DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-067

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on February 20, 2014, and prepared the draft decision with the assistance of staff member [redacted] as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 5, 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, a [redacted] pay grade E-5) who received a disability retirement[1] as a [redacted] from the Coast Guard Reserve on September 30, 2012, asked the Board to correct his record by backdating his retirement to October 1, 2009, and to show that he was retired as a [redacted] E-6 instead of a [redacted] E-5. He stated that he discovered the errors in his record when he received his first retired pay on November 1, 2012.

The applicant stated that on November 1, 2008, while serving on active duty orders under Title 10, he injured his back. He alleged he was immediately targeted by his command and accused of malingering and misusing/abusing the prescription medications that he received for his back pain. He was referred to a chiropractor, and no MRI was performed until five months later, in March 2009. He alleged that the MRI showed disc herniation at L2, L3, L4, L5, and S1. His condition worsened and shots helped only temporarily. He was accused of abusing his medications and ordered to meet with his unit's Command Drug and Alcohol Representative (CDAR) as well as the Navy Substance Abuse Officer. Both officers determined that he was not abusing his medications. However, in May 2009, his marks on his Enlisted Employee Review (EER) dropped significantly, and he was not recommended for advancement to [redacted] E-7 for the first time since he advanced to [redacted] E-6 in 2003.

[1] The applicant retired from the Reserve with a 40% permanent disability rating.

The applicant stated that in July 2009, he was found to be permanently not fit for duty (NFFD), and his doctors told his command that a medical board should be convened. He was placed on medical orders from July 29, 2009, until his Title 10 orders expired on September 30, 2009. However, his commanding officer (CO) continued to believe he was malingering. The applicant stated that he filed an EEO complaint that "went nowhere," and in response, the CO told him that "he was going to 'get me'. He said that he would Court Martial me." Therefore, the applicant asked the head of the Tactics Branch to intercede with the CO as his boss. Within a week, the applicant was called to the office of the executive officer (XO) and told he would be taken to mast and awarded non-judicial punishment (NJP)[2] by the CO for not following the chain of command and for malingering.

The applicant stated that at mast on September 29, 2009, his CO punished him for not following his chain of command, but that there was not enough evidence to support the charge of malingering. However, his CO reduced him in rate from [redacted] to [redacted] as of September 30, 2009, the day his active duty orders ended. The applicant stated that because he was released from active duty the day after his mast, he was not afforded the opportunity to appeal the NJP.

The applicant alleged that when he asked if he would be retained on active duty on a medical hold, his CO said that if the applicant were retained on active duty, the CO would court-martial him. When his orders ended, instead of placing him on medical hold, his command released him from active duty. Therefore, he had no job and had to pay out of pocket for insurance coverage as a reservist.

The applicant stated that in 2010 he was involuntarily extended for two years for his medical board processing, and he was transferred back to a Sector office. When he got to the Sector he learned that "nothing had been done with my medical board and I would have to start all over again." He alleged that his former command had lied to him and had not forwarded his medical board information to Headquarters. He did not receive any pay during this time and he was unable to get an identification card which would have allowed him to receive continued medical care at military treatment facilities. He stated that he never should have been removed from medical orders while undergoing the medical board processing and that it took the Coast Guard three years to retire him due to his permanent disability.

The applicant stated that because his new command did not issue ADHC (active duty for health care) orders for him until April 17, 2012, even though he was injured in 2008, he has not received all of the pay and allowances he should be entitled to. In support of his allegations, the applicant submitted the following documents:

- Standard travel orders dated September 13, 2007, showing that the applicant was being recalled to active duty under Title 10 USC from October 1, 2007, to September 30, 2008.
- Standard travel orders dated September 3, 2008, showing that the applicant was being retained under 10 USC § 12301(d) in support of Operation Iraqi Freedom from October 1, 2008, to September 30, 2009.

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[2] Article 15 of the Uniform Code of Military Justice (UCMJ) provides NJP as a disciplinary measure for minor offenses under the UCMJ.

