

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1996-063

FINAL DECISION

██████████ Attorney-Advisor:

This proceeding was conducted according to the provisions of section 1552 of title 10, United States Code. It was commenced on January 23, 1996, upon the BCMR's receipt of the applicant's application.

This final decision, dated January 28, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant is a former xxxxxx and xxxxxxxxx who resigned from the Coast Guard on March 15, 19xx. He asked the Board to "sit as the first competent medical board to determine whether I was disabled at the time of my separation from active duty" He wants the Board to correct his military record to show that he was placed on the permanent retired list or the Temporary Disability Retired List (TDRL) based on diagnoses of chronic prostatitis and temporal mandibular joint syndrome (TMJ). The applicant asked the Board to serve as his medical board and award him a 50% combined disability rating (20% for his TMJ and 40% for his prostatitis). He also asked the Board to consider rating him for chronic fatigue syndrome.

The applicant also asked that the Board, if it decides to retire him, to do so as of the date of this Final Decision in the rank and pay grade of xxxxx because he was on the selection list to that rank at the time of his resignation. If instead the Board decides to place him on the TDRL, he asked to be placed on it with the rank of xxxxxxxxx with a date of rank of July 1, 19xx, "in accordance with [his] signal status on the O-4 selection list in 19xx." In the alternative, the applicant

asked the Board to correct his military record to show that he received a medical discharge due to his disabilities on the date of this Final Decision. He further requested that he be awarded back pay from March 15, 19xx, to the date of this decision.

Finally, the applicant asked the Board to order the Coast Guard to appoint him counsel from the Coast Guard Physical Disability Evaluation Board to represent him in this matter.

APPLICANT'S ALLEGATIONS

The applicant alleged that, when he was separated on March 15, 19xx, he suffered from chronic prostatitis and TMJ, both of which had been diagnosed while he served in the Coast Guard. The TMJ, he stated, caused significant pain and frequently prevented him from opening his mouth wide enough to speak or eat. He alleged that at the time of his separation in 19xx, he had to take 800 milligrams of Motrin three or four times per day to relieve the pain and allow him to speak and eat. In addition, he stated that he has been on antibiotics since 19xx for his chronic prostatitis. The applicant alleged that both of these conditions have become much worse since his separation from service: "My life since discharge has been a living hell of pain and physical debilitation."¹

The applicant alleged that both conditions are ratable disabilities under the Department of Veterans Affairs (DVA) rating system. However, at the time of his physical examination for discharge, he was not informed that they were ratable disabilities. Nor was he informed of his right to review the findings of the physical, to dissent from those findings, and to request a medical board. The applicant also stated that, although he served as an xxxxx in the Coast Guard, his duties never touched on the rights of members with medical disabilities. Therefore, he was unaware of his rights at the time of his discharge.

The applicant also alleged that "[a]t the time of my separation from active duty, I was unaware of either the serious nature of these conditions or the fact that my condition would deteriorate even further over time." The Coast Guard's negligence in this regard, he alleged, prevented him from seeking care more promptly, which might have mitigated the rate or extent of his physical deterioration.

The applicant stated that, although he continued to perform active duty until the date of his discharge, he missed many days of work due to his medical

¹ The applicant included in his application many details of the severe pain and awkward inconveniences he now suffers because of the TMJ and chronic prostatitis.

conditions and often went home early. Therefore, he was not “fit for duty” at the time of his separation. He believes that, had he been given a medical board, he would have been found unfit for duty.

The applicant explained that his military medical records are sparse because the Coast Guard failed to keep adequate records. In addition, from 19xx until his discharge in 19xx, he was assigned to a circuit defense team. His duty on the team took him to remote locations, “thus making it impossible to receive consistent, regular medical treatment either inside the military system or outside the military system at [his] own expense.”

The applicant submitted four affidavits of Coast Guard officers and copies of medical and DVA records to support his allegations (see below).

