Coast Guard violated Article 12.B.6. of the Personnel Manual and Article 11.B.2. of the RATMAN because she was never given a physical examination upon separation or notified about whether or not her epilepsy was considered service connected.

The applicant argued that the Chief Counsel's statements about her service are very misleading because he attempted to classify her as an "occasional drilling" Reservist. She alleged that between her return to the Coast Guard Reserve in August 1989 and her release in September 1996, she performed 4 years and 9 months of active duty and accrued 90 Reserve drill points. Thus, over the 7-year period, she performed 5 years of military service. Therefore, she argued, she should not be considered an "occasional drilling" Reservist, who only performs 16 hours of service per month.

The applicant also argued that the Chief Counsel's reliance on her satisfactory drill years since her release to prove that she is FFD is misleading. Her anniversary year (AY) runs from March 9 through March 8. Therefore, when she was released from active duty on September 30, 1996, she had already completed a satisfactory year for AY 1997. She alleged that during AY 1998, 1999, 2000, and 2001, she was "only allowed to complete the minimum drill points and annual Active Duty for Training (ADT) required for a satisfactory service year [for retirement purposes], which is sixteen (16) hours per month." She alleged that in 1997, she was passed over for a one-year TEMAC at her recruiting center because of her disability. She alleged that the TEMAC was awarded to a less qualified Reservist. She further alleged that there is a standing order to deny her any TEMAC for a period of more than 30 days so that the Coast Guard will never have to convene an IMB and PEB for her.

The applicant alleged that her ability to perform 16 hours of drills each month during AY 1998 through 2000 is not indicative of her ability to perform full-time active duty and so should not be considered proof that she is FFD. She stated that she performed the drills, despite suffering numerous seizures, to safeguard her 20-year retirement because she could not depend on the Coast Guard ever processing her through PDES. Moreover, if she did not perform the drills, she would be subject to punishment under the Uniform Code of Military Justice.

The applicant argued that the purpose of the PDES is not only to prevent the arbitrary separation of disabled service members who can still perform the duties of their rating: it is also to compensate members who cannot find gainful employment in civilian life because of disabilities they have incurred while serving on active duty. Thus, she argued, the Coast Guard improperly denied her processing through the PDES because her seizures began while she was serving on active duty, and they have prevented her from sustaining gainful employment since her improper release from active duty in September 1996.

Finally, the applicant argued that the Chief Counsel's arguments regarding 10 U.S.C. § 1552(a)(2) are insincere and without merit. She stated that if she had been discharged in 1997 based on a finding that she was NFFD due to a non-service-connected disability, she would have been eligible to apply for veterans benefits. Because the Coast Guard retained her in the Reserve but refused to award her TEMAC because of her disability, she was ineligible for veterans benefits. Moreover, she alleged, even if the Coast Guard did recoup her pay for drills she performed after her release from active duty, "there is no administrative or legal precedent to retroactively annul my subsequent satisfactory service performed in good faith." Therefore, she argued, the BCMR could not jeopardize her entitlement to retirement by granting relief that resulted in her being medically retired.

APPLICABLE STATUTES AND REGULATIONS

Disability Retirement Statutes

Title 10 U.S.C. § 1201 provides the following for members who are on active duty for more than 30 continuous days:

> (a) Retirement. Upon a determination by the Secretary concerned that a member described in subsection (c) 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).
>
> (b) Required determinations of disability. Determinations referred to in subsection (a) are determinations by the Secretary that--
>
> (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 or willful neglect, and was not incurred during a period of unauthorized absence; 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 service computed under section 1208 of this title;

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after September 14, 1978.

(c) Eligible members. This section and sections 1202 and 1203 of this title apply to the following members:

(1) A member of a regular component of the armed forces entitled to basic pay.

(2) Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 10148(a) of this title) for a period of more than 30 days.

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--

(A) was incurred before September 24, 1996, as the proximate result of--

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

(ii) traveling directly to or from the place at which such duty is performed; or

(iii) an injury, illness, or disease incurred or aggravated while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training, if the site of the inactive-duty training is outside reasonable commuting distance of the member's residence;

(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;

(ii) while traveling directly to or from the place at which such duty is performed; or

(iii) while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training,

at or in the vicinity of the site of the inactive-duty training, if the site of the inactive-duty training is outside reasonable commuting distance of the member's residence; or

(C) is a result of an injury, illness, or disease incurred or aggravated in line of duty--

(i) while the member was serving on funeral honors duty under section 12503 of this title or section 115 of title 32;

(ii) while the member was traveling to or from the place at which the member was to so serve; or

(iii) while the member remained overnight at or in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence;

(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.