- A medical report from the [redacted] Naval Hospital dated November 3, 2008, showing that the applicant came to the hospital complaining of back pain and was diagnosed with acute back strain.
- A [redacted]e 7 dated November 25, 2008, in which the applicant's CO states that following the applicant's evaluation by the Navy substance abuse rehabilitation program (SARP) it was determined that he had neither abused nor was he addicted to narcotic medications. The Page 7 also states that the documentation which resulted in the referral [redacted] the result of a mistake in the prescription system which made it appear, erroneously, that the applicant was obtaining narcotics on each visit to the medical clinic.
- A medical report from the [redacted] Medical Clinic dated March 25, 2009, stating that the applicant was seen in the clinic for lower back pain and that an MRI of his spine on March 10, 2[redacted]evealed several disk herniations and an a[redacted]r tear.
- A medical report from the [redacted] Medical Clinic dated April 22, 2009, stating that the applicant was seen in the clinic to follow-up on his previous visit for lower back pain.
- A medica[redacted] Medical Clinic dated May 20, 2009, stating that the applicant's lower back pain and leg pain were "mostly resolved" but that physical therapy and more epidural injections would be required.
- A medical report from the [redacted] Medical Clinic dated July 13, 2009, stating that the applicant had his third epidural injection on July 1, 2009, and has a third scheduled for August 25, 2009.
- A medical report from the [redacted] Medical Clinic dated July 27, 2009, stating that the applic[redacted]will not be able to perform full duty within the military whether he undergoes surgical treatment for his condition or not."
- Standard travel orders dated August 26, 2009, showing that the applicant was being retained under 10 USC § 12301(h) for medical treatment.
- A six-page letter that the applicant emailed to the civil rights office on September 2, 2009, in which he alleged that he was treated unfairly by his Command. He stated that after injuring his back while moving some wood on November 1, 2008, he was treated by a chiropractor for five months, but his back pain worsened. In March 2009, an MRI showed that he had three herniated discs with two posterior tears. In May, he was surprised to receive an EER with much lower marks because although he had had various supervisors and assignments, no one had told him that his performance was declining, and he was certain it had not. For the first time since he advanced to [redacted] he was not recommended for advancement to [redacted] The applicant stated that he believed his marks and his command's negative attitude toward him were based on his injury. Then in July, he was transferred to Tactics and told he would have a "clean slate," when he did not even know how he had gotten a "dirty slate." In addition, he told his supervisor he should not be in Tactics because of his back injury and inability to work more than six hours per day. Then in August his back "went out" and he went to an emergency room. When the doctors said he should be SIQ (sick in quarters) for two da[redacted]and unjustly [redacted]se two days in the barracks even though his pain medications [redacted]t had to be fetched from his house. A week later, he was placed on report

for malingering and for a [redacted] to the chief health specialists about a medical appointment. Then, he was given a work schedule that had him on base for eight hours but spending one of those hours lying down in the barracks, which was not helpful for his back. Moreover, if he had a medical appointment, he was required to make up the hours h[redacted]s gone. He "put in" for leave and was told there would be no leave "while we have a course on board," so he asked his chief for three days of leave and it was approved but then canceled, and he received a Page 7 for circumventing the chain of command. However, another member got his leave approved after initially having it [redacted] the "course on board." The applicant alleged that the command was acting maliciously toward him and trying to end his career. He stated that he wanted to be transferred back to his old unit. He stated t[redacted]ly called a superior whom he had considered a friend to ask for his advice and was placed on report for circumventing the chain of command. [redacted]

- A two-year Reserve extens[redacted]d July 1, 2010, that was "authorized by Commander CGPC."
- Military Temporary Duty or Civilian Temporary Duty Travel Orders for the applicant to travel to [redacted] appointments from January 7, 2011, to January 10, 2011.
- Recommended findings of an Informal Physical Evaluation Board, dated May 30, 2012, stating that the applicant ha[redacted]it for duty and should be permanently retired with a 40% disability for intervertebral disc syndrome.
- Mandatory separation orders dated September 12, 2012, stating that the applicant would be permanently retired by re[redacted] disability on September 19, 2012.
- A letter from [redacted] L, who worked with the applicant in 2006 and 2007, stating that he feels that the applicant was treated unfairly and unjustly demoted. Specifically, he stated that other members in the applicant's unit were treated differently regarding time off for their injuries and that the applicant was "targeted by the CO at the time for whatever reason."
- Emails between the applicant and LT C in the Coast Guard Office of Legal & Defense Services from June 12 to June 25, 2012, discussing the applicant's assertions that his injuries should be rated higher than 40% and that his retirement back pay should be backdated to September 30, 2009.