IEWS OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On June 6, 1997, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief. The Chief Counsel stated as follows:

While we are sympathetic to Applicant’s medical problems, the laws and regulations governing service disability benefits and other benefits do not entitle him to disability benefits from the Coast Guard. The law that provides for physical disability retirement or separation . . . is designed to compensate members whose military service is terminated due to a service connected disability. . . . Applicant was not separated due to disability, was not entitled to disability processing through the Coast Guard Physical Disability Evaluation System [PDES] at the time of his discharge, and is not now entitled to disability benefits from the Coast Guard. The Coast Guard acknowledges that it erred by not requiring him to complete CG-4057 indicating his agreement or disagreement with the finding that he was fit for duty at his discharge physical. Nevertheless, Applicant was provided other notice of his right to object to the finding. He is not entitled to relief because he has not shown that he was prejudiced or harmed by this error.

The Chief Counsel stated that, on December 17, 19xx, the applicant requested expedited separation from the Service based on a recent adverse personnel action, family problems, and educational and employment opportunities he wanted to pursue. He did not mention his medical conditions as a factor.

The Chief Counsel stated that the applicant was not entitled to disability benefits because he was fit for duty at the time of his separation from service. “DVA ratings are not determinative of the issues involved in military disability retirement cases. Lord v. United States, 2 Ct. Cl. 749, 754 (1983).” In addition, the Chief Counsel noted that “the information available through the [DVA] was based in large part on physical examinations of Applicant that occurred through August of 19xx – more than two years after Applicant was discharged” The Chief Counsel attached to his advisory opinion a copy of a memorandum regarding the applicant’s case from the Chief of the PDES Branch (see below).

The Chief Counsel admitted that the Coast Guard had apparently “erred by failing to ensure that [the applicant] indicated his agreement or disagreement with the assumption of fitness for duty at separation on form CG-4057, and to provide him copies of medical documents, as required by Article 4.B.27.c. of the Coast Guard Medical Manual, COMDTINST M6000.1B.” He argued, however, that the applicant had received notice of his right to object to the finding of fitness in a letter to him dated February 7, 19xx. In addition, the Chief Counsel alleged that a letter the applicant wrote on February 23, 19xx, “a week before the physical examination, indicates that he received the letter and considered it carefully, that he was fully involved with his discharge proceedings. Thus, Applicant was at least constructively – and most likely actually – aware that he had a right to contest the finding of fitness.” The Chief Counsel also alleged that, contrary to the applicant’s allegation, the Coast Guard had no duty to inform him that his chronic conditions constituted ratable disabilities under the DVA system.

The Chief Counsel argued that even assuming the applicant was unaware of his right to object to the finding of fitness, he had not shown that he would have exercised his right to object. The Chief Counsel alleged that the applicant wanted to be discharged as soon as possible and had “strong reason to avoid delaying his separation by contesting [the finding of fitness].” But even assuming the applicant had contested the finding, the applicant still would not have received PDES processing for disability benefits for all the reasons stated by the Chief of the PDES Branch in his memorandum (see below). “[T]he test [for fitness for duty] is not whether he could perform all duties that could be required of a Coast Guard xxxxx at any time, but whether he was unfit to perform his *assigned* duties at the time of separation.”

Finally, the Chief Counsel argued that any procedural relief denied the applicant has been remedied by the Personnel Command’s review of his application.

Memorandum of the Chief of the PDES Branch

The Chief of the PDES Branch stated that, because the Coast Guard could find no relevant original medical records, he was relying on records supplied by the applicant. He concluded that the applicant's petition "falls far short of overcoming presumption of fitness, let alone actual finding of fitness in March 19xx. Applicant received adequate notification of his right to object to a finding of fitness. The due process allegedly denied—arguably surrendered—has now been provided by the Personnel Command."

The Chief of the PDES Branch quoted Paragraph 2-C-2-b of the PDES Manual (COMDTINST M1850.2), which states that PDES is not to be "misused" to provide benefits to persons who are voluntarily separating and have been drawing pay "on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service." He also cited Paragraph 2-C-2-b(2) of the PDES Manual, which "prohibits convening an Initial Medical Board for a member separating voluntarily, unless the member is unable to perform assigned duties, or the member suffers an acute, grave illness or injury." The Chief stated that the applicant had been diagnosed with "some degree of chronic medical problems" at the time of his discharge, but he "suffered no acute, grave illness or injury." The Chief pointed to the incongruity of the applicant's argument that, while he himself was unaware of the seriousness of his medical problems, he should have been found unfit for duty by the Coast Guard.

