


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-053

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

FINAL DECISION


This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on January 5, 2004, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated September 9, 2004, is 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 asked the Board to reinstate him on active duty in the Coast Guard as of the date of his release, June 30, 2002, so that he could be evaluated under the Physical Disability Evaluation System (PDES). He further asked that he be awarded back pay and allowances and receive credit for time in grade for pay, promotion, and retirement purposes.

The applicant stated that on January 25, 2001, while serving on extended active duty, he had a motorcycle accident. However, no line of duty investigation was ordered by his command. He alleged that he was seriously injured with three broken ribs, a fractured clavicle, and chronic paravertebral spasms. He also developed ulnar neuropathy in his elbow. However, instead of being processed under the PDES and medically separated or retired, he was administratively separated (released from active duty into the Reserve) when his active duty contract expired.

The applicant stated that after the accident and at the time of his discharge he was taking medication for back spasms (Flexeril and Skelaxin) and for pain (Vicodin and 800 milligrams of Motrin). However, he was not given a physical examination at least 60 days prior to his separation, as required by Article 12.A.10.b. of the Personnel Manual. The applicant alleged that, before his date of discharge, the Coast Guard's doctor, Dr. R, recognized his condition but refused to process him under the PDES. Therefore, with the assistance of counsel, he submitted a letter requesting PDES processing. However, his request was denied. The applicant alleged that a doctor at Coast Guard Headquarters, Dr. J, "unilaterally interfered with [his] due process rights" by telling Dr. R not to process him under the PDES because he was performing his assigned duties and was therefore "fit for duty" and not entitled to PDES processing under Article 2.C.2.b. of the PDES Manual. The applicant alleged that Dr. J's action was erroneous because the proper method for determining whether a member with a medical condition is fit for duty is through evaluation by medical boards in accordance with the PDES, not through the unilateral actions of Dr. J, who never saw the applicant.

The applicant alleged that on June 18, 2002, his command asked the Coast Guard Personnel Command (CGPC) to delay his separation date for medical reasons. However, the request was improperly denied based on the presumption of fitness. The applicant alleged that on June 26, 2002, he formally requested a 90-day extension so that he could complete certain medical appointments, but CGPC replied that the minimum term of extension he would be allowed was one year. He alleged that he did not extend his contract because he did not feel physically able to perform his duties for another year.

The applicant alleged that on June 28, 2002, he completed a Report of Medical History form "for what he thought was a medical board." However, Dr. R "treated the event as a [release from active duty] examination" and found him fit for duty and for separation. Although he was released from active duty on June 30, 2002, the applicant submitted an Initial Medical Board (IMB) report dated July 1, 2002, with Dr. R's findings. The applicant pointed out that on the IMB report, Dr. R found him fit for duty but noted that the "prognosis is unknown" and that he "advised the evaluatee to avoid ladders and strenuous activity pending further elucidation of the medical problem." The applicant alleged that Dr. R's comments were inconsistent with his finding of "fit for duty."

The applicant alleged that he was not fit for duty on June 30, 2002, and that the presumption of fitness for duty "does not apply where as here the disabilities were long standing, were refractory to medication, were degenerative and finally interfered with [his] ability to perform his duties," as shown by the limitations Dr. R placed on his activity.

SUMMARY OF THE RECORD

From 1990 to 1999, the applicant completed almost ten years of active duty as an officer in the Coast Guard. He resigned and was honorably separated on August 30, 1999. However, he joined the Reserve and on May 1, 2000, began serving on an extended active duty contract with a term of two years and two months.

On January 25, 2001, the applicant fell off his motorcycle [REDACTED]. The police report indicates that he was wearing a helmet and the motorcycle was not damaged, but he complained of pain in his ribs and right arm. Hospital xrays showed "a comminuted left mid clavicular fracture, as well as multiple fractures involving the 4th, 5th, and 6th ribs," but no injuries to the spine or brain. An xray of the thoracic spine revealed "some degenerative changes" but no fracture. He was placed in a limited duty status.

On February 2, 2001, the applicant sought treatment for pain in the upper thoracic area and his left elbow. Xrays of the elbow were "negative." A CT scan of the thoracic spine on February 7, 2001, ruled out a fracture but noted "mild marginal osteophyte formation anteriorly in the upper thoracic region."

On February 5, 2001, the applicant submitted a copy of the police report on his accident to his supervisor. There is no documentation of a "line of duty" determination in the record.