SUMMARY OF THE RECORD

The applicant served on active du[redacted]he Coast Guard from May 2, 1989, to June 30, 2001. He was treated for lower back pain before being released from active duty into the Reserve on July 1, 2001. During a medical examination in September 2006, he reported ongoing treatment by a chiropractor for lower back pain in his civilian life.

On November 2, 2006, the applicant began serving on continuous active duty for operational support (ADOS) orders in support of contingency operations at [redacted] He worked in the [redacted] for a year on travel orders and claims and was then transferred to the [redacted]

On his EER dated May 31, 2008, the applicant received primarily high marks of 5 and 6, with marks of 4 for "Military Bearing" and "Customs and Courtesies" and top marks of 7 for "Professional Specialty Knowledge" and "Quality of Work." He was recommended for advancement to

On October 31, 2008, while still on ADOS, the applicant went to a naval clinic and was given 30 tabs of Percocet after complaining of shoulder pain while building a house. He told the doctor he "can't say no" to his father. The next day, he continued the construction work and injured his back while carrying wood.

From November 2008 through February 2009, the applicant was treated by a chiropractor. In March 2009, an MR ved a herniated disc at L3-L4 and degen n at L4-L5. The applicant was referred to a neurosurgeon, who prescribed physical therapy and a series of three lumbar steroid shots and placed the applica y.

On May 20, 2009, the applicant reported that his physical therapy was helping. He was told to continue veek and was given a TENS unit. His command convened an initial medical board.

On his EER dated May 31, 2009, the applicant received mostly marks of 4, 5, and 6, with a top mark of 7 for "Using Resourc e assigned to the Training Office he had used his contacts to get personnel "the highest consideration for training opportunities." However, he received a low mark of 3 for "Setting an Example" and was not recommended for advancement because he—

> requires close su ion to monitor his work, breaks, and general military bearing. On several occasions he was counseled regarding his tardiness and questionable attitude. As a Chief Petty Officer, he would be required to lead others and set a positive example. [He] needs to further develop leadership skills and become a role model to subordinates by maintaining military formality and projecting a positive attitude.

On July 29, 2009, a medical officer forwarded a medical board report to the applicant's command. He noted that he did not have "any of his private consultant's notes, but we can send the board in as is and I expect he'll be granted continuance. If he fails to improve as expected, then the other doctors' notes will become critical."

On August 17, 2009, the applicant was counseled on a Page 7 about failing to follow the proper chain of command. On August 20, 2009, the applicant was charged with ting Article 92 of the Uniform Code of Military Justic CMJ) for again failing to follow the proper chain of command.

On August 24, 2009, the command asked the medical officer to send them an email stating that the applicant was NFFD. The doctor responded the same day, stating that the applicant was NFFD and able to perform only limited desk duty "as tolerated." He also noted that as stated in the interim medical board report dated July 28, 2009, whether the ndition was perma mprove was unknown.

On August 25, 2009, the [redacted] mmand sought to change the applicant's ADOS orders to ADHC orders. The change was made retroactive to July 29, 2009.

On September 9, 2009, several weeks after he was charged with violating the UCMJ, the applican[redacted] his civil rights complaint, in which he accused his CO of unfair treatment and targeting with malicious intent to his career. The record shows that the civil rights office closed the applicant's complaint on November 7, 2009, because he failed to respond that office's inquiries and two certified mailings. [redacted]

On September 24, 2009, a chief health specialist (HSC) at the command sent an email to the Integrated Support Command [redacted] at the applicant was about to demobilize and wanted an NOE (Notice of Eligibility for medical treatment). The HSC noted that the applicant would receive 180 day[redacted] TAMP transition benefits, including insu[redacted] coverage, and that the NOE would start thereafter. In reply, he was told that the applicant should contact the ISC about the NOE two weeks before his tran[redacted] would expire. The HSC replied that he would pass the time line and point of contact to the applicant and noted that the command was awaiting the completion of one more medical appointment before forwarding the medical board report for further processin[redacted] rded this email to PSC, stating that it showed that the applicant desired to demobilize at the end of September 2009.)

