


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-114

XXXXXXXXXX, XXXXXX X.
XXX XX XXXX, XXX

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. It was docketed on July 25, 2001, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated June 20, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct her record by changing the character of the discharge she received on May 15, 20xx from "honorable discharge by reason of misconduct due to fraudulent enlistment" to "honorable discharge by reason of physical disability." She stated that such a change would result in her continued receipt of the drug xxxxxx, which provides her temporary and partial relief from painful muscle spasms.

APPLICANT'S ALLEGATIONS

The applicant stated that in September 19xx, she completed recruit processing at a Military Entrance Processing Station (MEPS). The applicant alleged that while undergoing her initial physical examination during MEPS, she disclosed all medical ailments "honestly and to the best of her knowledge," including seasonal allergies and

skin rashes. Based on her MEPS evaluation, the applicant asserted, military doctors found her to be in good health “prior to the first time she saw an acupuncturist.”

The applicant alleged that in March of 19xx, she experienced mild neck discomfort and sought the assistance of an acupuncturist. The applicant stated that as a result of performing neck stretching and strengthening exercises suggested by the examining acupuncturist, she gained relief from her neck discomfort.

The applicant alleged that in September 19xx, she again sought the assistance of an acupuncturist while she was stationed on a cutter. However, on this occasion, the applicant stated, she sought an acupuncturist through Coast Guard TriCare, but later discovered that TriCare benefits did not include acupuncture services. The applicant stated that she independently obtained the services of an acupuncturist but gained no relief from the assistance.

The applicant alleged that approximately one year after she enlisted, she noticed that she was “having trouble controlling the movement of her head and neck.” The applicant stated that she was evaluated in January 20xx, by Dr. R of the U.S. Public Health Service, who determined that she had torticollis¹ and recommended that she follow a stretching regimen. She stated that at the time she was seen by Dr. R, her condition did not interfere with her duties.

The applicant alleged that after she transferred to another cutter, she experienced pain that hindered her from completing assigned duties, which in turn resulted in her being “xxxx xxxxxx xxxxxxxx.” The applicant stated that she was again evaluated by Dr. R, and thereafter referred to a neurologist, Dr. S, because xxxxxx xxxxxx xxxxxx xxx. Dr. S evaluated the applicant on January 11, 20xx, and determined that she suffered from cervical dystonia² and recommended that she receive xxxxxx injections.

The applicant averred that she developed cervical dystonia while serving on active duty in the Coast Guard, and that as a result of the disorder, she was forced to seek separation from the Coast Guard. The applicant asserted that the disorder causes the muscles in her neck to contract involuntarily, “prevent[ing] her from holding her head upright or turning [her head] to the left or right.” The applicant contended that with xxxxxx injections, she obtains temporary and partial relief from “the painful muscle contractions and involuntary movements” of her condition.

The applicant alleged that in preparation for an initial medical board (IMB), the Coast Guard completed a follow-up evaluation of the applicant on February 1, 20xx.

¹ Torticollis is a “contracted state of the cervical muscles, producing twisting of the neck and an unnatural position of the head.” Dorland’s Illustrated Medical Dictionary 1853 (29th ed. 2000).

² Cervical dystonia is distortion or impairment of voluntary movement pertaining to the neck, due to disordered tension of muscle. *Id.* at 329, 554, 559 and 1849.

That evaluation, contended the applicant, was identical to her MEPS physical examination in 19xx but yielded, in part, a diagnosis of cervical dystonia. The applicant stated that the evaluating physicians indicated "processing by reason of physical disability" in their report, and also completed a narrative summary for the IMB. The applicant stated further that on March 2, 20xx, she received the convening order evaluatee copy of her medical board report, and shortly thereafter, she submitted a statement in response.

The applicant alleged that the foregoing collection of documents, which were awaiting review by the Central Physical Evaluation Board (CPEB), were instead forwarded to the Commander of Enlisted Personnel Management (EPM) for purposes of considering a discharge due to fraudulent enlistment. The applicant asserted that because the CPEB never convened to hear her case, she was denied the opportunity to be considered for separation by reason of physical disability.

