

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-078

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 Chair docketed the application on February 2, 2007, upon receipt of a completed application, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 25, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a retired [REDACTED] asked the Board to correct his record to show that he retired on May 1, 2006, rather than on November 1, 2005. He further requested that he receive back pay and allowances for the period from November 1, 2005 to May 1, 2006.

The applicant alleged that on November 1, 2005, the date on which he retired, he was 100% disabled and he should have had a medical board or a delay in his retirement. He stated that in August 2005 he had just undergone major back surgery and he was under continuous treatment for a thyroid condition after having undergone thyroid surgery for cancer in early 2004.

The applicant stated that the Coast Guard knew of his conditions prior to the submission of his November 1, 2004 request to retire. He alleged that a flight surgeon who was treating him advised him to submit his retirement request because a medical board would take too long. He stated that at that time he did not have back problems, although he had thyroid cancer. He stated that on the recommendation of the flight surgeon and his aviation detailer he submitted a request for retirement. Approximately two weeks later, he was involved in an automobile accident. According to the applicant the accident resulted in a dramatic decline in his health, with major back and neck pain. As a result of the increased back problems, combined with continuing treatment for his thyroid condition, he requested to withdraw his retirement request, which was

denied by the Coast Guard. The applicant complained that the Coast Guard retired him on November 1, 2005, even though he just undergone back surgery in August 2005 and was in a body cast, depressed, and unable to work. The applicant stated that the Coast Guard refused to delay his scheduled retirement because it did not consider his condition to be a chronic or an acute illness; but the applicant argued that the Coast Guard failed to explain why his condition did not qualify as being acute. He therefore requested that the Board amend the Physical Disability Evaluation System (PDES) Manual to define the term "acute injury." He also requested that the Board compensate his family for the hardship the Coast Guard inflicted on them by retiring him when he was disabled and could not work.

The applicant submitted several emails detailing his attempt to have his retirement date delayed or to have a medical board. On January 12, 2005, the applicant submitted a copy of an email to a Chief Petty Officer D asking to withdraw his retirement request and to be evaluated by a flight surgeon to determine whether he could return to the aviation field. On the same date, a LCDR B responded to the applicant's email. She told the applicant that he could submit a request to withdraw his retirement request, but under Article 12.C.11.c. of the Personnel Manual,¹ she did not anticipate recommending approval of such. She told the applicant that there was no service need for his skill because the Coast Guard had "already made all advancement calculations and included those advancement calculations with [the applicant's] approved retirement." She further told the applicant that even if he applied to withdraw his request under the PDES regulation, she did not anticipate recommending approval, although she admitted that she did not know the extent of his medical condition. In a follow-up email she told the applicant that he could go to the Department of Veteran's Affairs (DVA) or through United States TRICARE for treatment once he retired.

On January 14, 2005, the applicant sent an email to a LT D seeking assistance in withdrawing his retirement request. He explained that the flight surgeon, Captain G, told him to submit his retirement request because a medical board would take too long and that he could go through the DVA for treatment. The applicant also stated in that email that his aviation detailer stated that he would not accept the applicant back into aviation. He wrote that soon after submitting his retirement request, he had a motor vehicle accident that aggravated his lumbar spine and caused a hernia of his C-6 cervical disc and that he has low back radiating pain, a herniated disc, and damaged nerves. He stated that he is required to take medication daily in order to work and that he had already undergone three epidural injections. He also noted that he had had thyroid cancer and was still being treated for a thyroid condition. LT D's reply, if any, is not in the record.

The applicant submitted an undated letter to his senator complaining about the manner in which the Coast Guard had treated him. The applicant's letter to the senator noted the complaints discussed above.

¹ Under Article 12.C.3. of the Personnel Manual, members who are going to retire must undergo a physical examination. If the examination uncovers an impairment that is listed as disqualifying under the Medical Manual, the member may be processed for a disability retirement under the PDES "only if the provisions of the [PDES Manual], paragraph 2.C. are satisfied."