Provisions of the Reserve Administration and Training Manual (RATMAN)

Article 11-B-1 of the RATMAN provides the following:

a. This section applies to reservists who incur or aggravate an injury, illness, or disease in line of duty while performing [inactive duty training], active duty, or while traveling directly to or from such duty or training. These reservists will receive Disability Orders and Notice of Eligibility for Disability Benefits, CG-4671.

b. Reservists serving under active duty orders issued for a period in excess of 30 days normally will be handled through the active duty Physical Disability Evaluation System (PDES) ... . However, if a reservist is released from active duty before the extent of the disability is known, or if the disability is first reported after release from active duty, the provisions of this section shall be followed.

Article 11-B-2.b. of the RATMAN provides that whenever a Reservist reports an injury or illness, she shall undergo a medical examination per Article 3 of the Medical Manual. The Reservist's commanding officer shall require from the examining physician (1) a detailed description of the clinical findings, (2) an opinion as to whether the condition was incurred or aggravated during a period of active duty for training or inactive duty training or, if the physician is a civilian, an opinion as to when the condition was incurred.

Article 11-B-2.c. provides that, if it appears a Reservist's injury or illness will require treatment past the expiration date of her active duty orders, her commanding officer shall inform the district commander of that fact and include in the report an opinion as to whether or not the impairment was incurred in the line of duty. Article 11-B-2.d. states that, "[i]f it appears that the impairment may

require the convening of a Medical Board, follow the procedures of section 3.(I) of the PDES Manual, COMDTINST M1850.2."

Article 11-B-4.a.(1) provides that Reservists who are found not fit for duty as the result of an illness or injury incurred or aggravated "in the line of duty while performing active duty" are entitled to the same pay and allowances provided by law or regulation for a member of the regular Coast Guard.

Article 11-B-7 provides that "Reservists serving on active duty in excess of 30 days may be retained on active duty until fit for full duty or disability separation processing has been completed per Chapter 12, Personnel Manual, COMDTINST M1000.6A (series)."

Article 12-B-1.a. states that "[t]he provisions of section 12-B, Personnel Manual, COMDTINST M1000.6 (series) concerning separation of enlisted personnel apply to enlisted reservists serving on inactive duty or active duty for training, except as specifically modified in this section." Article 12-B-5 of the RATMAN states that the provisions of Article 12-B-6 of the Personnel Manual, which requires a physical examination prior to separation, do not apply to Reservists.

Article 12-B-16 of the RATMAN provides that, upon the finding of a medical officer that a Reservist has a disqualifying physical condition, as defined in Article 3-F of the Medical Manual, the district commander will, based on the medical officer's report, "determine whether the condition is service connected and take the following action: a. When the condition is found to be service connected, make a determination as to separation/retention in accordance with the Physical Disability Evaluation System (PDES) ... . b. Initiate separation action when the condition is found not to be service connected."

Article 12-D-2 of the RATMAN, which governs disability retirement for members on active duty for more than 30 days, provides the following:

> A member of the Reserve entitled to basic pay, who is called or ordered to ACTIVE DUTY for more than 30 days ... and who is determined by the Commandant to be unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, may be permanently retired with retired pay, if the Commandant also determines that:
>
> a. The member's disability is of a permanent nature, and
> b. Is not the result of his or her intentional misconduct ..., and
> c. Either:
> (1) The member has at least 20 years service computed under 10 U.S.C. 1208, or
> (2) The disability is at least 30 percent, and either
> (a) The member has at least 8 years of service computed under 10 U.S.C. 1208, or
> (b) The disability is the proximate result of performing active duty, or
> (c) The disability was incurred in line of duty in time of war or national emergency.

Article 12-D-3, which governs disability retirement for members on active duty for 30 days or less, provides the following:

> A member of the Reserve not covered by the above section, who is determined by the Commandant to be unfit to perform the duties of his office, grade, rank, or rating because of physical disability resulting from injury, may be permanently retired with retired pay, if the Commandant also determines that:
>
> a. The disability is of a permanent nature, and
> b. Is the proximate result of performing active or inactive duty, or
> c. Is not the result of the member's intentional misconduct or willful neglect ..., and
> d. Either:
> (1) The member has at least 20 years service computed under 10 U.S.C. 1208, or
> (2) The disability is at least 30 percent.