The applicant alleged that the character of her discharge without sufficient proof or the benefit of a medical board is unjust for numerous reasons. First, alleged the applicant, the Coast Guard's claim that her enlistment was fraudulent due to failure to disclose an acupuncture visit during the interim period between her MEPS examination and her entry on active duty is unsubstantiated. Second, the applicant alleged that she possessed no knowledge of her condition prior to enlistment. Third, she alleged that she experienced no symptoms of her condition until she was serving aboard her first cutter on active duty. Fourth, she alleged, the medical examination board (MEB) summary, written by Dr. S on January 11, 20xx, was not taken into consideration by the Coast Guard in reaching its decision that she fraudulently enlisted.

The applicant argued that Dr. S's letter dated June 6, 20xx, which states that the applicant's condition "began after she entered the Coast Guard," further contradicts the Coast Guard's pronouncement of a fraudulent enlistment. She asserted that the Coast Guard has failed to demonstrate an intent to deceive on the applicant's part, as required by the Chief Counsel of the Coast Guard to establish a fraudulent enlistment. Such being the case, the applicant asserted, the Board should find that she is entitled to have the character of her discharge changed to honorable discharge by reason of physical disability.

SUMMARY OF THE APPLICANT'S RECORD

On December 14, 19xx, the applicant enlisted in the regular component of the Coast Guard under the Delayed Entry/Enlistment Program (DEP) for not less than four years. Prior to enrolling in DEP, during recruit processing at MEPS, the applicant indicated no problems with her neck or neck muscles on pre-enlistment physical examination reports.

In March 19xx, the applicant visited an acupuncturist for discomfort she experienced in her neck.

On April 5, 19xx, the applicant was honorably discharged from DEP and enlisted in the regular component of the Coast Guard on active duty. Two days later, she executed forms SF-600, stating that she had no change in her health since MEPS in September 19xx, and SF-93, denying that she had "consulted or been treated by clinics, physicians, healers or other practitioners within the past 5 years for other than minor illnesses."

On May 29, 19xx, the applicant successfully completed eight weeks of Coast Guard boot camp training, and thereafter attended "A" school to become a petty officer. She was transferred to her first cutter in September 19xx.

On June 15, 20xx, Dr. R evaluated the applicant, who complained of muscle tension in her neck and being unable to keep her neck in one position. According to the applicant's June 15th health record entry, she reported that she was experiencing no neck pain. Dr. R requested a radiological consult for cervical and neck x-rays for the applicant's "neck pain and difficulty in moving her neck to the [left and right]."

On June 22, 20xx, Dr. R met with the applicant regarding her lab results, assessed her with "suspected torticollis" and referred her to physical therapy for a plan of treatment. Over the course of the next two weeks, the applicant continued physical therapy treatment.

On June 29, 20xx, the applicant was again evaluated by Dr. R, who recommended an "ortho consult." According to the June 29th health record entry, the applicant reported that her condition was "very slightly better." Her cutter was deployed on July 5, 20xx, and she was advised to continue physical therapy at the end of her deployment.

On August 7, 20xx, the applicant was again evaluated for problems associated with her neck. Specifically, she complained that "her neck had a tendency to turn to the left." She was assessed with chronic torticollis and referred to a civilian facility to have an "ortho/spine consult." That consult was performed by Dr. Z on August 28, 20xx, and produced a diagnosis of "chronic torticollis on the right." Dr. Z ordered the applicant to begin a stretching program and noted his intent to consult with a different physician about "xxxx xxxx" for the treatment of "the sternocleidomastoid on the [applicant's] right."

In October 20xx, the applicant was transferred to another cutter. On December 12, 20xx, Dr. R again followed up with the applicant, who complained of "tight

soreness” and not being able to “function” or “relax” due to her condition. She reported that her neck problems had worsened during the ten days prior to the instant visit. The applicant continued to be diagnosed with chronic torticollis and was advised to continue physical therapy and follow-up visits. She continued to follow the plan of treatment.

The applicant’s cutter was scheduled to depart overseas on January 13, 20xx. On January 8, 20xx, she was examined for “persistent neck pain, tension and discomfort” at a chiropractor clinic. During this evaluation, Dr. C concluded, in part, that the applicant was “not fit to go away...[and] need[ed an] MRI neuro[logy] consult.” On January 9, 20xx, Dr. R followed up with the applicant on her chiropractic visit and found that “at present [it] may not [be] possible to go underway.” He recommended a neurology consult and told her to return in one to two weeks.