In response to the affidavits of the applicant's co-workers, the Chief of the PDES Branch stated that, while they support his contention that his medical problems "hampered his performance of duties," the applicant's performance evaluations "indicate superior performance in almost all dimensions." He noted that the applicant received scores of 6 (on a scale of 1 to 7, with 7 being highest) for the category "stamina" on his last two regular evaluations.

Regarding the applicant's due process rights, the Chief of the PDES Branch stated that in a letter dated February 7, 19xx, the applicant was ordered to "[c]omply immediately with Article 12-A-10, Personnel Manual (COMDTINST M1000.6A) regarding physical examinations." That article, the Chief stated, clearly entitles officers to object to findings of fitness and outlines the proper procedures. The applicant acknowledged his receipt of the letter on February 23, 19xx. The Chief also stated that the applicant's "letter of 23 February 19xx demonstrated scrupulous attention to Coast Guard's letter of 7 February 19xx." The Chief pointed out that in his letter of February 23, 19xx, the applicant "vigorously disputed" the discharge code he had been assigned and suggested three alternatives. None of the suggested alternatives was a disability-related code.

Furthermore, the Chief of the PDES Branch stated that Paragraph 3-B-5 of the Medical Manual gives the Commander of the Personnel Command authority to evaluate findings of fitness after an officer's objection. The Chief stated that, upon review of the applicant's application and medical records, the Personnel Command "now determines that the finding of fitness on Applicant's separation was appropriate."

The Chief of the PDES Branch asked the BCMR to further consult the Personnel Command "in order to identify possible technical defects in proposed remedies" if it should decide to grant the applicant relief.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On June 9, 1997, the Chairman sent copies of the Chief Counsel's advisory opinion and the memorandum of the Chief of the PDES Branch to the applicant and invited him to respond within 15 days. The applicant requested an indefinite extension and stated that he would be submitting more medical evidence as he was soon to undergo further evaluations. The Chairman granted two extensions and then placed the case on indefinite hold pending further submissions from the applicant. However, the applicant failed to submit any more evidence. In response to a telephone call from the BCMR on December 18, 1998, the applicant wrote a letter to the Board. The letter, dated December 21, 1998, indicated that the applicant would not be submitting further evidence and wanted his case presented to the Board.

In his letter dated December 21, 1998, the applicant responded to the Coast Guard's advisory opinion. The applicant alleged that the Chief Counsel had not rebutted any of the medical evidence or affidavits he had provided which show that he was unfit for duty at the time of his discharge. In this letter, the applicant made his first request to be rated for chronic fatigue syndrome.

The applicant also submitted a copy of a letter to him from xxxxxxxx dated October 21, 1998. The letter stated that he had received an "AV" rating as a "highly respected, ethical member of the xxxxxxxx."

SUMMARY OF THE APPLICANT'S PERSONNEL RECORDS

On July 27, 19xx, the applicant was commissioned a xxxxx in the Coast Guard Reserve after passing the xxxxxxxxxxxxxxxxxxxx. He began work as an assistant xxxxxxxx in the xxx District, where he served as an advisor for the xxxxxxxxxxxx. On December 1, 19xx, the applicant was assigned to serve as a xxxx and xxxxxxxx and an advisor for the xxxxxxxx divisions in the xxx District. On June 1, 19xx, he began serving as the primary xxxxx and xxxxx for all military

allowed in lieu of further administrative separation proceedings or board actions when member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed." The letter included the following order: "Comply immediately with Article 12-A-10, Personnel Manual (COMDTINST M1000.6A) regarding physical examinations."

On February 23, 19xx, the applicant replied to the Commander of the Personnel Command. He stated that he had reviewed COMDTINST M1900.4 series (the Separation Program Designator Handbook) and found that BNC was a separation code "which does not comport with my request to resign my commission and I hereby request your assistance in remedying this situation." He explained that because he had never received notice that board action was contemplated against him, he could not "be considered to have resigned in lieu of further action." The applicant suggested that he be assigned one of the following codes instead: FFF (discharged under honorable conditions), MFF (convenience of the government), or MND (by request).

According to the applicant's DD Form 214, on March 15, 19xx, the applicant was honorably discharged with "completion of required service" as the narrative reason for separation and MBK (voluntary release) as his separation code. On March 31, 19xx, he married a fellow officer, who provided an affidavit on his behalf (see below).