The senator contacted the Coast Guard on behalf of the applicant. In reply, on April 3, 2006, the Coast Guard advised the senator that the applicant could file an application with the BCMR if he thought that he had suffered an error or injustice. The Coast Guard also stated the following in that letter:

The Coast Guard Personnel Command approved [the applicant's] requested retirement date of November 1, 2005. Under current law and service policy, once retirement orders are approved, members cannot not delay their retirements and they are not entitled to a medical board unless a condition arises where an illness or injury is acute or grave. [The applicant's] condition was not acute or grave.² His request to delay his retirement was considered in light of this policy, and after determining that his condition did not meet this criteria, his request was disapproved. As a retired Coast Guard member, [the applicant] has extensive medical benefits through the TRICARE system and the Department of Veteran's Affairs.

Pertinent Medical Background

An October 29, 2003 radiological report indicated that the applicant had a history of low back pain that radiated to the left lower extremity. The radiologist's impression was that the applicant had "[m]inimal change of degenerative disease involving the lumbosacral spine." Upon examination, the radiologist found that the applicant had tiny spurs arising from vertebral bodies and that the disc space between L5-S1 was slightly narrowed.

On January 14, 2004, the applicant underwent a left thyroid lobectomy and in May 2004 he had a total thyroidectomy. Medical reports noted the applicant had difficulty in regulating his hormone level since that surgery because he was not able to tolerate statins.

A May 2004 radiological report noted that the applicant had a normal thoracic spin. An MRI was taken of the lumbar spin showed a "straightening of the curvature consistent with muscle spasm. There is degenerative disc disease at L2-3 and L5-S1. There is modic type 1 degeneration of L5-S1 with bright signal in T2 and low signal in T1. There is moderate sized central to the left and inferior disc protrusion at L5-S1 which impresses on the thecal sac and nerve root."

² Article 2.C.2.b.(1)(b)M1850.2C (PDES) Manual states that:

Continued performance of duty until a 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: . . . (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 him or her unfit for further duty.

A July 20, 2004 neurosurgical initial office consultation showed that the applicant was diagnosed with a left lumbar radiculopathy secondary to a herniated nucleus pulposus at the left L5-S1 level. He was treated with home exercises and a lumbar epidural steroid injection. The report noted that the applicant had had an MRI of the thoracic spine on May 26, 2004 that was negative. The report noted that the MRI of the lumbar spine showed degenerative disc disease with decreased signal at all levels except for L3-4 which had a normal signal. It further noted that at L5-S1 there was decreased disc space height. "There is a large left and central herniated nucleus pulposus with impression on the thecal sac and left S1 nerve root." The neurological report stated that the applicant had had chronic low back pain with waxing and waning in the back and legs over a number of years, but that it had gotten worse approximately two months ago.

A September 17, 2004 neurological report stated that the applicant had undergone one epidural steroid injection but that his back symptoms were worse with the pain starting in his left buttock and radiating down the left leg. However, there was no numbness, paresthesias, or weakness. An EMG shows there was a left L5-S1 radiculopathy.

A September 30, 2004 neurosurgical report stated that a range of options had been discussed with the applicant for treatment of his back that included microlumbar discectomy at the left L5-S1 vertebrae as well as the possibility of future surgery. However, at the time of the examination, a second epidural injection was the recommended treatment.

On November 8, 2004, the applicant requested voluntary retirement effective November 1, 2005, allegedly on the advice of his flight surgeon and detailee. Commander, Coast Guard Personnel Command (CGPC) approved the applicant's request for retirement.

A neurological progress note of December 4, 2004 stated that the applicant was involved in a motor vehicle collision on November 12, 2004, and was taken to the hospital with neck pain and increased back pain. A cervical MRI taken on November 24, 2004 showed that the applicant had a diffuse herniated disc at the C5-6 level. The neurologist's impression was that the applicant had suffered a new onset of cervical and right-sided numbness with worsening low back pain since the motor vehicle accident of November 12, 2004.

A December 20, 2004 neurological progress note stated that a lumbar MRI from December 9, 2004 showed multilevel disc degeneration and a large left L5-S1 herniated disc. There was decreased signal at L1-2 and L2-3 as well as L4-5 and L5-S1. There was a bulge at L4-5 and there was decreased height at L5-S1. The neurologist's impression was that the applicant had "1. Bilateral lumbar radiculopathy with left herniated nucleus pulposus L5-S1. 2. Decreased disc space height with bilateral foraminal stenosis L5-S1 with multilevel disc degeneration and cervical radiculopathy with C5-6 HNP."