On January 11, 20xx, the applicant was evaluated by a neurologist, Dr. S, who reported that she had a prior injury of whiplash and diagnosed her with cervical dystonia. Dr. S concluded that the applicant was not fit for deployment to sea and proscribed the lifting of heavy objects. The applicant’s condition was further noted to require MEB or PEB processing. Dr. S documented her findings in an MEB summary, listing an impression of cervical dystonia. Dr. S recommended, in part, that the applicant be referred to a medical board and that she receive xxxxxx injections every three months.

On January 19, 20xx, the applicant followed up with Dr. S for a xxxxxx injection. The applicant’s records indicate that Dr. S recommended that she return in three months, or two weeks, if needed. Approximately three weeks later, the applicant was again assessed by Dr. S, who administered a one-time booster injection of xxxxxx.

On February 1, 20xx, the applicant was evaluated for the purpose of an Initial Medical Board (IMB). The IMB found that the primary diagnosis of “cervical dystonia (torticollis)...[is] correct and that the [applicant] is not fit for duty.” The board further stated that the applicant had no other neck injuries except whiplash and concluded that “[g]iven the chronic nature of her pain and concurrent diagnosis[,] the prognosis for [the applicant] is reserved. Additional treatment recommendations include periodic follow-up with a Neurologist (xxxxxx Injection), Physical Therapy and Chiropractor.”

The applicant continued her recommended plan of treatment with physical therapy from February 12, 20xx to May 30, 20xx, but showed no significant changes in her condition. Also during this period, she received her third injection of xxxxxx and was advised by Dr. S to return in three months.

On March 7, 20xx, the applicant timely acknowledged that she intended to submit a rebuttal to the findings and recommendations of the IMB. In rebuttal, the

applicant stated that she was never medically diagnosed with whiplash, but her mother once said that she might have whiplash after she was "rear-ended ... on a bumper-car ride." The applicant conveyed that she experienced no pain or discomfort as a result of the amusement park event. The applicant further expressed that she accepted her medical condition, was pleased with her current level of treatment, and hoped to be medically retired.

By memorandum dated April 13, 20xx, the Commander of the Coast Guard Personnel Command (CGPC) notified the Commanding Officer (CO) of the Integrated Support Command (ISC) of CGPC's receipt of the applicant's IMB, wherein the applicant was reported to have known that she suffered from "limited range of motion [in] her neck since December 19xx...." CGPC further indicated that a discharge due to fraudulent enlistment was in contemplation and that ISC should offer the applicant an opportunity to make a statement.

In response to CGPC's April 13, 20xx memorandum, the applicant submitted a statement on May 11, 20xx, stating that she "did see a chiropractor and an acupuncturist in early 19xx for [her] neck" but attributed the problem to "a pulled or unusually tense muscle...simply due to stress from joining the Coast Guard." The applicant went on to state that, after she was twice seen by an acupuncturist but experienced no relief, she began to associate her neck pain with problems greater than stress. The applicant expressed disappointment that she was being considered for a discharge due to a fraudulent enlistment and concluded that "[t]he occasional neck pain that [she] experienced prior to [her] enlistment was not chronic nor did it affect [her] daily life in any way."

On May 15, 20xx, the applicant received a message from CGPC, via the ISC, ordering her honorable discharge by reason of misconduct due to fraudulent enlistment. The discharge orders were effective not later than June 13, 20xx. On June 29, 20xx, the applicant was honorably discharged from the Coast Guard for "fraudulent entry into military service" with an RE-4 reenlist code (not eligible) and a JDA separation code, which denotes an "involuntary discharge ... when a member procured a fraudulent enlistment, induction, or period of military service through deliberate material misrepresentation, omission or concealment."

VIEWS OF THE COAST GUARD

On February 6, 2002, the Chief Counsel provided the Coast Guard's comments to the Board. He attached to his advisory opinion a memorandum on the case prepared by CGPC. In concurring with CGPC's analysis, the Chief Counsel recommended that the Board grant the applicant partial relief by ordering the Coast Guard to review the

applicant's medical condition under the Physical Disability Evaluation System (PDES) to determine the extent of disability and the nature of discharge.

The Chief Counsel argued that the applicant had a duty to disclose treatment that she sought for health problems associated with her neck during the four-month interim period between her enlistment in DEP and her commencement of active duty. He asserted that she was fully counseled on this obligation and further contended that the record wholly supports the applicant's appreciation of the requirement to disclose such information. The Chief Counsel stated that in spite of the multiple opportunities to comply with the requirements for disclosing her medical information, the applicant failed to so do.