On September 29, 2009, the applicant received NJP for violating Article 92 – failure to obey order or regulation. The court[redacted] tates that on August 20, 2009, he failed to use his chain of command after being counseled and signing a negative Page 7 regarding following the proper chain of command on August 17, 2009. The applicant was reduced in rank from E-6 to E-5. He did not appeal the NJP. [redacted]

On an EER oc[redacted] ned by the NJP, the applicant received an unsatisfactory conduct mark and was not recommended for advancement. In the performance categories, he received mostly marks of 4, a few low marks of 3, and a very low mark of 2 for "Setting an Example" because—

> [a]lthough very competent and capable, [he] requires constant supervision, tasking, and diligent oversight to ensure that his work objectives remain focused. He spends far too much time engaging in idle chat with others, wasting precious work hours of an already understaffed unit. He has been counseled numerous times on this tendency and reminded to concentrate on the task at hand. Moreover, [he] is self-serving and overtly manipulates procedures and policies to his personal advantage in attempt to avoid assigned tasking or participate in other undesired work. He is not presently performing in a manner commensurate with his paygrade nor a Coast Guard Petty Officer.

On September 30, 2009, the civil rights office sent an email to the appl[redacted] stating that the command had submitted a response to [redacted] pplicant's complaint and asking the applicant to contact the office. The applicant forwarded this email to himself on October 9, 2009.

The applicant's ADHC orders ended on September 30, 2009, and he was released from active duty into the Individual Ready Reserve (IRR).

On May 27, 2010, the applicant's CO wrote a letter to the District Commander stating that th[redacted] a history of back problems and received pain medication at a Naval Clinic

on October 31, 2008. He was co[redacted]e pain medication would cause lightheadedness and that he should not drive, use machinery, or do any activity that requires alertness while taking the pain medication, but he failed to comply with those instructions by performing construction work at his father's house the next day. The CO stated that the applicant was therefore grossly [redacted]ent in his behavior, and the CO did not support his claim that he was injured in the line of duty and would not sign a CG-3822 attesting that the applicant was injured in the line of duty. The CO stated that after being injured the applicant—

> constantly initiate[d] conversations related to the status of his medical board and the amount of medical disability compensation he desire[d] (30%). [The applicant] never want[ed] to discuss the option of getting the necessary tre*atment [surgery]* to improve his physical condition. Instead, he is convinced he will never be b[redacted]nly option is to discuss his medical board and disability options. Moreover, he failed to use the chain of command to communicate his medical status. Rather, he [redacted]ed you and Dr. E … directly in an attempt to by[redacted]is command and to assert his will on others via half truths and manipulation.

On August 19, 2010, the applicant was administratively reassigned to his former Reserve unit to complete a Medical Evaluation Board (MEB).

On September 14, 2010, the ISC issued the applicant an NOE for medical treatment retroactively effective since April 1, 2010, so that he could be reimbursed for medical expenses related to his back because the applicant's TAMP transition benefits had expired on March 31, 2010. The ISC noted that the NO[redacted]d beyond November 30, 2010, if additional medical board processing was required.

On February 22, 2011, the [redacted]ssued a report diagnosing the applicant with chronic low back pain and herniated discs, degenerative disc disease, and lumbar stenosis from L3-L5.

On March 22, 2011, the ISC sent the applicant a letter noting that his NOE had been extended through June 30, 2011, and could be extended further "pending final medical board disposition."

On May 24, 2011, the applicant was advised by email that his medical board report had been forwarded for review by an Informal Physical Evaluation Board (IPEB).

On April 17, 2012, an IPEB convened and found the applicant's back injury to have been incurred in the line of duty and recommended him for permanent retirement with a 40% disability rating for intervertebral disc syndrome. The applicant accepted the recom[redacted]dation of the IPEB and did not reject the findings or dem[redacted]d a formal hearing. (According to the applicant, he was also issued ADHC orders on this date.)

On September 6, 2012, the Coast Guard notified the applicant that the Commander, Personnel Service Center (PSC) had approved the findings of the IPEB and that he would be permanently retired on September 19, 2012.

[redacted]

On September 20, 2012, the applicant was placed on the Permanent Disabled Retired List (PDRL) with a 40% disability rating. His retirement orders address him as a [redacted] E-5 but otherwise do not mention his retired pay grade.

VIEWS OF THE COAST GUARD

On June 30, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case.

The JAG stated that the applicant's arguments can be divided into two categories: (1) the alleged impropriety of his NJP proceeding and punishment, and (2) the error or injustice in determining his grade for incapacitation pay as a result of the NJP.

