

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-132

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XXXXXXXXXXXXXXXXXXXXXXXXXXXX

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 case on May 16, 2007, upon receipt of the completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 21, 2008, 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 asked the Board to correct her military record to show that she was evaluated by a medical board, processed under the Coast Guard's Physical Disability Evaluation System (PDES), and separated because of a physical disability on February 3, 2007. She alleged that when she was being hazed, her crewmates threw her off a pier, she hit a wooden piling, and became unconscious. She stated that she now has significant medical problems because of this incident. In support of her allegation, the applicant submitted copies of her medical records, which are included in the summary below.

SUMMARY OF THE RECORD

On February 4, 2003, the applicant enlisted in the Coast Guard for four years, through February 3, 2007. Upon completing training, she was assigned to a Coast Guard station.

On May 16, 2003, the applicant sought treatment for a headache and an abrasion on her left arm. She told the doctor that she had been thrown off a pier into a boat slip and hit her head on some wood and scraped her left arm. The doctor noted, "Denies LOC," indicating that she told him she had not suffered a loss of consciousness during the incident. He further wrote that although she had a contusion on her head, she appeared well and healthy and testing showed that all her nerves were intact. She was prescribed Tylenol for her headache.

On January 21, 2004, the applicant sought treatment for back pain and pain in both knees. X-rays showed no abnormalities. She was diagnosed with a strain and prescribed Celebrex and physical therapy.

On February 23, 2004, a physical therapist reported that the applicant showed "signs of postural dysfunction and lumbar instability with extreme tightness of hip flexors and hamstrings. She is also weak in abdominal muscles." The physical therapist noted that the applicant said she was very sore as a result of attending her kick boxing class and noted that she would likely need only two physical therapy sessions.

On August 25, 2006, the applicant sought treatment for pain in her left wrist. An x-ray showed there were no fractures or bone injuries. She was diagnosed with tendonitis, prescribed ibuprofen and a brace, and advised not to do weight-bearing exercises, such as pushups or lifting.

On September 1, 2006, the applicant had a follow-up appointment for her left-hand tendonitis. She was told not to do pushups or lifting.

On October 2, 2006, a health service specialist, second class (HS2) at the applicant's unit noted that the applicant was fit for full duty and to attend "A" School. The HS2 noted that the applicant had a "prior history of left hand tendonitis. Has been treated by PCM and Orthopedic. Member reports no complaints today, left hand with good ROM. No obvious distress noted."

On October 16, 2006, the applicant began training at "A" School to become a gunner's mate. However, pain in her left wrist prevented her from performing the training. On November 30, 2006, an orthopedist examined the wrist. He found that she had pain on abduction and extension of the thumb, pain in the thumb, and pain over the radial styloid. Her x-ray results were "entirely normal." He diagnosed her with "de Quervain tenosynovitis" of the wrist, with pain in the "anatomical snuffbox." He ordered an MRI to check her navicula and told her to continue taking Motrin, wearing a brace, and doing range of motion exercises each day.

On December 4, 2006, an MRI of the applicant's left wrist indicated that the wrist was normal, with "no radiographic abnormality seen in the anatomic snuffbox or within the navicular bone," although there was "small chronic osteochondral erosion along the proximal surface of the triquetrum." On December 5, 2006, an MRI of the applicant's left hip showed no abnormalities in her hip but did indicate that she had a benign ovarian cyst.

On January 1, 2006, the orthopedist noted that an MRI had shown that there was nothing wrong with the applicant's hip or pelvis bones. He diagnosed her with trochanteric bursitis, which she had suffered since she was pregnant in the spring of 2006. He noted, however, that the baby was seven months old and that such pregnancy-related bursitis normally ends two or three months after giving birth. As the applicant was complaining of problems with her ankles, knees, and shoulders, as well as her hips and left wrist, the orthopedist noted that he would refer her to a rheumatologist.

