DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-124

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on May 2, 2014, the Chair docketed the case and assigned it to [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 19, 2014, is approved and 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, who was honorably discharged as an [redacted]E-7, on March 3, 2014, asked the Board to direct the Coast Guard to authorize the payment of separation pay, which the applicant did not receive upon his discharge. The applicant also asked the Board to reinstate the transfer eligibility of his Post-9/11 GI Bill educational benefits.[1] The applicant alleged that he was unjustly denied separation pay and the ability to transfer his educational benefits to his dependents upon his discharge from the Coast Guard for failing to meet the required weight standards. The applicant's DD-214, dated February 12, 2014, shows a separation code of JCR[2] (weight control failure), and a reentry code of RE-3F[3] (exceeds weight standards). In support of his application, the applicant submitted (1) a declaration and a memorandum in support of his allegations, (2) his DD-214, (3) discharge paperwork, and (4) medical documentation.

The applicant alleged that on March 3, 2014, after more than eighteen years on active duty in the Coast Guard, he was involuntarily discharged for failing to comply with the weight standards set forth in Coast Guard policy. The applicant stated that he was never considered for

[1] 38 U.S.C. § 3319 (authorizing the Secretary of Defense, as a recruitment and retention tool, to prescribe regulations allowing eligible servicemembers to transfer a portion of their entitlement to educational assistance to their eligible dependents).
[2] JCR – Involuntary discharge directed by established directive (no board entitlement) when a member fails to meet established weight control standards.
[3] RE-3F – Eligible for reenlistment except for disqualifying factor.

or counseled on separation pay prior to his discharge even though he was entitled to it under Chapter 10.H. of the Pay Manual, COMDTINST M7220.29B. He argued that none of the circumstances precluding payment of separation under Chapter 10.H. apply to a member discharged for weight control failure.

The applicant also stated that in January 2013, over a year before his discharge, he transferred all 36 months of his Post-9/11 GI Bill benefits to his daughter. However, because he was involuntarily discharged in March 2014, he failed to complete the obligatory service commitment required of members who transfer their benefits and so his transfer of benefits to his daughter was terminated.

The applicant argued that his eligibility to transfer his benefits should not have been terminated because prior to his discharge, he was diagnosed at a military treatment facility with severe "obstructive sleep apnea." The applicant stated that obstructive sleep apnea has been linked to weight gain and/or difficulties in losing weight. The applicant alleged that his struggles with maintaining his weight and compliance with the Coast Guard weight standards were caused in large part by his sleep apnea and that his diagnosis should therefore meet the exception to be a "physical condition… that did not result from the member's own misconduct but did interfere with the performance of his duties" under the rules for transferring benefits. The applicant claimed that since he was unable to complete his service requirement required to transfer his GI Bill benefits due to a physical condition, "weight gain exacerbated by sleep apnea," the transfer of his educational benefits to his daughter should not have been terminated.

As part of his record, the applicant also included a signed declaration stating that he is "willing to serve in the Coast Guard Reserves for 3 years and [is] willing to sign any documentation in any format to memorialize [his] willingness to serve in the USCG Reserves."[4]

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in 1994 and served on active duty until March 29, 2001, when he was voluntarily discharged. He reenlisted on October 8, 2002, and served on continuous active duty until his discharge for weight control failure on March 3, 2014.

About four years before his discharge, on June 10, 2010, the applicant received a Page 7 stating that with a height of 68 inches and weight of 191 pounds, he was 11 pounds overweight and that if he failed to reach compliance by the end of the probationary period, August 17, 2010, he would be recommended for separation. He was required to complete a wellness profile and fitness plan, to participate in a fitness activity for at least an hour three days per week, and to undergo a monthly fitness assessment while on probation. The applicant acknowledged the entry by signature. Another Page 7, dated September 23, 2010, states that he weighed 180 pounds and achieved 24% body fat and so he met the required standards and his probationary period had ended.

[4] 10 U.S.C. § 1174(e) states that "[a]s a condition of receiving separation pay under this section, a person otherwise eligible for that pay shall be required to enter into a written agreement with the Secretary concerned to serve in the Ready Reserve of a reserve component for a period of not less than three years following the person's discharge or release from active duty."

On November 2, 2012, the applicant received a Page 7 stating that at 187 pounds, he was 7 pounds overweight and had 29% body fat. He was placed on probation until February 2, 2013, at which time he was required to have lost the excess weight. The Page 7 further states that this non-compliant semi-annual weigh-in would be considered the applicant's "first strike"[5] and that he would be recommended for separation if he was not compliant by February 2, 2013. The applicant signed and acknowledged the Page 7. Another Page 7, dated January 31, 2013, states that he had achieved 26% body fat, met the required standards, and so his probationary period had ended.