NJP Proceeding and Punishment

With respect to the alleged impropriety of the NJP proceeding and punishment, the JAG recommended that the Board deny the applicant's request because the applicant failed to exhaust all effective administrative remedies. The JAG stated that the applicant was not prevented from appealing his NJP just because his ADHC orders ended. The JAG stated that appeals of NJP imposed under Article 15, UCMJ, are governed by Part V, MCM, and Chapter 1 of the Military Justice Manual, and that the MJM in effect at the time of the applicant's NJP provided that members could appeal their NJP punishment in writing for being "unjust" or "disproportionate" within five days of the mast. The JAG stated that the applicant failed to file an appeal within five days and failed to show "good cause" for not filing the appeal within five days. The JAG argued that the applicant therefore waived his right to appeal the NJP.

The JAG also argued that punishment that he received was permissible and not unjust or disproportionate to the charge.[3] The applicant received NJP under Article 92, Failure to Obey Lawful General Order or Regulation, after failing to use his chain of command despite having been counseled about using proper chain of command a month earlier. The JAG stated that as a captain/O-6, the applicant's CO had the authority to impose the reduction in grade under Article 15 of the UCMJ. The JAG noted that the CO had the authority to impose worse punishment, but did not do so.

The JAG also stated that the applicant failed to provide evidence that his reduction in grade was disproportionate or that his NJP was retaliation for having filed a civil rights complaint. The JAG noted that for a punishment to be considered disproportionate, the applicant has the "burden of proving that although the punishment imposed was legal, it was excessive or too severe considering all of the circumstances, (e.g., the nature of the misconduct involved; the absence of aggravating circumstances; the prior good record of the member; or any other circumstances that tend to lessen the severity of the misconduct or explain it in light more favorable to the member.)"

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[3] Regarding this issue, PSC stated that the applicant "failed to provide substantial grounds to support changing his pay grade from E-5 back to E-6 as he did not fully exhaust the existing appeal process for the NJP and does not provide, by a preponderance of the evidence, for the accusation of malicious targeting from his command. However, PSC also feels that [the JAG] would be the more appropriate venue to assess the validity of the applicant's NJP challenge. Upon review, it appears the punishment awarded is disproportionate with the offense that he committed."

The JAG argued that the applicant's claim that his NJP was in retaliation for his disability and for filing a civil rights claim is without merit. The JAG noted that the offenses for which he received NJP were committed on August 17, 2009, but the applicant did not contact the civil rights of[redacted]ntil September 2, 2009, and did not file his civil rights complaint until September 9, 2009. The JAG noted that for military members, unlike civilians, disability is not a protected status and that because the applicant never responded to inquiries from the civil rights office, his case was closed on November 7, 2009. The JAG also argued that the marks an[redacted] applicant's EERs dated May 31 and September 29, 2009, support the CO's decision to impose NJP. The JAG noted that the applicant did not appeal these EER marks.

The JAG concluded by recommending that the Board deny the applicant's request to be reinstated in pay grade [redacted]E-6.

Pay Grade for Incapacitation Pay[redacted]

Regarding the applicant's pay grade for his incapacitation pay, the JAG adopted the findings and ana[redacted]n the case prepared by the Personnel Service Center (PSC) and recommended that the Board grant partial relief as recommended by PSC.

PSC stated that the applicant failed to prove that he was targeted by his CO or retaliated against because of his medical co[redacted]ing the applicant's claim that his command retained him involuntarily in his barracks for two days when he was SIQ instead of letting him go home, PSC noted that on a medical report dated August 11, 2009, the applicant's doctor expressly ordered "Barracks x 2d."[redacted]

With regard t[redacted]applicant's request that his placement on the PDRL be backdated to 2009 and that he be paid as an E-6 instead of an E-5, PSC stated that partial relief is justified. PSC stated that the applicant's command failed to conduct a proper line of duty determination pursuant to the Coast Guard Administrative Manual, M5830.1A, Ch. 7, and that the line of duty determination is required to determine the eligibility of continued medical care, pay and allowances. PSC stated that the applicant's CO refused to sign the line of duty determination on May 27, 2010, but acknowledged that the injury was incurred while on active duty and was not caused by the applicant's own misconduct.