The Chief Counsel stated that as a result of the applicant's failure to disclose health problems existing prior to her enlistment, the Coast Guard was denied the opportunity to fully evaluate her eligibility for enlistment. He argued that according to the applicant's record, the Coast Guard reasonably found that the applicant intended to conceal her history of health problems and thereby was justified in subsequent steps taken to implement her discharge.

The Chief Counsel contended, however, that "[t]here is insufficient evidence in the record to support CGPC's determination that Applicant fraudulently enlisted." He stated that the plain language of the SF-93 (Report of Medical History) medical questionnaire may have led the applicant to consider her neck problems to be of a non-serious nature.³ In light of the applicant's entire record, asserted the Chief Counsel, it is difficult to establish that the applicant was aware of the severity of her condition. Such being the case, he stated, it is appropriate to withdraw the fraudulent enlistment separation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 18, 2002, the Chairman sent a copy of the views of the Coast Guard to the applicant and invited her to respond within 15 days. The applicant was granted a 30-day extension and responded on April 26, 2002.

The applicant stated that she agreed with the recommendation of "the Board to grant relief by ordering the Coast Guard to review [her] condition under the Physical Disability Evaluation System..."⁴ Notwithstanding agreeing with the recommended

³ Specifically, the applicant answered "no" to the question "[h]ave you ever been a patient in any type of hospital or consulted or been treated by clinics, physicians, healers or other practitioners within the past 5 years for other than minor illnesses?"

⁴ The Board interprets this to mean that she agrees with the Coast Guard's advisory opinion to the extent indicated.

relief, the applicant alleged that the Coast Guard's advisory opinion warranted a number of clarifications or corrections in order to portray her record accurately. She pointed out that specific sections in her medical record show conflicting assessments of either the nature and/or duration of her neck problems. The applicant also submitted letters written on her behalf by acquaintances, who indicated that they knew her well and were unaware of any health problem prior her entry on active duty.

The applicant further alleged that she candidly answered the Coast Guard's medical questionnaires. She contended that had she answered affirmatively that she had "been treated by clinics, physicians, healers or other practitioners...for other than minor illnesses," her answer would imply treatment for a major illness. The applicant declared that such a claim would have been untrue.

APPLICABLE LAW

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

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 their 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 a physical disability. Article 2.A.23. defines "incurance of disability" as the moment "when the disease or injury is contracted or suffered as distinguished from a later date when the member's physical impairment is diagnosed or the physical defect renders the member unfit for continued duty. ... A physical disability that is due to the natural progress of disease or injury is incurred when the disease or injury causing the disability is contracted."

According to Article 3.D.8., entitled "Requirement for Initial Medical Board (IMB), "[e]xistence of one or more of the following situations requires convening an IMB: ... In any situation where fitness for continuation of active duty is in question."

Article 3.F.1 provides that "[a] medical board considers and reports upon any evaluatee whose case has been referred for consideration. It conducts a thorough

physical examination to evaluate the member's general health. ... It shall obtain and examine available records to formulate a conclusion regarding the member's present state of health and the recommendations required."

Article 3.F.2. provides that "[a] medical board is not a forum for conducting a formal hearing, taking other than medical evidence, or making determinations required of physical evaluation boards by chapters 4, 5, 6, and 7 of [the PDES]. It presents a clear medical picture of the case in question[,] making all pertinent diagnoses/prognoses and giving a medical opinion as to the evaluatee's fitness for duty and recommendation for future action. ... "

According to Article 4.A.1.a., "[t]he CPEB is a permanently established administrative body convened to evaluate the following on the basis of records only: the fitness for duty of active duty and reserve members; ..." Furthermore, Article 4.A.3. provides that "[t]he CPEB evaluates the fitness for duty of all evaluatees whose cases are referred to it for consideration by Commander (CGPC-adm), Coast Guard Personnel Command."

Personnel Manual (COMDTINST M1000.6A)

Article 12.B.1.e. of the Personnel Manual, entitled "Cases Involving Concurrent Disability Evaluation and Disciplinary Action," provides the following:

Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander, (CGPC-amd) is processing a member for disability while simultaneously Commander (CGPC-emp-1) is evaluating him or her for an involuntary administrative separation for misconduct or disciplinary proceedings which could result in a punitive discharge or an unsuspended punitive discharge is pending, Commander, (CGPC-adm) suspends the disability evaluation and Commander (CGPC-epm-1) considers the disciplinary action. If the action taken does not include punitive or administrative discharge for misconduct, Commander, (CGPC-adm) sends or returns the case to Commander, (CGPC-adm) for processing. If the action includes either a punitive or administrative discharge for misconduct, the medical board report shall be filed in the terminated member's medical personnel data record (MED PDR)."