On October 4, 2013, at age 41, the applicant received a Page 7 stating that at 189 pounds, he was 9 pounds overweight. He was placed on probation until January 4, 2014, at which time he was required to have lost the excess weight or reduced his body fat percentage from 29% to 26%. He was advised that if he was not compliant by January 4, 2014, he would be processed for separation. The applicant signed and acknowledged the Page 7.

On December 2, 2013, a physician certified on a Command Medical Referral Form that there was "no underlying medical condition for the member's excess weight"; that it was safe for the applicant to lose the excess weight and comply with standards; that the member had declined nutritional counseling; and that there was no medical condition that would make fitness activities detrimental to the applicant's health.

On January 4, 2014, the applicant weighed 197 pounds and had 30% body fat. He was notified on a Page 7 that that he had not achieved his maximum allowable weight and percent body fat by the end of his probationary period and he would therefore be recommended for separation. The applicant signed and acknowledged the Page 7.

Also on January 4, 2014, the applicant underwent testing for sleep apnea and was diagnosed with obstructive sleep apnea.[6]

On January 6, 2014, the applicant was notified by memorandum of the intent to discharge him for failing to comply with the maximum allowable weight or body fat standards set forth in Coast Guard policy. The applicant signed a form acknowledging the notification, waiving his right to submit a statement, and indicating that he did not object to being discharged.

On January 14, 2014, a physician certified on another Command Medical Referral Form that there was "no underlying medical condition for the member's excess weight"; that it was safe for the applicant to lose the excess weight and comply with standards; that the member had

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[5] COMDTINST M1020.8H, Article 4.A., states that members must be processed for separation if they are non-compliant at the end of weight probation, fail to make progress during weight probation, are placed on weight probation for a third time in 14 months, fail a third consecutive semiannual weigh-in, or have so much excess weight and body fat percentage that their probationary period (calculated at a rate of one pound per week or one month per one percent body fat, whichever is greater) would exceed 35 weeks.

[6] Sleep apnea is caused by the obstruction of the airway during sleep, and obesity is the most common "predisposing factor" for the condition. A diagnosis of "obstructive sleep apnea/hypopnea syndrome" requires "unexplained daytime sleepiness with at least five obstructed breathing events (apnea or hypopnea) per hour of sleep." HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 18th ed. (McGraw-Hill, 2012), p. 2186.

declined nutritional counseling; and that there was no medical condition that would make fitness activities detrimental to the applicant's health.

On January 27, 2014, a Separation Authorization was entered into the applicant's record with an effective date of March 3, 2014. The authorization noted that a Page 7 entry was to be entered into the applicant's record stating the following with regard to the applicant's possible future reenlistment:

> Active duty enlisted members discharged for exceeding the maximum allowable weight or for appearance shortcomings may request reenlistment to their former rate provided member is within the maximum allowable weight, meets appearance standards and has been out of the service no longer than 24 months. The service's decision to authorize reenlistment will be based on its needs and the member's past performance.

The applicant was honorably discharged on March 3, 2014, at the rate of E-7[redacted], for the convenience of the Government in accordance with Article 1.B.12. of the Military Separations Manual, COMDTINST M1000.4.[7]

VIEWS OF THE COAST GUARD

On September 18, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC).

PSC stated that the applicant's discharge for failure to meet the maximum allowable weight standards does not warrant separation pay. PSC stated that under Article 4.d.(8) of Commandant Instruction 1910.1, *Eligibility of Regular and Reserve Enlisted Personnel for Separation Pay*, members who are separated for "failure to meet the maximum allowable weight standards" are *not eligible* for separation pay. PSC further stated that while the applicant claimed that sleep apnea contributed to his weight gain, it is insufficient evidence to cause a change to the classification of his discharge because his physician did not identify sleep apnea as an underlying medical condition for the applicant's excess weight.

With regard to the applicant's transfer of his Post-9/11 GI Bill benefits, PSC stated that the applicant's discharge for failure to meet weight standards prevented him from meeting the obligated active duty service requirement for transferring the benefits, and so he is no longer entitled to transfer them. PSC stated that a discharge for weight control failure "is not included as an exception to meeting this requirement" and "does not warrant exception" under DoDI 1341.13.

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[7] COMDTINST M1000.4, Article 1.B.12., authorizes separating a member for the convenience of the Government for "[o]besity, provided a medical officer certifies a proximate cause of the obesity is excessive voluntary intake of food or drink, rather than organic or other similar causes apparently beyond the member's control."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 22, 2014, the Chair of the BCMR sent the applicant a copy of the Coast Guard's views and invited him to submit a written response within thirty days. The BCMR did not receive a response.