PSC stated that the applicant's ADHC orders could have been extended to retain him on active duty beyond September 30, 2009, but instead the applicant requested to be released from active duty (RELAD) and to receive a Notice of Eligibility (NOE). PSC stated[redacted]t was standard practice to authorize an NOE 180 da[redacted]er RELAD when a reservist's TAMP transition benefits expired. The applicant's TAMP expired on March 31, 2010, and an NOE was authorized from April 1, 2010, to September 30, 2010, to ensure medical coverage. The NOE was later extended during his medical board processing. PSC noted that the applicant was entitled to submit incapacitation pay claims during this period but did not do so.

Regarding the applicant's medical processing, PSC noted tha[redacted]'s command had a [redacted]a medical board when his physician determined that he was NFFD[redacted]ss was started but not completed before the applicant was RELAD. The

process was restarted after the app[redacted]inistratively reassigned to his prior Reserve unit in August 2010. PSC stated that once a medical board report is submitted to PSC "it can take one to two years on average before a case is completed." After the IPEB recommended that the applicant be retired with a 40% disability rating, he was afforded counsel and voluntarily accepted [redacted]ecommendation.

PSC stated that there is no statutory requirement to keep a reservist on active duty orders until he is processed for separation or retirement. However, PSC noted, th[redacted] required to ensure that a reservist is covered for medical care for his injury. Accordingly, PSC recommended that an NOE be authorized from October 1, 2009, through September 19, 2012. This NOE would allow the applica[redacted]sed for the expenses he incurred in treating his back injury and to apply for incapacitation pay, in accordance with 37 U.S.C. § 204(g), (h), (i), and 37 U.S.C. § 206. [redacted] stated that because the applicant was a [redacted]E-5 during this period, his incapacitation pay should be paid at that rate. PSC also noted that to ensure timely and appropriate processing, the applicant wi[redacted]t medical bills, travel claims, RMP requests, and incapacitation pay requests under the authorized NOE to CG PSC-RPM-3 via email.

Finally, P[redacted]urrently preparing a retirement certificate and a DD 214 for the applicant's disability retirement.

APPLICANT'S RESPONSES TO THE VIEWS OF THE COAST GUARD

On July 2, 2014, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The Board did not receive a response.

APPLICABLE LAW

Title 10 U.S.C. § 1074a(a)(1) states in pertinent part that "[e]ach member of a uniformed service who incurs or aggravates an injury, illness, or disease in the line of duty while performing … (B) inactive-duty training" and not as a result of gross negligence or misconduct is entitled to "(1) the medical and dental care appropriate for the treatment of the injury, illness, or disease of that person until the resulting disability cannot be materially improved by further hospitalization or treatment; and (2) subsistence during hospitalization."

Under 10 U.S.C. § 1074a(e), a member injured in the line of duty in accordance with § 1074a(a) who is ordered to active duty for health care or recuperation for more than 30 days "is entitled to medical and dental care on the same basis and to the same extent as members covered by section 1074(a) of this title [which provides medical and dental care for activ[redacted]y members] while the member remains on active duty."[redacted]

Title 10 U.S.C. § 12322 states, "A member of a uniformed service described in paragraph (1)(B) or (2)(B) of section 1074a(a) of this title may be ordered to active duty, and a member of a uniformed service described in paragraph (1)(A) or (2)(A) of such section may be continued on active duty, for a period of more than 30 days while the member is being treated for (or recovering from) an injury, illness, or disease incurred or aggravated in the [redacted]described in any of[redacted]

Title 37 U.S.C. § 204(g) states, "A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a r[redacted]er of a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated-- … (B) in line of duty while performing inactive-duty training" but "the total pay and allowances shall be reduced by the amount of [non-military] income. In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered."

Reserve Regulations

Chapter 6 of the Reserve Policy Manual (RPM) covers the Reserve incapacitation system. Chapter 6.A.1. provides the following general policy:

> Medical and dental care shall be provided for reservists incurring or aggravating an injury, illness, or disease in the line of duty, and physical examinations shall be authorized to determine fitness for duty or disability processing. Pay and allowances shall be authorized, to the extent permitted by law, for reservists who are not medically qualified to perform military duties, because of an injury, illness, or disease incurred or aggravated in the line of duty. Pay and allowances shall also be authorized, to the extent permitted by law, for reservists who are fit to perform military duties but experience a loss of earned income because of an injury, illness, or disease incurred or aggravated in the line of duty.