SUMMARY OF THE APPLICANT'S MEDICAL RECORDS

The file of the applicant's medical records provided by the Coast Guard was essentially empty. The following medical records, including copies of the applicant's DVA records, were provided by the applicant.

- 5/11/xx The applicant sought treatment for pain on the right side of his jaw. Dr. x, a dentist for the Coast Guard, diagnosed TMJ and ordered a night guard for the applicant to wear.
- 9/27/xx The applicant sought treatment for painful and frequent urination. Dr. x, a civilian urologist, found his prostate to be enlarged and prescribed antibiotics.
- 11/9/xx The applicant again sought treatment from Dr. x, who diagnosed prostatitis.
- 2/23/xx Because the applicant had worn through his soft night guard, Dr. x, a dentist for the Coast Guard, ordered an acrylic one for him. Dr. x found that the applicant suffered from TMJ.

3/1/xx The applicant underwent a RELAD physical prior to discharge. The dentist noted that he had "limited opening continued masseter pain" due to TMJ.

A physician's assistant filled out a Chronological Record of Medical Care, on which he noted that the applicant was under the care of a civilian doctor for prostatitis and took antibiotics for it. He also noted that he was unable to examine the applicant's throat because of jaw pain due to TMJ. He prescribed 800 milligrams of Motrin for the pain.

3/15/xx The applicant was discharged.

3/22/xx A chief warrant officer signed a form CG-4057, on which a member being discharged is supposed to indicate whether he agrees or disagrees with the findings of his RELAD physical examination and whether he will submit a statement. At the bottom of the form, the officer wrote "Member departed without signing CG-4057." The form included the following information:

You have been examined and found physically fit for separation from active duty. Any defects noted during the examination are recorded in block #74 of the attached Report of Medical Examination (SF-88).

The defects listed on the Report of Medical Examination do not disqualify you from performing your duties or entitle you to disability benefits from the Coast Guard. To receive a disability pension from the Coast Guard, you must be found unfit to perform your duties before you are separated.

After you are separated or retired, any claims for disability benefits must be submitted to the Veterans Administration. . . .

7/28/xx Dr. x noted that the applicant had a tender prostate and continued his prescription for antibiotics for the prostatitis.

1/11/xx Dr. x noted that the applicant "has had some intermittent problems with prostatitis since last seen" and refilled the prescription for antibiotics.

3/8/xx Dr. x, a dentist, noted that the applicant was experiencing increasing muscle spasms due to his TMJ.

3/11/xx The applicant applied for disability benefits from the DVA.

10/11/xx The DVA granted service connection for both prostatitis and TMJ. He was awarded a 10% disability rating for each and a combined disability rating of 20% as of May 1, 19xx.

2/26/xx The DVA increased the applicant's disability rating for prostatitis to 40%.

The applicant provided many medical records indicating that his conditions have worsened considerably since his discharge, causing severe pain and tremendous inconvenience.

AFFIDAVITS OF THE APPLICANT'S COLLEAGUES

Affidavit No. 1

The following statements were signed by an xxxxxxx who is currently a xxxx on active duty in the Coast Guard and who met the applicant in October 19xx and married him on March 31, 19xx:

. . . I was aware of the fact that [the applicant] had been suffering from both prostatitis and TMJ prior to his discharge from active duty. I was very surprised when he informed me of how the Coast Guard Support Center xxxx Health Clinic seemed to summarily conduct his exit physical. However, at this time, we were both hoping that his physical situation would improve. Neither one of us was aware of the fact that he was entitled to review his medical record prior to discharge from active duty. .

..

From [the applicant's] date of discharge, his physical condition deteriorated at a rapid rate. . . . From the last couple of months that he was on active duty, to the present, his conditions have dramatically deteriorated.

...

Since [the applicant's discharge from active duty until the present, I have observed the following:

TMJ -

1. [The applicant] can barely open his mouth to speak almost every day of the week. . . . He complains to me of blinding headaches

2. There are days in which I observe him taking an entire bottle of Motrin (when his prescriptions have run out) in order to be able to speak or eat . . .