While still in a figure-eight sling in February 2001, the applicant began complaining of pain in his upper and mid back. The doctor noted that he was taking Motrin and Vicodin for pain and that the Flexeril he had been prescribed for the applicant's back spasms did not seem to help. The doctor prescribed Skelaxin for the back spasms and referred the applicant to a physical therapist. On February 27, 2001, the applicant also complained of swelling in the ulnar aspect of his left wrist. At a follow-up examination on March 23, 2001, the applicant was found to be doing well, as he had "essentially no pain over the left clavicle" and an xray showed "excellent callus formation." He was released from further care, but on April 20, 2001, he requested chiropractic treatment, which was authorized.

Throughout 2001 and 2002, the applicant continued to seek chiropractic care and physical therapy. He continued to work full time but used sick leave to attend medical appointments. He reported continuing symptoms, including back spasms; pain in his upper back, neck, and left shoulder; and tingling in his left arm. He reported that work aggravated his symptoms because he sat at a computer most of the time.

Beginning in November 2001, the applicant complained of loss of feeling in his left arm and fingers and on the left side of his back. He stated that he continued to have pain where his ribs had broken and muscle spasms near the scapula.

On January 7, 2002, the applicant told a doctor that his arm symptoms had continued, with intermittent numbness in two left fingers and sometimes the entire arm. The doctor referred him to an orthopedist. On January 28, 2002, the orthopedist reported that the applicant had developed numbness in his left forearm and ring and little fingers and complained of some continuing pain and occasional tingling "in the left side of the thoracic cage." The orthopedist provisionally diagnosed the applicant with an "ulnar neuropathy at the elbow" and referred him to a neurologist for "consultation and consideration of nerve conduction studies."

On March 13, 2002, the neurologist reported to the orthopedist that the applicant was still complaining of intermittent back and neck pain and numbness and tingling in his left arm and fingers. The neurologist stated that he would conduct electrodiagnostic studies of the left arm. On April 24, 2004, after the studies, the neurologist diagnosed the applicant as having a "left ulnar neuropathy at the elbow."

On May 6, 2002, xrays of the applicant's shoulder and left wrist were "normal." The applicant's orthopedist recommended that he seek help at a pain clinic because, he stated, he did "not believe that there are any further orthopedic interventions to consider." The orthopedist stated that the applicant's primary complaint was "pain and paresthesia [numbness] radiating around his left lateral chest wall," which likely resulted from his broken ribs.

On May 8, 2002, Dr. R noted that the applicant consulted him about "his future in the USCG." The doctor noted that he had chronic pain but "is able to work daily and has no deployment limits."

On May 13, 2002, the applicant sought help for thoracic back pain, which he stated had been aggravated by a massage from his chiropractor the week before. A health services technician placed him on limited duty until his evaluation the next day. On May 14, 2002, the applicant told a doctor that he was frustrated by his continuing symptoms and felt depressed. He reported feeling a burning sensation in his left shoulder and discomfort in the left thoracic back, which he described as "hot, burning, and searing." He also reported muscle spasms in his left back and shoulder blade area. The doctor diagnosed him with chronic thoracic pain, secondary to his motor vehicle accident, and depression.

On June 12, 2002, the applicant requested an IMB. Dr. R noted the applicant's continuing physical complaints, referred him to a pain clinic, ordered another MRI, and

recommended regular deep water therapy and pain management therapy, but also noted that he was “fit for discharge based upon [Article] 2.C.2.b. per [Dr. J].”

On June 18, 2002, the applicant’s command asked CGPC to extend his contract for three months for unstated medical reasons. On June 19, 2002, CGPC responded by denying the request. CGPC stated that the applicant was presumed fit absent “a serious injury, illness, or disease discovered upon separation processing or which has been aggravated by active service and would otherwise lead to termination of service with physical disability.” CGPC noted that it had offered the applicant another two-year contract.

On June 20, 2002, the applicant was prescribed Celexa for his depression.