Article 12.B.18.b.2., entitled "Reasons to Discharge for Misconduct," provides that "Commander, (CGPC) may direct discharging a member for misconduct..." for "procuring a fraudulent enlistment, induction, or period of active service through any deliberate material misrepresentation, omission, or concealment which, if known at the time, might have resulted in rejection. ..."

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. The application was timely.

2. The applicant alleged that she was wrongly denied the opportunity to have "her case heard by competent Board members" of a CPEB in order to consider her for separation by reason of physical disability. Pursuant to 3.F.1.c. of the Medical Manual, the Coast Guard was required to determine the applicant's fitness for duty when the applicant's health problems associated with her neck interfered with her duties aboard her second cutter. In assessing her continued fitness for active duty, an IMB was convened and the applicant's general health was evaluated during a comprehensive physical examination. PDES Manual, Articles 3.D.8., 3.F.1. and 3.F.2. A CPEB, however, was not required to evaluate the applicant's fitness for duty unless her case was referred to the CPEB by the Commander (CGPC-adm), Coast Guard Personnel Command. PDES Manual, Article 4.A.3.

3. The applicant alleged that the Coast Guard erred in forwarding her case to the Commander of EPM for administrative discharge, while her case was awaiting CPEB review. It is an established rule that the administrative discharge of an enlisted person before the expiration of their enlistment term is void if it "exceeds applicable statutory authority, or ignores pertinent procedural regulations, or violates minimum concepts of basic fairness." Waller v. United States, 198 Ct. Cl. 908, 913, 461 F.2d 1273, 1276 (1973); Giglio v. United States, 17 Cl. Ct. 160, 166 (1989). However, under Article 12.B.1.e. of the Personnel Manual, involuntary administrative separations for misconduct or disciplinary proceedings, which may result in punitive discharge, supersede separations by reason of disability. Therefore, the Board cannot find that the Coast Guard erred when it suspended the applicant's disability evaluation, subsequent to her IMB evaluation, in order to consider administratively separating her for fraudulent enlistment.

4. The applicant asserted that her discharge for misconduct due to fraudulent enlistment is legally and factually insufficient because the evidence fails to establish that she knowingly misrepresented the serious nature of her health problems. The record shows that, prior to her entry on active duty, she experienced one neck ache that was resolved through stretching exercises. The Chief Counsel admitted that under the circumstances presented, it is difficult to ascertain and establish whether or not the applicant knew and intentionally concealed the severity of her condition. Consequently, he agreed that the character of the applicant's discharge should be

corrected by removing the fraudulent enlistment separation. Moreover, the Coast Guard has recommended that the Board grant partial relief by ordering the Coast Guard to review the applicant's medical condition under the Physical Disability Evaluation System in order to determine the extent of her disability and the nature of the applicant's discharge.

5. The PDES Manual governs the determination of when a service member incurs a disability. PDES Manual, Article 2.A.23. The Board is persuaded that the Coast Guard denied the applicant a CPEB and discharged her for misconduct without sufficient evidence that she knowingly provided false information about the nature of her health problems. The preponderance of the evidence in the record indicates that neither the applicant nor her doctors had any idea of the serious nature of her illness until she had served on active duty for almost two years. Therefore, the applicant has proved by a preponderance of the evidence that the Coast Guard erred in discharging her for fraudulent enlistment with a JDA separation code and RE-4 reenlistment code. She has also proven that she was denied due process, in that she should have been discharged under the PDES.

6. Accordingly, the applicant should be granted the relief of having the Coast Guard convene a CPEB to determine the extent of the applicant's disability and the nature of the applicant's discharge. In addition, her DD 214 should be corrected to reflect a reason for discharge that is consistent with the final determination of the PDES.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXX XXXX XXXXX, XXXXXXXXXXX, USCG, is granted as follows:

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

After such PDES processing is complete, the Coast Guard shall correct her DD 214 to show a narrative reason for separation, separation authority, separation code, and reenlistment code that reflect the results of her PDES processing and that conform to the provisions of the Separation Program Designation Handbook.

The Coast Guard shall pay the applicant any sum she may be due as a result of this correction.