Under Chapter 6.A.3. of the RPM, a reservist injured in the line of duty is entitled to medical and/or dental treatment for the injury as authorized by 10 U.S.C. § 1074a until the member is fit for military duty or the member has been separated under the Physical Disability Evaluation System.

Chapter 6.A.4. states the following:

> a. A reservist who incurs or aggravates an injury, illness, or disease in the line of duty is entitled to pay and allowances, and travel and transportation incident to medical and/or dental care, in accordance with 37 U.S.C. 204 and 206. The amount of incapacitation pay and allowance authorized is determined in accordance with DoD 7000.14-R, Volume 7A, DoD Financial Management Regulation, Military Pay Policy and Procedures – Active Duty and Reserve Pay, and is summarized below.
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> b. A reservist who is unable to perform military duties due to an injury, illness, or disease incurred or aggravated in the line of duty is entitled to full pay and allowances, including all incentive and special pays to which entitled, if otherwise eligible, less any earned income as provided under 37 U.S.C. 204(g).

Chapter 6.A.6.e. authorizes ADHC orders as follows:

> Personnel Command (CGPC-rpm) may authorize a reservist to be ordered to or retained on active duty, with the consent of the member, under 10 U.S.C. 12301(h)[4] to receive authorized medical

[4] Title 10 U.S.C. § 12301(h) is actually inapplicable because it authorizes only the Secretaries of "military departments" to order reservists to active duty to receive medical care, and for the purposes of Title 10, "military departments" are defined at 10 U.S.C. 101(a)(8) as follows: "The term 'military departments' means the Department of the Army, the Department of the Navy, and the Department of the Air Force." However, the Coast Guard may issue ADHC orders under 10 U.S.C. § 12322.

> care or to be medically evaluated for a disability, and may authorize a reservist to be ordered to or continued on active duty while the member is being treated for, or recovering from, an injury, illness, or disease incurred or aggravated in the line of duty while performing inactive duty or active duty for a period of 30 days or less as authorized by 10 U.S.C. 12322 (ADHC). Such authorization shall normally be provided only after consultation with Commandant (CG-1311), and only for members expected to remain not fit for military duties for more than 30 days, when it is in the interest of fairness and equity to provide certain healthcare or dependent benefits.

Chapter 6.B.3. of the RPM states the following about NOEs:

> a. A Notice of Eligibility (NOE) for authorized medical treatment is issued to a reservist following service on active duty to document eligibility for medical care as a result of an injury, illness, or disease incurred or aggravated in the line of duty. …
>
> b. Servicing ISC (pf)s will issue each NOE for a period not to exceed three months and may authorize reimbursement for travel incident to medical and dental care in connection with the NOE. …
>
> c. Upon determination that the member will require treatment beyond the first three-month period of the NOE, commands shall notify the servicing ISC (pf) and may request extensions in one-month increments. Requests for NOE extensions shall indicate whether or not a medical board has been initiated. ISC (pf)s may not authorize extensions to allow an NOE to exceed six months.

Retired Pay Grade

Title 10 U.S.C. § 1372 states the following:

> Unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under section 1201 or 1204 of this title, or whose name is placed on the temporary disability retired list under section 1202 or 1205 of this title, is entitled to the grade equivalent to the highest of the following:
>
> (1) The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is retired. …

Chapter 8.D.5. of the RPM states that "[u]nless entitled to a higher grade under some other provision of law, a member retired for physical disability is entitled to the highest of the following: a. The grade or rank in which the member was serving when placed on the TDRL, or retired. …"

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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[5] The applicant's claims regarding his NJP and RELAD were not timely filed within three years of his discovery of the alleged error, but his claims concerning his

[5] 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

lack of an NOE and ADHC orders and retired pay grade were timely filed within three years of his discover of the alleged errors.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[6]

3. The Board may excuse the untimeliness of a claim if it is in the interest of justice to do so.[7] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny a claim for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[8] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[9]