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

According to Article 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." Article 3.F. lists medical conditions that "are normally disqualifying" for retention 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 "convulsive disorders ... when seizures are not adequately controlled (complete freedom from seizure of any type) by standard drugs which are relatively nontoxic and which do not require frequent clinical and laboratory reevaluation."

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

> [a]ny member undergoing separation from the service who disagrees with the assumption of fitness for duty and claims to have a physical disability as defined in section 2-A-38 of COMDTINST M1850.2 (series), Physical Disability Evaluation System, shall submit written objections, within 10 days of signing the Chronological Record of Service (CG-4057), to Commander [Military Personnel Command]. . . .
>
> . . . Commander [Military Personnel Command] will evaluate each case and, based upon information submitted, take one of the following actions:
>
> (1) find separation appropriate, in which case the individual will be so notified and the normal separation process completed;
>
> (2) find separation inappropriate, in which case the entire record will be returned and appropriate action recommended; or
>
> (3) request additional documentation before making a determination.

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

> [w]hen a member has an impairment (in accordance with section 3-F of this manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation.

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

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

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

The PDES Manual governs the separation of members due to physical disability. Article 1.A. states that the PDES was "enacted primarily for the purpose of maintaining a vital and fit military organization will full consciousness of the necessity for the maximum use of available work force. These laws provide benefits for eligible service member whose military service is terminated due to arbitrary separation from the service of those individuals who incur a disabling injury or disease."

Article 2.A.23. defines "incurrence of disability" as the moment "when the physical 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.

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. ... 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 ...
>
> (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.
>
> • • •
>
> f. The following standards and criteria will not be used as a basis for making determinations that a service member is unfit for continued military service by reasons of physical disability.
>
> (1) Inability to perform all duties of their office, grade, rank or rating in every geographic location and under every conceivable circumstance will not be the sole basis for a finding of unfitness...
>
> (2) Inability to satisfy the standards for initial entry into military service ...
>
> (5) The presence of one or more physical defects that are sufficient to require referral for evaluation or that may be unfitting for service members in a different office, grade, rank or rating.

Under Article 2.C.2.f., members may not be found unfit for duty just because they may be unable to perform every conceivable duty of their rate or because they would be unable to meet the standards for entry into military service.

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, a member of the Coast Guard Reserve, alleged that she was wrongly denied a physical examination prior to her release from active duty under Article 12.B.6. of the Personnel Manual and that, if she had undergone such an examination, she would have objected to any finding that she was FFD and been entitled to a review of that finding under Article 12.B.6.c. However, Article 12.B.5. of the RATMAN states that Article 12.B.6. of the Personnel Manual does not apply to Reservists.

3. The applicant alleged that the Coast Guard improperly released her from active duty on September 30, 1996, instead of retaining her and initiating an IMB and PEB under Article 11-B-7 of the RATMAN. Under Article 12.B.16. of the RATMAN, when a Reservist was found to have a "disqualifying" medical condition, as defined in Chapter 3.F. of the Medical Manual, the district commander was required to direct a medical officer to prepare a report on the Reservist including an opinion as to whether the condition was service connected. Before referring a Reservist for processing through the PDES, the district commander was required to determine that the member's condition was service connected, based on the report of the medical officer. A member whose disability was not service connected was subject to discharge. RATMAN, Article 12.B.16.b.

4. The "but for" or "proximate result" test for determining service connection—which was propounded by the Chief Counsel in his advisory opinion and apparently was applied by CGPC to the applicant's case in 1997—is only proper for Reservists serving on active duty for 30 days or fewer. 10 U.S.C. § 1204. While the applicant was serving on extended TEMAC in September 1996, she was entitled to processing under the PDES for a disability retirement under the same provisions that apply to members of the regular Coast Guard. 10 U.S.C. § 1201; RATMAN 11-B-1.b. Those laws required her to prove that she was NFFD due to an injury or illness that she incurred while serving on extended active duty.[3]

5. Therefore, to prove that the Coast Guard erroneously and unjustly denied her PDES processing while she was serving on extended active duty in September 1996, the applicant must prove both that she met the requirements for PDES processing under Article 3.F. of the Medical Manual and that she incurred her epilepsy while serving on extended active duty. RATMAN, Articles 11.B.1.b., 12.B.16., and 12.D.2. Absent strong evidence to the contrary, military officers, including the applicant's command and doctors, are presumed to have executed their duties correctly, lawfully, and in good faith. *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Moreover, although the Board has authority to correct records reflecting

[3] Although the applicant's extended TEMACs were separated by periods of inactive duty, there is no law requiring the "proximate result" test, rather than the "incurring" test, to be applied when an illness or injury incurred during one period of extended TEMAC causes the Reservist to be NFFD during a later period of extended TEMAC.

the medical decisions of physicians, it should give great deference to the professional assessment of a physician who actually examined a member at the pertinent time in question.