APPLICABLE LAW AND POLICY

Weight and Body Fat Standards Program

Article 1.A. of COMDTINST 1020.8H, Coast Guard Weight and Body Fat Standards Program, states that the purpose of the standards are applicable to all Coast Guard military personnel and are intended to ensure that all military personnel maintain a healthy weight and body fat, are capable of meeting the service's operational needs, and present a sharp, professional military appearance. Article 1.B. states that a member must "[m]aintain compliance with weight and body fat standards at all times, unless specifically stated otherwise by this Manual." Article 4.A. states that a member must be processed for separation if he fails to come into compliance with the standards by the end of a probationary period.

Separation Pay

Title 10 U.S.C. § 1174(b)(1) states the following:

> A regular enlisted member of an armed force who is discharged involuntarily or as the result of the denial of the reenlistment of the member and who has completed six or more, but less than 20, years of active service immediately before that discharge is entitled to separation pay computed under subsection (d) unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.

Chapter 10.H.1.b. of the Coast Guard Pay Manual, COMDTINST M7220.29B, states that enlisted member may be entitled to separation if they have at least 6 but less than 20 years of active duty and was involuntarily discharged. Chapter 10.H.2. includes a list of members who may not receive separation pay. The list includes members being separated for unsatisfactory performance, unsuitability, or misconduct under Article 12 of the Personnel Manual (now Article 1 of the Military Separations Manual) and when a "determination is made by the Commander, CG Personnel Service Center, that the member's separation does not warrant payment."

COMDTINST 1910.1, *Eligibility of Regular and Reserve Enlisted Personnel for Separation Pay,* "establishes policy, procedures, and responsibilities for determining eligibility for separation pay for Regular and Reserve enlisted members who are involuntarily separated from active duty." Paragraph 3 notes that under 10 U.S.C. § 1174, the Coast Guard may establish the conditions under which members may receive full or half separation pay and that any member separated for substandard performance, unsuitability, or misconduct may not receive separation pay. Paragraph 4.d. lists the circumstances under which members are <u>not</u> eligible for separation pay, such as when they are being separated as a result of a court-martial sentence, for misconduct, for unsatisfactory performance, or under other than honorable conditions. Number (8) on

the list is, "The member is being separated for failure to meet the maximum allowable weight standards."

Post-9/11 GI Bill

Title 38 U.S.C. § 3319 provides the following:

> (a) In general.--(1) Subject to the provisions of this section, the Secretary concerned may permit an individual described in subsection (b) who is entitled to educational assistance under this chapter to elect to transfer to one or more of the dependents specified in subsection (c) a portion of such individual's entitlement to such assistance, subject to the limitation under subsection (d).
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> (2) The purpose of the authority in paragraph (1) is to promote recruitment and retention in the uniformed services. The Secretary concerned may exercise the authority for that purpose when authorized by the Secretary of Defense in the national security interests of the United States.
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> (b) Eligible individuals.--An individual referred to in subsection (a) is any member of the uniformed services who, at the time of the approval of the individual's request to transfer entitlement to educational assistance under this section, has completed at least--
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> (1) six years of service in the armed forces and enters into an agreement to serve at least four more years as a member of the uniformed services; or
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> (2) the years of service as determined in regulations pursuant to subsection (j).
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> (f) Time for transfer; revocation and modification.--
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> (1) Time for transfer.--Subject to the time limitation for use of entitlement under section 3321 an individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement only while serving as a member of the armed forces when the transfer is executed.
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> (j) Regulations.--(1) The Secretary of Defense, in coordination with the Secretary of Veterans Affairs, shall prescribe regulations for purposes of this section.
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> (2) Such regulations shall specify--
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> (A) the manner of authorizing the transfer of entitlements under this section;
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> (B) the eligibility criteria in accordance with subsection (b); and
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> (C) the manner and effect of an election to modify or revoke a transfer of entitlement under subsection (f)(2). [Emphasis added.]

Under both Directive Type Memorandum (DTM) 09-003, issued on June 22, 2009, and Department of Defense Instruction 1341.13, issued on May 31, 2013, which both apply to the Coast Guard, to be eligible to transfer one's Post-9/11 GI Bill educational benefits, a member on active duty must have performed at least six years of military service and agree to serve four more years in the military. Enclosure 3 of DoDI 1341.13, paragraph 3.g., *Failure to Complete Service Agreement*, states the following:

> (1) Except as provided in this section of this enclosure, if an individual transferring entitlement under this section fails to complete the service agreed to consistent with paragraph 3.a. of this enclosure in accordance with the terms of the agreement, the amount of any transferred entitlement that is used as of the date of such failure shall be treated as an overpayment of educational assistance and shall be subject to collection by VA.
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> (2) Subparagraph 3.g.(1) of this enclosure shall not apply to an individual who fails to complete service agreement due to:
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> (a) His or her death.
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(d) Discharge or release from active duty or the Selected Reserve for a physical or mental condition, not a disability that did not result from his or her willful misconduct, but did interfere with the performance of duty.