On June 26, 2002, the applicant sent a letter to CGPC requesting a ninety-day extension so that he could be processed under the PDES and complete medical appointments. His commanding officer strongly supported his request. On June 28, 2002, CGPC denied the request, citing the message of June 19, 2002, and stating that a “further discussion with the [Executive Officer of the applicant’s unit] on 27 Jun 2002 indicates an IMB will not be submitted.” CGPC stated that if the applicant wanted to continue in his position, the minimum term of extension allowed was twelve months. The applicant replied by fax the same day. He wrote that he was “not physically able to complete an active duty extension of 12 months” and that he “was told by [Dr. R that] both a separation physical and medical board would be initiated 28 Jun 02” and that, although CGPC had indicated that he was being denied a medical board, he was currently at the clinic for completion of the medical board. A copy of a Report of Medical History form that the applicant filled out on June 28, 2002, shows that he checked “Medical Board” as the purpose of the examination.

On June 28, 2002, Dr. R completed the applicant’s physical examination. His “Report of Physical Examination” indicates that it was conducted because of the applicant’s upcoming release from active duty (not pursuant to a medical board). Dr. R noted that the applicant had a full range of motion in his left shoulder, elbow, and wrist but tender sites and paresthesia around the mid thoracic spine and left scapula, “hypoesthesia l. ulnar distribution,” and “chronic pain and residual neuropraxia.” Dr. R recommended that the applicant continue treatment at a pain clinic and seek physical therapy and deep water exercise. However, he marked the form to indicate that the applicant was fit for duty or for release from active duty.

At some point, Dr. R completed an undated IMB report in which he found that the applicant’s medical conditions included “para-spinous and peri-scapular pain coupled with ‘depression’ and sleep maintenance disorder [that] are suspicious for a Myofascial Syndrome,” and left cubital tunnel syndrome (mild and related to the [motor vehicle accident]).” Dr. R also wrote that the applicant’s “prognosis is

unknown" but that he was fit for full duty and for release from active duty. However, Dr. R noted that he "advised the [applicant] to avoid ladders and strenuous activity pending further elucidation of the medical problem." In addition, Dr. R noted that "recommended evaluations are in abeyance" because the applicant "elected to separate from the military."

On June 30, 2002, the applicant was honorably released from active duty into the Individual Ready Reserve (IRR).

On July 2, 2002, after his release from active duty, the applicant was apparently shown a copy of Dr. R's findings. He signed a statement indicating that he did not agree with the findings. He also wrote that he had never recovered from his accident and that he had been denied a medical board.

VIEWS OF THE COAST GUARD

On February 6, 2003, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant the applicant alternative relief.

TJAG argued that the applicant's evidence was "unpersuasive in light of the evidence showing the Coast Guard followed its policy of not evaluating members already scheduled for separation in the [PDES]. The Coast Guard committed no error and created no injustice in even-handedly applying its policy to Applicant." TJAG stated, however, that despite the lack of error, "the Coast Guard is committed to taking care of its people and ensuring they receive any benefits to which they are entitled." TJAG argued that conducting a proper IMB to discover the applicant's current medical status and "using the results of that IMB to determine whether additional corrective action is justified is in both Applicant's and the Coast Guard's best interest. ... If Applicant is currently not fit for full duty, then it is appropriate to evaluate him for separation and also to revisit his status at the time of his [release] from active duty."

TJAG based his recommendation on a memorandum on the case prepared by CGPC. CGPC stated that the applicant's medical records show that after his motorcycle accident he "sought ongoing treatment for pain, numbness, spasms, and depression," as well as "ulnar neuropraxia at the level of the elbow, pain in the left ribs and chest, and myofascial syndrome with tender sites," and that he "was occasionally unable to work as a result of his medical condition." CGPC alleged that although the applicant was absent from work for periods to receive physical therapy, there "is no evidence of extensive periods of absence from work to convalesce as a result of his medical condition." Moreover, CGPC noted that the applicant continued to perform active duty and did not request an IMB until approximately seventeen months after his accident and one month prior to his scheduled release from active duty. Therefore, CGPC argued,

“the provisions of Article 2.C.2.b. of the PDES Manual were appropriately applied to his circumstances.”

CGPC alleged that Dr. J, the Senior Medical Advisor for CGPC, “took no unilateral action in this case. The initial decision not to convene an IMB was made by the local medical authority, who in the process of reaching his decision may have sought advice from [Dr. J]. [Dr. J] is free to offer his advice and expertise in these and similar matters to local medical authorities—this is one of his routine duties.”