4. The applicant failed to explain or justify his delay in challenging his NJP and RELAD in 2009. Moreover, a cursory review of the merits of these requests shows that he is unlikely to prevail. Although the applicant alleged that his reduction in rate at NJP on September 29, 2009, was retaliatory and unjust, the record does not support these claims. The record shows that he had been repeatedly counseled about his performance and about circumventing the chain of command in 2008. In addition, his claim that he could not appeal his NJP because he was RELAD is erroneous. Being RELAD does not bar a reservist from appealing an NJP. Nor has the applicant shown that his RELAD was improper or unjust. A "medical hold" retaining a reservist on active duty or ADHC orders may be issued based on the severity of the injury, the expected recovery time, whether the member is expected to be FFD again, input from the medical officer, and the member's consent.[10] Otherwise, NOEs and incapacitation pay are authorized expressly because reservists may be RELAD while undergoing medical care and processing. The record contains insufficient evidence supporting the applicant's allegations of error or injustice with regard to his NJP and RELAD in September 2009, and these actions are presumptively correct.[11] Based on the record before it, the Board finds that the applicant's claims regarding his NJP and RELAD are unlikely to prevail on the merits. Accordingly, the Board will not excuse the untimeliness of these claims.

5. The record shows that on November 1, 2008, while serving on ADOS orders, the applicant injured or aggravated an injury to his back. Although his CO found that the injury was due to "gross negligence" because he was doing construction work while taking Percocet, later his injury was presumptively deemed to have been incurred in the line of duty since no proper investigation had been conducted. Therefore, applicant was entitled to medical treatment for his

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[6] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[7] 10 U.S.C. § 1552(b).
[8] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[9] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).
[10] *See* ALCGRSV 058/10; ALCGRSV 061/10.
[11] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

back injury and incapacitation pay for periods when he lost civilian income while still a member of the Reserve—i.e., until he was placed on the PDRL.[12] These benefits are normally provided by issuing a member an NOE.[13] The record shows that the applicant was not issued an NOE until after his TAMP benefits ended on March 31, 2010, and it is not clear when his NOE ended or whether he received additional ADHC orders before his retirement. Therefore, the Board finds that he has proven by a preponderance of the evidence that his record should be corrected to show that he was issued an NOE for the entire period from October 1, 2009, to the date of his placement on the PDRL, except for any periods covered by ADHC orders, so that he may be reimbursed for medical expenses and apply for incapacitation pay.

6. The applicant alleged that his pay grade of E-5, instead of E-6, is erroneous and unjust, and he stated that he discovered this error when he received his first retired pay on November 1, 2012. Therefore, it appears to the Board that the applicant is claiming that his retired pay grade for the calculation of his retired pay is erroneous and unjust. The Coast Guard failed to address this issue and confined its consideration to his pay grade prior to his retirement, which is not always the same as a member's retired pay grade, but the applicant submitted no response objecting to the recommendation in the advisory opinion. Under 10 U.S.C. § 1372 and Chapter 8.D.5. of the RPM, however, a reservist being retired because of a disability is entitled to a retired grade equivalent to his pay grade at the time of his retirement except in situations inapplicable to the facts in this case.[14] The applicant was an E-5 at the time he was medically retired and so that is his proper retired pay grade. Therefore, the applicant has not proven by a preponderance of the evidence that his retired pay grade is incorrect or unjust.

7. Accordingly, relief should be granted by correcting the applicant's record to show that he was issued an NOE for the entire period from October 1, 2009, to the date of his placement on the PDRL, except for any periods covered by ADHC orders, so that he may be reimbursed for medical expenses and apply for incapacitation pay. In addition, the Coast Guard should provide him with advice on submitting medical bills, travel claims, RMP requests, and claims for incapacitation pay under the NOE. His other requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[12] 10 U.S.C. § 1074a(a)(1); 37 U.S.C. § 204(g).
[13] RPM, Chapter 6.B.3.
[14] 10 U.S.C. § 1372; RPM, Chapter 8.D.5.

ORDER

The application of [redacted] USCGR (Retired), for correction of his military record is granted in part as follows: The Coast Guard shall issue him an NOE for the entire period from October 1, 2009, to the date of his placement on the PDRL, except for any periods covered by ADHC orders, so that he may be reimbursed for medical expenses and apply for incapacitation pay. The Coast Guard shall provide him with advice on submitting medical bills, travel claims, RMP requests, and claims for incapacitation pay under the NOE within 90 days of the date of this decision and shall pay him any amount due.

December 5, 2014

[redacted]