On July 8, 2005, the applicant began the medical examination process to determine whether he was fit for separation/retirement. The applicant reported that he underwent back surgery on August 26, 2005, which is supported by the separation medical examination report.

On September 14, 2005, the applicant signed an entry on the medical examination report form acknowledging that he was found not qualified for service. The doctor noted the following defects and diagnoses in Block 71 on the medical examination form: "1. Back [with] no ROM [i]n any plane 2[degree] brace for recent fusion. 2. [Had] thyroid cancer [surgery] one year ago [with] difficulty regulating synthroid dose & needs further monitoring for recurrence. 3. [Had] familial hypercholesterolemic uncontrolled on Zetia and unable to take statins . . ."

In Block 78 of the physical examination form (recommendations-further specialist examination indicated), the doctor recommended that the applicant have convalescent leave for four to six months and light duty for 12 to 24 months during recovery from surgery. The doctor also recommended physical therapy three times per week for 12 to 24 weeks to begin six weeks after surgery and continued follow-up with endocrinology & oncology for the thyroid cancer.

In the comments section of the September 14, 2005 medical report, the doctor noted that the applicant was in a back brace and that he should wear it for the next three months. The report states that the applicant had radicular pain and weakness and had noted no improvement. With respect to the applicant's thyroid cancer and surgery, the doctor stated that he was on a high dose of synthroid to keep the thyroid hormone suppressed, which had been difficult to regulate with the applicant suffering weight-loss, heat intolerance, restlessness, anxiousness and agitation. The report indicated that the applicant had osteoarthritis in many of his joints that limited his activities and that he suffered from familial hypercholesterolemic that had been difficult to control due to his inability to tolerate any of the inhibitor class drugs.

VIEWS OF THE COAST GUARD

On July 19, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He based his recommendation in part on a memorandum on the case prepared by CGPC.

CGPC stated that a review of the applicant's case does not substantiate his claim that there was an error or injustice in processing his retirement. CGPC noted that the applicant had voluntarily requested retirement which was approved for November 1, 2005. CGPC also noted that several months prior to the applicant's retirement he was involved in a motor vehicle accident which exacerbated a back injury, requiring surgery that he received two months prior to his retirement date. With regard to the applicant's contention that he should have been retained on active duty, CGPC stated the following:

The Coast Guard consistently applies the policy within the PDES Manual regarding such cases. There is no provision to retain the individual to allow for continued recuperative care as the applicant contends. Even though the applicant was not entitled to be processed through the PDES . . . since he had an approved voluntary retirement, he was entitled to continued care and disability evaluation through the Department of Veteran's Affairs. The approval of the applicant's voluntary retirement request set in motion a number of administrative actions which are not able to be reversed without unduly impacting other Coast Guard members. In cases where the Coast Guard approves delays in retirement orders

members are granted extensions to allow for completion of surgery and short term post operative care, typically 1 month. In January 2005, the applicant informally inquired . . . with his command regarding canceling his retirement. However, there is no record of the applicant requesting to cancel his retirement pursuant to [Article 12.C.11.c. of the Personnel Manual]. There is no provision to extend individuals for full rehabilitative care that is covered under the Department of Veteran's Affairs. Once a member retires, the Coast Guard cannot be responsible for a member's future employment. The Service does not abandon such members as they are entitled to retirement pay and have extensive medical benefits as a retiree. There is no merit to the applicant's request for the BCMR to change CG policy. . . . "

The applicant indicates that the VA awarded him a disability rating of 10%.³ The subsequent VA disability does not reflect an omission regarding his separation processing. The military disability system determines unfitness for duty whereas the VA ratings are based on an evaluation of the whole person, including an evaluation of the evaluatee's employability status and earning capacity. Accordingly, VA ratings are not determinative of the issues involved in military disability determinations. The evaluation of the applicant at the time of discharge is not effected by a subsequent VA disability rating. The applicant is being processed through the Department of Veterans Affairs disability system which is the appropriate venue for disposition of this case.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On July 20, 2007, a copy of the views of the Coast Guard was mailed to the applicant for him to submit a reply. The Board did not receive a response to the Coast Guard's views from the applicant.