6. According to Article 3.F. of the Medical Manual, if a member is found to have a "disqualifying" physical impairment during a medical examination, an IMB "shall" be held to determine the member's disposition. Given her continuing seizures despite medication, the applicant's condition clearly constituted one of the disqualifying impairments listed in Article 3.F.: "convulsive disorders ... when seizures are not adequately controlled (complete freedom from seizure of any type) by standard drugs which are relatively nontoxic and which do not require frequent clinical and laboratory reevaluation." However, the applicant was being released from active duty at the end of September 1996, not because she was physically unable to perform her duties at the recruiting center, but because her TEMAC was ending. Article 3.B.6. of the Medical Manual 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 an IMB only if the members' "physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating."

7. The applicant was found FFD by a Navy neurologist on September 12, 1996. The neurologist also apparently considered but rejected the idea of convening an IMB for the applicant at that time. These decisions were based on her military medical record, on information provided by the applicant about her then-current condition, and on the fact that in 1993 a PEB had determined that the applicant's seizures did not make her unfit to perform the duties of a yeoman. The applicant alleged that the neurologist was unfamiliar with her case and that her command's subsequent decision to convene an IMB and that IMB's finding in 1997 that she was NFFD prove that the neurologist's decisions were erroneous. However, the neurologist's FFD finding was confirmed by Dr. A, a Coast Guard doctor more familiar with her condition, on October 6, 1996.

8. Moreover, while suffering complex partial seizures, the applicant continued to perform her duties as a yeoman at the recruiting center until her contract terminated on September 30, 1996. Her continued performance creates a presumption of fitness for duty that may be overcome by a preponderance of the evidence. PDES Manual, Articles 2.B.1. and 2.B.2. The duties of members in the yeomen rating are normally limited to administrative duties, involving matters such as pay, personnel, and travel orders, and are performed in an office. Impairments such as epilepsy do not preclude members from being FFD if they can perform the duties of their rates. PDES Manual, Article 2.C.2.c.

9. Furthermore, the applicant not only continued to do her job until the end of her TEMAC in September 1996, she also apparently (upon her own admission) applied for another long-term TEMAC in 1997 and continued to drill to accumulate satisfactory years for retirement in 1998, 1999, and 2000. In addition, when her command forwarded the report of the IMB to CGPC on April 4,

1997, he wrote that she was able to perform "all duties assigned to her in a satisfactory manner, with the exception of driving." Under Article 2.A.47. of the PDES Manual, the applicant's inability to drive did not necessarily prevent her from being considered fit for duty. The applicant had already successfully performed the duties of her rate on TEMAC while unable to drive because of her seizures. Therefore, although she may have been unable to drive, and although the SSA has found that her epilepsy is "severe" by its standards and that she has not held a long-term, full-time job since September 1996, the preponderance of the evidence in the record before this Board does not indicate that the Navy neurologist was wrong in finding that the applicant was FFD in September 1996 despite her epilepsy. Thus, whether or not her epilepsy is service connected, the applicant has not proved that she was erroneously or unjustly denied PDES processing in September 1996.

10. The applicant alleged that the Coast Guard has refused to award her another TEMAC since September 1996 because of her epilepsy and that this refusal proves that she was NFFD. However, the applicant presented no evidence whatsoever, other than the fact that she has not served on TEMAC again, to prove that her epilepsy is the cause of her failure to receive a further TEMAC. Without evidence to support her allegation that the Coast Guard has refused to offer her extended TEMAC because of her disability, the Board cannot consider the fact that she has not served on TEMAC as proof that she was actually NFFD in September 1996.

11. The applicant alleged that the Coast Guard improperly refused to convene a PEB for her after she was found NFFD by an IMB in March 1997. As indicated in Finding 3, above, under Article 12.B.16. of the RATMAN, prior to convening an IMB on the applicant, her district commander should have directed a medical officer to prepare a report on her condition, including an opinion as to whether it was service connected, and he should have made a determination about whether her epilepsy is service connected based on that opinion. The record indicates that her district commander failed to make that determination. The record also indicates that she was able to perform all the duties of her rating, except driving.