FINDINGS AND CONCLUSIONS

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

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

2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant alleged that he discovered the alleged error or injustice on March 5, 2014. The applicant was discharged on March 3, 2014. Therefore, the application is timely.

3. The applicant asked the Board to direct the Coast Guard to authorize the payment of separation pay, which the applicant did not receive upon his discharge, and also to reinstate the transfer eligibility of his Post-9/11 GI Bill benefits. The applicant alleged that he was unjustly denied separation pay and the ability to transfer his educational benefits upon his discharge from the Coast Guard for failing to meet the required weight standards. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[8] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[9]

4. Under 10 U.S.C. § 1552, the Board is authorized to "correct an error or remove an injustice" in any Coast Guard military record. "Error" means a mistake of a significant fact or law and includes a violation by the Coast Guard of its own regulations.[10] For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."[11] The Board has authority to determine whether an injustice exists on a "case-by-case basis."[12] Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its man-

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[8] 33 C.F.R. § 52.24(b).

[9] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

[10] *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("'Error' means legal or factual error."); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations.").

[11] *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

[12] Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

date,"[13] and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."[14]

5. The applicant argued that he was unjustly denied separation pay to which he was entitled under the Pay Manual, COMDTINST M7220.29B, when he was involuntarily discharged for failing to meet the required weight standards on March 3, 2014. While the list of circumstances that preclude separation pay in the Pay Manual does not expressly include being discharged for weight control failure, the list of such circumstances in the more specific instruction governing separation pay, COMDTINST 1910.1, paragraph 4.d., does include "being separated for failure to meet the maximum allowable weight standards." Therefore, Coast Guard policy does not allow payment of separation pay to members who, like the applicant, are discharged for failing to meet the weight standards.

6. The applicant alleged that his non-receipt of separation pay is unjust despite the rule because his obesity was caused by sleep apnea and he had more than eighteen years of service. In fact, however, obesity is the most common "predisposing factor" for sleep apnea,[15] a physician repeatedly certified that the applicant had no underlying medical condition that was causing his obesity, and the applicant was able to comply with the weight standards during probationary periods through diet and exercise twice previously. Given the policy, the lack of a compelling explanation for the applicant's failure to comply with the weight standards, and his lack of objection to his discharge upon notification, the Board is not persuaded that his non-receipt of separation pay constitutes an error or injustice.

7. With regard to the transferability of his educational benefits, the applicant stated that he transferred his benefits to his dependent in January 2013 but is now erroneously deemed ineligible to do so because he was discharged for weight control failure and did not complete the four-year obligated service requirement. The applicant argued that his discharge for weight control failure should not block the transfer of his benefits because his obesity and sleep apnea fall into the exception for discharges caused by a "physical condition … that did not result from the member's own misconduct but did interfere with the performance of his duties" under DTM 09-003, which is mirrored in the current instruction, DoDI 1341.13. PSC argued, without elaboration, that a discharge for weight control failure does not fall within this exception or warrant an exception.

8. Under COMDTINST 1020.8H, Coast Guard members are required to comply with the Coast Guard's weight and body fat standards unless a physician certifies that they are unable to do so, or it is unsafe for them to do so, because of an underlying medical condition. Failing to abide by the requirements in the manual is, in essence, failing to obey an order or regulation and so constitutes a form of misconduct. Because the applicant's physician repeatedly certified his lack of an underlying medical condition preventing his weight loss and his ability to comply with the standards safely, the preponderance of the evidence shows that the applicant could have but willfully failed to comply with the standards during this final weight probationary

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[13] *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).
[14] *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).
[15] *See* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 18th ed. (McGraw-Hill, 2012), p. 2186.

period even though he had successfully complied through diet and exercise twice before. Therefore, the Coast Guard's interpretation of the regulations in DoDI 1341.13 and DTM 09-003 as not providing an exception to the four-year obligated service requirement for members discharged for weight control failure is not unreasonable or unjust.

9. The applicant has not proven by a preponderance of the evidence that his non-receipt of separation pay and the termination of the transfer of his GI Bill benefits to his dependent are erroneous or unjust. The applicant's failure to comply with the Coast Guard's weight standards by losing 9 pounds or 3% body fat between October 4, 2013, and January 4, 2014, caused his discharge and his loss of eligibility for both separation pay and the transfer of his educational benefits. Accordingly, his requests for separation pay and for the reinstatement of the transfer of his Post-9/11 GI Bill benefits should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [redacted], USCG, for correction of his military record is denied.

December 19, 2014

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