SUMMARY OF APPLICABLE LAW

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

Under Article 12.C.3. of the Personnel Manual, members who are going to retire must undergo a physical examination. If the examination uncovers an impairment that is listed as disqualifying under the Medical Manual, the member may be processed for a disability retirement under the PDES "only if the provisions of the [PDES Manual], paragraph 2.C. are satisfied."

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

The PDES Manual governs the separation of members due to physical disability. Article 2.C.2.a. provides that the "sole standard" to be used in "making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office,

³ The Board has been unable to corroborate this statement in the record. The applicant stated in a telephone conversation with the staff that he had a 70% combined DVA rating.

grade, rank or rating because of disease or injury incurred or aggravated through military service.” Article 2.C.2. of the PDES Manual states the following:

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member 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 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 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 him or her unfit for further 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 Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. On November 1, 2004, the applicant requested to be retired from the Coast Guard effective November 1, 2005. However approximately two weeks later, on November 12, 2004, he had a motor vehicle accident that aggravated his lower back condition and caused a new injury to his cervical spine. The applicant then requested to withdraw his retirement request, but the Coast Guard denied it. After various unsuccessful treatments (home exercises and epidural injections) for his back, he underwent surgery on his back in August 2005, after which he was required to wear a body cast for at least three months. While still in the body cast, the Coast Guard separated the applicant on November 1, 2005, his scheduled retirement date.

4. Prior to submitting his November 1, 2004 retirement request the applicant had suffered from thyroid cancer, had surgery for it, and was under continuous treatment to manage his hormone levels. The Board also notes that the applicant had back problems prior to submitting his retirement request. In this regard, an October 29, 2003 radiological report stated that the applicant had a history of low back pain that radiated to the left lower extremity. In addition, a July 20, 2004 neurological report stated that he had developed a left herniated nucleus pulposus at the L5-S1 level, and other medical evidence shows that the applicant had undergone

at least one epidural treatment prior to his request to retire. The applicant contended that on the advice of his flight surgeon and detailer he submitted his request to retire. He stated the flight surgeon told him that a medical board would take too long and that he could get treatment through the DVA. There is no evidence in the record to corroborate the applicant's contention in this regard; nor is there any evidence that the applicant was forced or coerced into submitting a retirement request. Therefore, the Board finds that the applicant's retirement request was voluntary and made with full knowledge of his medical problems and conditions at that time.

5. The applicant also alleged that the Coast Guard committed an error and/or injustice by not delaying his scheduled retirement or convening a medical board after his motor vehicle accident. However, since the applicant requested voluntary retirement prior to his motor vehicle accident, to obtain a retirement or separation by reason of physical disability he must satisfy Article 2.C.2.b. of the PDES Manual which states as follows:

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member 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 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 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 him or her unfit for further duty.

6. The applicant has not rebutted the presumption that he was fit for duty under either exception discussed above. He has not proven by a preponderance of the evidence that because of a disability he was physically unable to perform adequately in his or her assigned duties" as required under Article 2.C.2.b.(1)(a). While the September 2005 separation/retirement examination determined that the applicant was not qualified for service at that time, the doctor never stated that the applicant suffered from a physical disability that caused him to be unable to adequately perform his assigned duties. The PDES Manual defines physical disability as any manifest or latent physical impairment due to disease, injury, or aggravation of an existing condition that separately or in combination makes a member unfit for continued duty. Article 2.A.38, PDES Manual. Unfit for continued duty is defined as the status of a member who is physically and/or mentally unable to perform the duties of office, grade, or rating because of a physical disability. Article 2.A.50 of the PDES Manual. There is nothing in the medical record before the Board where any doctor has stated that the applicant was unfit for continued service due to any of the conditions mentioned in his medical record. Nor is there any evidence that the applicant was placed on extended sick leave or limited or light duty during his Coast Guard career, except for surgery two months prior to his scheduled retirement date. According to

Article 2.C.2.b.e. of the PDES Manual, a member convalescing from a disease or injury may be found fit for duty if the member is expected to improve to the point of being able to perform the duties of his rate. Further the PDES Manual states that although a member may have impairments rated under the Department of Veterans Affairs Schedule for Rating Disabilities, such impairments do not necessarily render him or her unfit for military duty. Article 2.C.2.F.i. of the PDES Manual. The applicant has failed to prove that the injury to his back caused him to be permanently unable to perform the duties of his rate, although he may have been suffering from various conditions and impairments including surgery and recovery that temporarily interfered with his ability to perform his assigned tasks at a given time.