12. The Chief Counsel argued that, because the applicant's district commander failed to require an opinion from a medical officer about service connection and failed to make a determination about service connection, it was proper for CGPC, after receiving the results of the IMB, to make the determination in his place. The Chief Counsel further argued that CGPC reviewed the applicant's record and properly found that the applicant's epilepsy was not service connected because it was not a proximate result of her military service.[4]

13. Under 10 U.S.C. §§ 1201 and 1204, whether a member's entitlement to disability retirement is determined by when it was "incurred" or by whether it

[4] Of course, by this logic, if the applicant's epilepsy was not service connected, she also should not have undergone PDES processing in 1992 and 1993. There is no evidence in the record as to whether a service-connection determination was made at that time.

was the proximate result of active duty depends upon whether the member was on active duty for a period longer than 30 days at the time she became unfit for duty because of the injury or illness, rather than at the time the injury or illness was incurred. Therefore, although whether Congress intended this result is unclear, the disability of a member whose injury or illness is incurred while she is serving on extended TEMAC but does not render her unfit for duty until later, when she is no longer serving on TEMAC, must be the proximate result of the member's military service. Thus, under the statutes, any service-connection determination made while the applicant was not on extended TEMAC, after September 1996, must be based on whether her epilepsy is the proximate result of her military service and not on whether she incurred epilepsy while serving on extended TEMAC.

14. Under Article 12.B.16. of the RATMAN, a determination of service connection must be made with the input of a medical officer, presumably one familiar with the member's medical history. It is unclear from the record whether CGPC consulted any medical officer familiar with the applicant's case prior to deciding that her epilepsy was not service connected. CGPC's letter of September 3, 1997, denying further PDES processing, provided no explanation whatsoever for its determination that her district commander "had no authority to convene" the IMB. Only upon inquiry by the Chief Counsel's office did CGPC reveal that the district commander's alleged lack of authority was due only to his failure to make a determination of service connection.

15. Very few of the applicant's medical records concerning her epilepsy are contained in her military record because she has been treated primarily by private doctors. The lack of such records in her military file does not necessarily prove that her condition was not service connected. While it may seem unlikely for the onset of epilepsy not to have been recorded in a member's military medical file, it is quite possible if the epilepsy began at the end of a period of TEMAC. For example, on August 25, 1992, a doctor indicated that one of the first signs of the applicant's epilepsy may have been a 5-day headache, which was misdiagnosed as "possibly" TMJ, at the end of her extended TEMAC in February 1983.

16. Of the few records in the applicant's military medical file, at least some—such as the 1992 IMB report and the report of a consultation on August 25, 1992—suggest that her epilepsy may have been incurred while she was serving on extended active duty. The fact that she was processed through the PDES in 1992 and 1993 could also be considered evidence that service connection was assumed at that time. On the other hand, on February 12, 1992, a doctor found that her epilepsy was probably idiopathic, which most often begins in childhood and has no apparent cause. Therefore, when CGPC decided to substitute its determination for that of her district commander and a medical officer familiar with her case, it apparently had very little and very contradictory information about the onset and etiology of her epilepsy on which to base its decision. Given that epilepsy has several possible causes and can begin at any age after a head injury or stroke, CGPC's determination, apparently based only on an administrative review of her military medical records, is hardly a fair substitute for the opinion of a medical officer familiar with her medical history and condition,

which was required under Article 12.B.16. of the RATMAN. Moreover, PEBs regularly make findings about whether or not medical conditions have been incurred while on active duty or to what extent they have been aggravated while on active duty.

17. Therefore, and in light of the lack of evidence that a service-connection determination was required for the applicant in 1992, the Board is persuaded that, once the applicant's command had begun processing her through the PDES in 1997 without making an initial service-connection determination, it was unjust for CGPC to deny her a PEB, without a coherent explanation or right of appeal, by substituting a determination based on a review of her sparse and ambiguous military medical records for a determination made by a medical officer familiar with her medical history and condition or by a PEB, as required by regulation. In making this finding, the Board bears in mind that CGPC's determination of no service connection must be given the presumption of correctness. However, CGPC's overly obtuse and unexplained handling of the decision has undermined the Board's confidence that its determination was made with sufficient care to guarantee that any due process denied the applicant by her district commander's failure to make a service-connection determination based on a medical officer's opinion constituted harmless error.