PROSTATITIS:

1. Since before [the applicant] left active duty, he complained of a burning pain while urinating. . . .

2. Over the course of the past two years, his condition has worsened. He audibly groans in pain while urinating. . . .

Affidavit No. 2

The following statements were signed by an xxxxxx who is a lieutenant commander on active duty in the Coast Guard and who met the applicant in 19xx.

. . . I reported to the xxx District xxxx in August of 19xx. I recall that [the applicant] had complaints of frequent pain associated with TMJ and prostatitis. He did not complain often but he seemed to frequently be in discomfort. In retrospect, there were times when I had difficulty understanding what he had to say that could have been related to his TMJ.

I was never his supervisor but I do recall that he was frequently not at work and/or left work early. Again, he was not a chronic complainer but these absences could have been health related.

Our duties as members of the xxxx kept us constantly on the road and this could have hampered his ability to receive regular consistent medical care. . . .

I believe that [the applicant] should have been afforded an opportunity to have his medical status reviewed by a medical board. I spent a number of years as counsel for evaluatees who were processed through the Coast Guard Physical Disability Evaluation System; based on my knowledge and that experience, I believe that [the applicant] would have been found not fit for duty. . . .

Affidavit No. 3

The following statements were signed by an xxxxx, a now-retired commander in the Coast Guard who met the applicant in 19xx and served as his supervisor during 19xx and 19xx:

. . . [The applicant] was a solid performer and fine xxxxxx. . . . During the period from 19xx to 19xx, I recall [the applicant] missing work rather often, either coming in late some days or not at all. At the time, [the applicant] explained that his inability to come to work was a result of his TMJ syndrome and his prostatitis. During this same period, [the applicant] was in a travelling billet that required him to be "on the road" several times a month. Having been in a similar billet myself, I can attest to the inconvenience and difficulty such duty creates when it comes to obtaining consistent medical care. . . .

Affidavit No. 4

The following statements were signed by an xxxxxx who is a lieutenant commander in the Coast Guard and who met the applicant in 19xx and served on the same xxxxxx team during 19xx and 19xx:

. . . It was during April of 19xx that [the applicant] informed me that he was experiencing frequent pain and discomfort due to TMJ and prostatitis. Over time, [the applicant] complained of his conditions becoming more frequent and severe. [The applicant] would frequently leave early or not come to work at all which he attributed to the worsening symptoms of the TMJ and prostatitis. I had no reason to doubt [the applicant's] claims that he was ill on any of those occasions. . . .

APPLICABLE REGULATIONS

Provisions of the Personnel Manual (COMDTINST M1000.6A)

Article 12-A-10 requires officers to undergo a physical examination prior to discharge if they have not had one during the prior year. Article 12-A-10.e. of the Personnel Manual provides the following:

- (1) If an officer is found qualified for separation/release and agrees with the finding, the officer shall be processed for separation/release as scheduled.
- (2) If an officer is found qualified for separation/release and disagrees with the finding, . . . [t]he officer shall then be processed in accordance with Chapter 3 of the Medical Manual
- (3) If there is a question about the unfitness of an officer to perform duties and the officer agrees with the condition, . . . [t]he officer shall then be processed in accordance with Chapter 3 of the Physical Disability Evaluation System Manual. . . .

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

The Medical Manual governs the disposition of members with physical disabilities. According to Article 3.B.3.a., during the medical examination a member must undergo prior to separation, "the examiner shall consult the appropriate standards of this chapter to determine if any of the defects noted are disqualifying for the purpose of the physical examination."

Article 3.F. lists medical conditions that "are normally disqualifying" for administrative discharge in the Service. Persons with such disqualifying conditions "shall be referred to an Initial Medical Board." Prostatitis and TMJ are not listed. Article 3.F.17. lists "[d]iseases and abnormalities of the jaws or associated tissues when, following restorative surgery, there remain residual conditions which are incapacitating or interfere with the individual's satisfactory performance of military duty. . . ." Article 3.F.19.c. lists miscellaneous conditions "which individually or in combination, not elsewhere provided for in this section, if: (1) the individual is precluded from a reasonable fulfillment of the purpose of employment in the military service; . . ."

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

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

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

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

Article 4.B.27.c. provides that "[m]embers not already in the physical disability evaluation system, who disagree with the assumption of fitness for duty at separation shall indicate on the reverse of form CG-4057. They shall then proceed as indicated in paragraph 3-B-5. of this manual.