8. Nor has the applicant shown that he suffered from an *acute, grave illness or injury or other deterioration of his physical condition immediately prior to or coincident with his processing for retirement of reasons other than physical disability which rendered him or unfit for further duty* under Article 2.C.2.b.(1)(b) of the PDES Manual. The PDES Manual does not define grave or acute, so the Board will apply their ordinary meaning. Acute is defined in Webster's Ninth New Collegiate Dictionary as a "sudden onset" and grave is defined "as likely to produce great harm or danger." On November 12, 2004, the applicant was involved in a motor vehicle accident that according to the neurosurgeon resulted in a "[n]ew onset of cervical and right-sided numbness with worsening low back pain." Indeed the cervical MRI of November 24, 2004 showed a herniated disc at C5-6 that had not been present prior to the accident. The MRI of the applicant's lumbar spine subsequent to the accident was not significantly different from that taken prior to the motor vehicle accident. However, the motor vehicle accident occurred almost a year prior to the applicant's scheduled November 1, 2005 retirement date, and therefore cannot be considered to have occurred immediately prior to or coincident with his processing for separation. The applicant waited almost a year after the accident to undergo surgery and he has presented no evidence that he was not able or fit to perform his duties during this period, except for the period he underwent surgery and his recovery. It is difficult to find that the new injury to the cervical spine and the slight aggravation to the lumbar spine resulting from the motor vehicle accident could be considered acute or grave under this set of circumstances. Nothing in the medical reports provided to the Board describes the applicant's back condition as acute or grave.

9. The Board further finds that the applicant failed to prove that he suffered from any other deteriorating physical condition immediately prior to or coincident with his processing for a voluntary retirement that rendered him unfit for further duty. As discussed above, the applicant underwent back surgery two months prior to his retirement, but there is no medical evidence that that surgery caused deterioration in his physical condition that rendered him unfit for further duty, although it may have rendered him not fit for duty for a short period of time. Not fit for duty and unfit for further duty are not synonymous terms. Not fit for duty means an inability to perform ones immediate assignment for a short period, whereas unfit for further duty means the existence of a physical disability that renders the member unfit to perform the duties of his office, grade, rank, or rating. See Article 12.A.10. of the Personnel Manual. The applicant has not presented any evidence that as a result of his surgery he was rendered unfit for further duty. Nor was there a medical prognosis that the applicant would not completely recover from his back surgery or that he would have been unable to resume the duties of his office, grade, rank, or rating after surgery, if he had not retired.

10. Regarding the applicant's other conditions such as his thyroid condition and familial hypercholesterolemic, the Board notes that the applicant was aware of these conditions when he requested retirement on November 1, 2004, and they cannot be considered to have occurred coincident with his processing for retirement on November 1, 2005. As stated above, the applicant alleged that the flight surgeon told him to request retirement because a medical board would take too long; however, he has not presented any corroboration for this assertion. Moreover, the applicant has not established that the flight surgeon's alleged statement, even if corroborated, would have entitled him to a medical board.

11. With respect to the applicant's allegation that he should have had a medical board, Article 3.D.7. of the Personnel Manual states that "a member who is being processed for . . . retirement by reason of age or length of service, shall not normally be referred for physical disability evaluation." This provision is consistent with that portion of Article 2.C.2.b. of the PDES which states that the law for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. Here, the applicant's career was not terminated by reason of physical disability but by his own voluntary request for retirement.

12. The applicant asked the Board to direct that the PDES instruction be revised to include a definition of an acute illness. While the Board has no authority to direct the Coast Guard to take such action, the Board recommends that the Coast Guard review its instruction to determine whether it would be helpful to both the members and the Coast Guard to define or explain the term an "acute, grave illness or injury." However, as stated above, applying the ordinary meaning of the terms "acute" and "grave" to the applicant's conditions, the Board is satisfied that none were acute or grave.

13. The applicant has failed to show that the Coast Guard committed an error or injustice in this case. Accordingly, the applicant is not entitled to relief.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXX, USCG (Ret.), for correction of his military record is denied.