CGPC alleged that the applicant’s assertion that “a presumption of fitness for duty under Article 2.C.2.b. can only be made by a [medical board]” is erroneous. CGPC alleged that “[d]epending on the circumstances of the case, local medical authorities may appropriately make such determinations even before an IMB is convened.” CGPC stated that if a member objects to a determination by the local medical authority, he may request review by a higher authority, as the applicant did. CGPC alleged that his requests were twice reviewed “and given due consideration in accordance with current policies.”

CGPC stated that the “record contains evidence that an IMB was initiated on the Applicant ..., but was not completed. The local medical authority may have been initially supportive of the Applicant’s position that an IMB was warranted. However, this partially completed IMB supports evidence that the medical authority found the Applicant fit for duty.”

CGPC alleged that the applicant received a complete physical examination prior to his separation. Although it was not conducted more than sixty days before his separation, CGPC alleged that the sixty-day requirement under Article 12.A.10.b. of the Personnel Manual “is in place to help ensure any potentially disabling conditions are properly evaluated prior to separation.” CGPC alleged that it is the responsibility of the separating officer to schedule such an examination in a timely manner, and the applicant failed to do so.

CGPC stated that although the Coast Guard “acted appropriately in separating the Applicant in a fit for duty status, I believe there is reasonable uncertainty that the Applicant remains in this status. The record indicates that his condition may have been slowly declining at the time he left active duty (though not to the point that his performance was affected).”

CGPC noted that although no “line of duty” investigation was conducted, the record indicates that his injuries occurred in the line of duty. CGPC also noted that the applicant is currently a civilian employee of the Coast Guard and a member of the IRR.

CGPC concluded by recommending that the Board grant alternative relief by ordering the Coast Guard to conduct a physical examination of the applicant. CGPC stated that, if the examination revealed no currently disabling conditions, no corrections to his record would be made. CGPC stated that if the applicant was found to have a disabling condition, the Coast Guard would convene an IMB and, if the IMB determined that the applicant was not fit for duty on June 30, 2002, the Coast Guard would process the applicant in accordance with the PDES "for possible separation or retirement due to physical disability." CGPC noted that if the IMB found that the applicant was fit for duty on June 30, 2002, but is no longer fit for duty, he would be processed for discharge from the Reserve.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On April 23, 2004, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 30 days. No response was received. On August 20, 2004, in response to an inquiry by the BCMR staff, the applicant's attorney called the BCMR offices and stated that the applicant had in fact submitted a written response agreeing with the Coast Guard's recommendation for relief.

SUMMARY OF APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination." Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the schedule shall be discharged with severance pay.

Provisions of the Personnel Manual

Article 12.A.10.a. of the Personnel Manual states that, as used in that Article, the phrase "not fit for duty" is "a local medical term meaning the member is unable to perform the immediate duties to which assigned for a short period of time. A finding of 'not fit for duty' does not qualify the member for processing in the [PDES], and does not mean the member is not qualified for separation. ... 'Unfit for continued service' means a physical disability exists which renders the member unfit to perform the duties of his or her office, grade, rank, or rating. This determination can only be made through the PDES"

Article 12.A.10.b. states that “[a]n officer being separated shall schedule any necessary physical examination so it is completed at least 60 days before the effective date of separation or release, although Commander (CGPC-opm) will not delay a separation or release date solely because the officer failed to complete a scheduled physical examination. A scheduled separation or release date may be delayed only if a question exists about a member’s unfitness for continued service so as to require convening a medical board under the [PDES]”

Article 12.A.10.f. provides that if an officer’s physician finds that he is qualified for separation or release, and the officer objects, the medical record and any statement submitted by the officer are forwarded to CGPC.

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

Article 3.B.5. of the Medical Manual provides that when an officer objects to a finding of qualified for separation or release, CGPC will review the record to make a final determination as to whether the officer will be separated or processed under the PDES.

Article 3.B.6. provides that “[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. of the Medical Manual provides that members with medical conditions that “are normally disqualifying” for retention in the Service shall be referred to an IMB by their commands. Article 3.F.1.c. of the Medical Manual states the following:

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

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

Chapter 2.A.15. of the PDES Manual defines “fit for duty” as “[t]he status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating. This includes specialized duty such as duty involving flying or diving only if the performance of the specialized duty is a requirement of the member’s enlisted rating.”

Chapter 2.A.38. defines “physical disability” as “[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty.”