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

[a]ny member undergoing separation from the service who disagrees with the assumption of fitness for duty and claims to have a physical disability as defined in section 2-A-38 of COMDTINST M1850.2 (series), Physical Disability Evaluation System, shall submit written objections, within 10 days of signing the Chronological Record of Service (CG-4057), to Commander [Military Personnel Command]. . . .

. . . Commander [Military Personnel Command] will evaluate each case and, based upon information submitted, take one of the following actions:

- (1) find separation appropriate, in which case the individual will be so notified and the normal separation process completed:
- (2) find separation inappropriate, in which case the entire record will be returned and appropriate action recommended; or
- (3) request additional documentation before making a determination.

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

The PDES Manual governs the separation of members due to physical disability. Article 2-C-2 of the PDES Manual states the following:

b. The law that provides for disability retirement or separation (Chapter 61, Title 10, U.S. Code) is designed to compensate members whose military service is terminated due to a physical disability that has rendered the member unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply.

(1) Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the service member, because of disability, was physically unable to perform adequately the duties of office, grade, rank or rating; or

(b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident

with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty.

(2) Service members who are being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating.

c. If the evidence establishes that service members adequately performed the duties of their office, grade, rank or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments.

• • •

i. The existence of a physical defect or condition that is ratable under the standard schedule of rating disabilities in use by the [Department of Veterans Affairs] does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render the member unfit for military 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that he should have been evaluated by a medical board prior to his discharge on March 15, 19xx. He asked the Board to sit as his medical board and place him on either the permanent retired list or the TDRL. He also asked the Board to assign him a combined disability rating of 50% due to his chronic prostatitis and TMJ. In the alternative, the applicant asked the Board to award him a medical discharge due to his disabilities. He alleged that, at the time of his discharge, he was not informed of his right to object to his medical examiner's finding of fitness for duty. He also alleged that

his doctors did not inform him, and he did not know, how much his conditions could deteriorate.

4. According to Article 3.F.2. of the Medical Manual, if a member is found to have a “disqualifying” physical impairment during a medical examination, a medical board “shall” be held to determine the member’s disposition. However, Article 3.B.6. states that the Coast Guard shall convene an IMB for members with disqualifying impairments who are being separated for reasons other than a disability only if the requirements of Article 2-C-2.b. of the PDES Manual are met. That article requires members to prove by a preponderance of the evidence that they are not fit for duty because of a disability. It also states that members such as the applicant, who are being processed for separation for reasons other than physical disability, shall not be referred to a medical board “unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating.” Therefore, the Board finds that, to prove that the Coast Guard erred by not convening a medical board to evaluate him for disability discharge, the applicant must prove that, at the time of his release from active duty, (a) he had a disqualifying physical impairment which rendered him unfit for duty or (b) his physical condition reasonably prompted doubt as to his fitness for duty.

5. Disqualifying Physical Impairment. Article 3.F. of the Medical Manual lists those conditions that are considered “disqualifying physical impairments.” Neither prostatitis nor TMJ is specifically listed in Article 3.F. Furthermore, because the Board finds that the applicant satisfactorily performed active duty service until his discharge (see Finding 6 below), the Board finds that the applicant’s conditions at the time of his discharge were not “disqualifying physical impairments” within the meaning of Articles 3.F.17 and 3.F.19.c.

6. Fitness for Duty. Article 2-C-2.b.(1) of the PDES Manual states that “[c]ontinued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty.” The applicant continued to perform active duty service until the date of his discharge. The applicant may overcome the presumption of fitness, however, if he establishes by a preponderance of the evidence that he was unable to perform his duties adequately. The applicant alleged that at the time of his discharge, he had been missing work because of his conditions and was unfit for duty. Affidavits signed by his fellow officers and former supervisor support the applicant’s allegation that he had missed work and cited his medical conditions as the cause. Nevertheless, based on the following evidence, the Board finds that the applicant has not proven by the preponderance of the evidence that he was unable to perform his duty adequately or unfit for duty at the time of his discharge:

a. The medical personnel who conducted the applicant's examination prior to discharge found him fit for duty although they knew of his prostatitis and TMJ.

b. None of the applicant's medical records indicates that he had been found unfit for duty because of his conditions prior to his discharge.