On January 5, 2006, the orthopedist again reviewed the applicant's MRI and noted that the only abnormality was "a minor erosion in the triquetrum but this is not where she is having

pain.” He stated that the de Quervain tenosynovitis in her left wrist should be treated surgically. He noted that he had referred her to another doctor “for her back and multiple other complaints of her hip.”

On January 8, 2007, the HS2 at the applicant’s station noted that she had been released from “A” School because she could not perform the gunner’s mate training due to wrist pain. The HS2 noted that she could not perform even limited duty functions such as telephone watchstander because she could not type without experiencing wrist pain. The HS2 also noted that the applicant was scheduled to undergo wrist surgery on January 18, 2007.

On January 11, 2007, the applicant underwent a physical examination to determine her fitness for duty because she had been “on and off SIQ [sick in quarters] for the past 2 months.” The doctor noted that she told him her wrist pain had begun when she was doing pushups in September 2006. She also told him that she had suffered chronic hip and back pain for more than three years ever since she was thrown into the water by some crewmates and landed on some “wood bars.” Her “back pain began to get much worse after she fell a few times on her boat while underway” and her knee had also begun to hurt. The doctor noted that she should have an MRI of her spine, and that she was fit for limited duty only for 30 days, during which she was to do desk work only, with no sea duty, lifting, climbing, or sports. He reported to her command that she was “not fit for separation” and should be reassigned to a base where she could get better treatment. In addition, he recommended that the command convene a medical board to evaluate her and process her through the Physical Disability Evaluation System (PDES).

On January 30, 2007, the applicant and her command signed the following statement on a CG-3307 (“Page 7”) for her record:

I, [applicant’s name], desire to be separated from the Coast Guard on my normal expiration of active obligated service date. I understand I will not be eligible for further follow-up studies or treatment at a U.S. Uniformed Services medical facility or for disability benefits under laws the Coast Guard administers, and any further treatment or benefits would be under the Veterans’ Administration’s jurisdiction.

On January 30, 2007, the applicant also signed a CG-4057 form for her record but did not indicate whether she agreed that she was either reasonably fit to perform her duties or had a high expectation of being so in the near future as a result of her surgery.

On February 3, 2007, the applicant was released to inactive duty in the Reserve upon “completion of required active service.” Her DD 214 shows that her character of service was honorable and that she is eligible to reenlist.

VIEWS OF THE COAST GUARD

On July 14, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant’s request. The JAG adopted the findings and recommendation in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that Article 12.B.11.f. of the Personnel Manual allows the Coast Guard to retain a member on active duty past the end of enlistment for the purpose of evaluating their disabilities and processing them under the PDES, but that a member has a right to waive evaluation and be separated. CGPC further noted that under Articles 2.A.4.b.(1)(a) and (c) of the Medical Manual, the Coast Guard may not compel members to undergo medical treatment, procedures, or examinations, but may administratively separate those who refuse to submit.

CGPC stated that prior to her separation, the applicant was being treated for numerous conditions that had not been fully evaluated or resolved. However, instead of remaining on active duty to allow the Coast Guard to do so, she elected to be separated and waived her right to further evaluation/processing under the PDES. CGPC stated that in seeking separation, the applicant also waived her right to further medical care and completion of her separation physical.

CGPC concluded that the applicant “was afforded the opportunity to complete her physical examination prior to separation and for the Coast Guard to potentially process her through the PDES.” However, she “voluntarily waived any further processing and treatment in accordance with service policies.” Therefore, CGPC argued, she suffered no error or injustice in being separated without PDES processing.

In support of these allegations, CGPC submitted the following statement from the HS2 at the applicant’s unit:

With the discovery of the many ailments that [the applicant] appeared to be suffering from, she was placed under the care of a specialist by her primary care manager. After several specialty visits, it was determined by myself and the command that this member needed to be evaluated by a military medical officer to determine fitness for duty and medical board possibilities.

An appointment was made with [Dr. R] Aviation Medical Officer Group Galveston, TX, on 11 Jan 2007. [The applicant] expressed a concern about the lengthy process that a med board could take and that she wanted to “get out” by her normal assigned time; however, she did agree to the appointment that was scheduled for her.