18. Whether the applicant's epilepsy was caused by or aggravated by her military service remains unclear even though the record before the Board contains some of the applicant's non-military medical records. There is evidence that she suffered a severe headache in 1983 while she was serving on extended TEMAC and that the headache was diagnosed as "possibly TMJ." In addition, the record indicates that in August 1992, she reported to one doctor that she began developing complex partial seizures in 1983 and that the headache was not TMJ but a symptom of the epilepsy and that she suffered at least one grand mal seizure and many other complex partial seizures while serving on extended TEMAC.

19. Contrary to this evidence of service connection, however, doctors noted on May 3, 1989, that she already had a documented history of recurring seizures and on February 12, 1992, that she probably had idiopathic epilepsy, which is most often incurred in childhood. Moreover, the record indicates that the applicant herself may have obscured the origin and onset of her seizures by denying having epilepsy or "fits" when reporting her medical history to the Coast Guard during a regular physical examination in 1985; during a physical examination to transfer from the Army Reserve back to the Coast Guard Reserve on August 1, 1989 (less than three months after she sought treatment on May 3, 1989, for "simple partial seizures"); and again during a physical examination on May 29, 1991, exactly two months after she suffered a grand mal seizure (the first such seizure documented in the medical records she submitted to the BCMR).

20. It is clear from the record that the applicant has long been treated for her seizures by private, civilian doctors. It is also clear that she failed to submit those records from her private doctors that would indicate the etiology of her epilepsy and prove when she first began experiencing seizures. Even if, as she

alleged, she suffered her first grand mal seizure while serving on TEMAC on March 29, 1991, this would not mean that her military service caused or aggravated her epilepsy or that she "incurred" epilepsy on that day. Under Articles 2.A.23. and 2.B.1. of the PDES Manual, "physical disability due to the natural progress of disease or injury is incurred when the disease or injury causing the disability is contracted."

21. A finding of service connection should be made by a medical officer familiar with the applicant's medical history. The Board is persuaded that the applicant was denied a PEB based on a negative determination of service connection made without sufficient evidence to reliably prove the etiology of her epilepsy and without input from a medical officer familiar with her medical history. Therefore, the applicant has proved by a preponderance of the evidence that she was denied due process with respect to the determination of whether her epilepsy, or any aggravation of it, was service connected. The Board has more medical records before it than were considered by CGPC in 1997 but is hardly better placed to make a service-connection determination.

22. Accordingly, the applicant should be granted relief by having the Coast Guard convene a PEB to determine whether or not her epilepsy or any aggravation thereof is service connected. The applicant should have the chance to submit for consideration by the PEB any private civilian medical records that might shed light on the origin or aggravation of her epilepsy. If that PEB finds any service connection, the Coast Guard should continue to process the applicant under the PDES in accordance with regulation.

23. If the PEB should find that some or all of the applicant's epilepsy is service connected and that her epilepsy rendered her NFFD and thus entitled to a disability retirement as of a specific date, there is no reason to delete any record of drills or other service she has performed in the meantime even if pay she received for that service must be deducted from disability payments. Under no circumstances resulting from this decision should she lose retirement benefits based on her satisfactory years of service, unless she becomes entitled to retirement benefits due to a physical disability.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [redacted] for correction of her military record is hereby granted as follows:

At least two months after but within four months of the date of this decision, the Coast Guard shall convene a PEB to determine whether the applicant's epilepsy or any aggravation thereof is service connected. In making this determination, the PEB shall consider any medical records submitted by the applicant prior to the date the PEB convenes. The Coast Guard shall not be required to bring her back on active duty solely for the purpose of convening the PEB.

If the PEB determines that the applicant's epilepsy or any aggravation thereof is service connected, the PEB and the Coast Guard shall proceed in accordance with regulation to determine whether she was rendered unfit for duty by her seizures and is entitled to a disability retirement or other benefits as of a specific date. If she is found to have been entitled to retirement by reason of physical disability as of some past date, the Coast Guard shall pay her any sums she is due.

Although because of this order, the applicant may be medically retired from the Reserve, under no circumstances resulting from this order shall any record of drills or other service the applicant has performed to date be erased from her record even if some payments must be recouped to offset physical disability retirement payments she might receive as a result of this order.

[redacted]