Chapter 2.C.2. states the following:

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate members whose military service is terminated due to a physical disability that has rendered him or her 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 member, because of disability, was physically unable to perform adequately in his or her assigned duties; 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) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.

c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is presumed fit for duty even though medical evidence indicates he or she has impairments.

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e. An evaluatee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found “unfit for continued duty” even though the member is currently physically capable of performing all assigned duties. Conversely, an evaluatee convalescing from a disease or injury which reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found “Fit for Duty.”

f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluatee is unfit for continued military service by reason of physical disability.

- (1) Inability to perform all duties of his or her office, grade, rank or rating in every geographic location and under every conceivable circumstance. ...
- (2) Inability to satisfy the standards for initial entry into military service
- • •
- (4) Inability to qualify for specialized duties requiring a high degree of physical fitness, such as flying
- (5) The presence of one or more physical defects that are sufficient to require referral for evaluation or that may be unfitting for a member in a different office, grade, rank or rating.
- (6) Pending voluntary or involuntary separation, retirement, or release to inactive status.

Chapter 3.D.7. states that a “member who is being processed for separation ... shall not normally be referred for physical disability evaluation. ... [A]bsence of a significant decrease in the level of a member’s continued performance up to the time of separation or retirement satisfies the presumption that the member is fit to perform the duties of his or her office, grade, rank or rating (see paragraph 2.C.2.).”

Chapter 3 provides that if a member’s fitness for continued duty is in question, an IMB of two medical officers shall conduct a thorough medical examination, review all available records, and issue a report with a narrative description of the member’s impairments, an opinion as to the member’s fitness for duty and potential for further military service, and if the member is found unfit, a referral to a CPEB. The member is advised about the PDES and permitted to submit a response to the IMB report.

Chapter 4 provides that a CPEB shall review the IMB report, the CO’s endorsement, and the member’s medical records. Chapter 2.C.2.a. provides that the “sole standard” that a CPEB (or FPEB) may use in “making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service.” Chapter 2.C.3.a.(3)(a) provides that, if a CPEB (or subsequently an FPEB) finds that the member is unfit for duty because of a permanent disability, it will propose a physical disability rating. Chapter 4.A.14.c. provides that if the member objects to a CPEB finding, he may demand a formal hearing by the FPEB. Chapter 5.C.11.a. provides that the FPEB shall issue findings and a recommended disposition of each case in accordance with the provisions of Chapter 2.C.3.a. (see above). The applicant may submit a rebuttal within 15 working days, and the FPEB must respond and, if indicated, prepare a new report. The FPEB’s final report is reviewed for sufficiency by an officer at CGPC and by the Judge Advocate General, and forwarded to the Chief of the Administrative Division of CGPC for final action.

Paragraph E2.A1.1.20.2. of Enclosure 2 of this instruction, which the Coast Guard uses as non-binding guidance, states that “[d]emonstrable pain on spinal motion associated with positive radiographic findings shall warrant a 10 percent rating. If paravertebral muscle spasms are also present, a 20 percent rating may be awarded. Such paravertebral muscle spasms, however, must be chronic and evident on repeated examinations.”

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 10 U.S.C. § 1552. The application was timely.

2. The Board begins each case presuming that the applicant's records are correct and that Coast Guard officials, including his doctors, have acted correctly and in good faith.¹ The applicant's Coast Guard doctor, Dr. R, found that he was fit for duty and for separation in June 2002 and that he was not entitled to evaluation by an IMB. The applicant's medical record also indicates, however, that at the time of his release, Dr. R advised him to “avoid ladders and strenuous activity pending further elucidation of the medical problem.” Dr. R's advice indicates that, although the applicant was adequately performing his assigned duties (primarily desk work) prior to his release, he may not have been fit for any more physically demanding assignment. Chapter 2.A.15. defines fitness for duty as the physical and mental ability “to perform the duties of office, grade, rank or rating.” As the duties of a Coast Guard officer are frequently more physically demanding than desk work, the Board finds that the applicant has overcome the presumption of regularity accorded Dr. R's finding of fitness for duty, but he must still prove by a preponderance of the evidence that Dr. R and the Coast Guard erred in releasing him without PDES processing.²

3. The applicant's medical records indicate that, during his last 17 months of active duty, he suffered symptoms including back pain and numbness in his left arm and fingers as a result of his motorcycle accident. The Board agrees with the Coast

¹ 33 C.F.R. § 52.24(b). See *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that “absent strong evidence to the contrary,” government officials are presumed to have acted “lawfully, correctly, and in good faith”).