c. In the letter the applicant sent to request to resign his commission, he listed several reasons, none of which was related to his medical conditions.

d. The applicant stated that his medical conditions have worsened progressively. His wife signed an affidavit stating that his conditions deteriorated rapidly and dramatically after his discharge. Yet more than one year after his discharge, the DVA awarded the applicant just 10% disability ratings for each of his conditions and a combined rating of 20%.

e. On January 1, 19xx, less than one year after his discharge, the applicant's doctor described his incidence of prostatitis as "intermittent."

f. The applicant stated that at the time of his discharge, he did not know of the serious nature of his conditions. This strongly suggests that he did not then consider his conditions to be serious.

g. When the applicant protested the assignment of the BNC separation code, he suggested several alternatives, none of which was related to his medical conditions.

h. The applicant did not deny that he was informed of the finding that he was fit for duty prior to his discharge. However, he never contested the finding. Although the applicant alleged that he did not know he had a right to contest it, the Board finds that any officer--and especially an xxxxx--who believed such a finding to be in error would have at least inquired into the possibility of having the finding reversed.

i. The applicant's last two regular evaluations and the affidavits of his supervisor and colleagues reflect superior job performance during his last year on active duty.

7. Reasonable Doubt of Fitness for Duty. The applicant voluntarily sought to resign his commission for nonmedical reasons. Article 2-C-2.b.(2) of the PDES Manual states that members who are being administratively separated

shall be referred to a medical board if “their physical condition reasonably prompts doubt that they are fit to perform the duties of their office, grade, rank or rating.” At the time of his medical examination for discharge, the applicant (a) had been diagnosed with prostatitis and TMJ, (b) took antibiotics and wore a night guard for these conditions, respectively, (c) had missed some work because of these conditions, and (d) occasionally required Motrin to be able to open his mouth wide enough to talk and eat. Nevertheless, the Board finds that the applicant has not proved by a preponderance of the evidence that his physical condition should have prompted doubt in his fitness for duty. Therefore, the Board finds that the applicant was not entitled to a medical board under the terms of Article 2-C-2.b.(2) of the PDES Manual.

8. The applicant stated that he was not informed that his conditions are ratable disabilities under the DVA rating system. The Board knows of no law – and the applicant did not cite any--that requires the Coast Guard to give its members of this particular information. Having a ratable disability under the DVA system does not entitle a member of the Coast Guard to a medical board. Furthermore, pursuant to Article 2-C-2.i. of the PDES Manual, the fact that the applicant’s conditions are ratable disabilities under the DVA rating systems does not prove that he would have been found unfit for duty by a medical board. As the Chief Counsel pointed out, the Court of Federal Claims has held that “[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The [DVA] determines to what extent a veteran’s earning capacity has been reduced as a result of specific injuries or combination of injuries. . . . The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. . . . Accordingly, [DVA] ratings are not determinative of issues involved in military disability retirement cases.” Lord v. United States, 2 Cl. Ct. 749, 754 (1983).

9. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice by not convening a medical board to evaluate his conditions or by not giving him a medical discharge.

10. The applicant stated and the Coast Guard admitted that he had not signed a CG-4057 form to agree or disagree with his medical examiner’s finding of fitness. The applicant stated that this error deprived him of his right to object to the finding and have it reviewed and perhaps reversed. The Coast Guard argued that the error was harmless because the applicant received other notice of his rights and because, if he had objected to the finding, the examiner’s finding of fit for duty would have been upheld. In addition, the Coast Guard argued that

the error had been remedied because, upon receiving the applicant's application and medical records, the Personnel Command had reviewed them in accordance with Article 3.B.5. of the Medical Manual. The review determined that the finding of fitness was appropriate. In light of the facts set out in Finding 6, above, the Board is persuaded that the Coast Guard's failure to notify the applicant of his right to object to the finding of fitness via the CG-4057 form was harmless error.

11. Regardless of the severe pain and difficulties the applicant is suffering now, he has not established by the preponderance of the evidence that his conditions at the time of his discharge rendered him unfit to perform his duty. A veteran's remedy for loss of income due to a service-connected condition that becomes significantly disabling after his discharge lies with the DVA.

12. Therefore, the applicant's request for correction should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of former XXXXX, USCGR, is hereby denied.