² See BCMR Dkt. No. 2000-194 (holding that once the applicant has rebutted the presumption of regularity by presenting at least some “clear, cogent, and convincing” evidence that specifically contradicts the disputed record, the Board weighs the evidence in the record and determines whether the applicant has met his burden of proof, which is the preponderance of the evidence).

Guard that, although no line of duty investigation was conducted, the preponderance of the evidence in the record indicates that the accident occurred while the applicant was serving on active duty and that it was not a result of his own misconduct.

4. The record further indicates that, despite these symptoms, the applicant continued to work regularly and took sick leave to attend his medical appointments. The applicant has not alleged or proved that his symptoms caused him to miss many days at work or that they significantly interfered with his performance of his assigned duties. Chapter 2.C.2.b. of the PDES Manual provides that the Coast Guard's own "disability evaluation system [is] 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 promotion, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service." Service-related medical conditions that become disabling after separation or retirement are properly handled by the disability evaluation system of the Department of Veterans' Affairs.

5. Chapter 2.C.2.b.(1) provides 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 argued that the presumption should not have been applied to him because his symptoms were longstanding. The Board disagrees. The applicant's case clearly fell within the parameters of Chapter 2.C.2.b. because he continued to perform his assigned duties adequately while tolerating his physical impairments, and there is no evidence of "acute, grave illness or injury, or other deterioration of [his] condition ... immediately prior to or coincident with processing for separation." PDES Manual, Chap. 2.C.2.b.(1)(a) and (b).

6. The applicant alleged that Dr. J "unilaterally interfered with [his] due process rights" by telling Dr. R not to process him under the PDES. The applicant's medical record does indicate that Dr. R consulted Dr. J while considering the applicant's request to be evaluated by an IMB. However, the applicant has not proved that Dr. J improperly influenced Dr. R's decision, or that Dr. R did not properly exercise his own professional judgment in finding the applicant fit for release in June 2002.

7. The applicant alleged that Dr. R's advice in June 2002 that he should "avoid ladders and strenuous activity pending further elucidation of the medical problem" proves that he was not fit for duty and should have been processed under the PDES. In May 2002, the doctor wrote that although the applicant had chronic pain, he "is able to work daily and has no deployment limits," which supports the doctor's determination that he was fit for duty, as defined in Chapter 2.A.15. of the PDES Manual. However, the record also shows that in June 2002, Dr. R at least began preparing an IMB report for the applicant, indicating that at one point Dr. R had substantial doubts about the applicant's fitness for duty.

8. The applicant has not proved by a preponderance of the evidence that Dr. R erred in finding him fit for duty and release or that CGPC erred in failing to extend his contract for ninety days and in not processing him under the PDES. He has not proved that he is entitled to the relief he originally requested, which was reinstatement on active duty as of July 1, 2002. However, the applicant has proved that his primary doctor had substantial doubts about his fitness for duty prior to his release and that he was suffering from significant impairments that might have interfered with his performance of duty in a more physically demanding assignment. The Coast Guard has recommended that the Board order the Coast Guard to conduct a physical examination of the applicant and, if indicated, to process him under the PDES, and the Board finds that it would be in the interest of justice to order this relief.

9. Accordingly, partial relief should be granted by ordering the Coast Guard to conduct a physical examination of the applicant. If he is found to be currently unfit for duty due to a physical disability that was incurred while he was serving on active duty, the Coast Guard should convene an IMB in accordance with COMDTINST M1850.2C. If the applicant is evaluated by an IMB, and the IMB determines that he was unfit for duty on June 30, 2002, the Coast Guard should further process him under the PDES, and his DD form 214 and other records as necessary should be corrected to reflect the results of that processing.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted in part as follows:

The Coast Guard shall expeditiously conduct a physical examination of the applicant. If he is found to be currently unfit for duty due to a physical disability that was incurred while he was serving on active duty, the Coast Guard shall convene an IMB in accordance with COMDTINST M1850.2C. If the applicant is evaluated by an IMB, and the IMB determines that he was unfit for duty on June 30, 2002, the Coast Guard shall further process him under the PDES, and his DD form 214 and other records as necessary shall be corrected to reflect the results of that processing.

The Coast Guard shall pay the applicant any amount he may be due as a result of any correction made to his record in accordance with this order.