[The applicant] attended her appointment in Galveston, and it was determined that this member was fit for limited duty (desk work only) and not fit for separation; member was told to return in 30 days (12 Feb 2007) or sooner for a follow-up exam. It was also recommended by the medical officer that member be administratively transferred to Galveston for further treatment and to proceed with a medical board process. All of this was explained to the member upon her return from Galveston.

On 30 January 2007 [the applicant] signed a page 7 stating her desire to be separated from the Coast Guard on her “normal expiration of active obligated service date.” It was explained to [her] that she would not be entitled to any further treatments or disability benefits once she got out. Member signed that she understood and wanted to proceed with the discharge.

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On November 9, 2007, the Board received the applicant’s response to the views of the Coast Guard. The applicant alleged that she was misled and pressured by her command into signing the release on January 30, 2007. She alleged that she was threatened by the executive officer of her unit and two chief petty officers, who said they would call her a liar and “impose

unfavorable assignments that would cause me to not be able to fulfill my duties as a mother” if she sought PDES processing.

SUMMARY OF APPLICABLE REGULATIONS

Article 12.B.6.a. of the Personnel Manual provides that “[b]efore discharge ..., retirement, or release from active duty ..., every enlisted member ..., shall be given a complete physical examination. ... The examination results shall be recorded on Standard Form 88.” Article 12.B.6.b. provides that “[w]hen the physical examination is completed and the member is found physically qualified for separation, the member will be advised and required to sign a statement on the reverse side of the Chronological Record of Service, CG-4057, agreeing or disagreeing with the findings.”

Article 12.B.6.c. provides that when “a member objects to a finding of physically qualified for separation, the Standard Form 88 together with the member’s written objections shall be sent immediately to Commander (CGPC-epm-1) for review. If necessary the member may remain in service beyond the enlistment expiration date.”

Article 12.B.6.d. provides that when a member has a medical condition that disqualifies her for continued service, the Coast Guard convenes a medical board to evaluate the condition and the member is retained on active duty under Article 12.B.11.f.1., which states the following:

a. An active duty member whose enlistment expires while he or she suffers from a disease or injury incident to service and not due to his or her own misconduct and who needs medical care or hospitalization may remain in the Service after the normal enlistment expiration date with his or her consent, which should be in writing and signed by the ill member, and recorded in accordance with the Personnel and Pay Procedures Manual, PSCINST M1000.2 (series). He or she may remain until recovered to the point he or she meets the physical requirements for separation or reenlistment or a medical board ascertains the disease or injury is of a character that prevents recovery to such an extent. Tacit consent may be assumed if mental or physical incapacity prevents informed consent. A member in this category ordinarily will remain up to six months after the enlistment expiration date; however, the Commandant may authorize further retention on proper recommendation accompanied by the supporting facts (14 U.S.C. 366 and Article 12.B.6.).

b. If the member desires separation, it shall be effected, provided the member signs this entry on an Administrative Remarks, CG-3307, in the PDR, witnessed by an officer, when examined for separation:

I, [Member’s name], desire to be separated from the Coast Guard on my normal expiration of active obligated service date. I understand I will not be eligible for further follow-up studies or treatment at a U.S. Uniformed Services medical facility or disability benefits under laws the Coast Guard administers, and any further treatment or benefits would be under the Veterans' Administration’s jurisdiction.

Article 12.B.11.f.1.d. states that a command shall not discharge a member undergoing PDES processing unless the member desires separation and signs a waiver such as that shown in paragraph b.

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 preponderance of the evidence in the record indicates that at the time her enlistment ended, the applicant suffered from various medical conditions that rendered her unfit for separation. A military medical officer found her unfit for separation and advised her command to convene a medical evaluation board to process her under the PDES. However, on January 30, 2007, the applicant voluntarily waived her right to further medical evaluation, treatment, and disability benefits under the PDES because she wanted to be separated upon the end of her enlistment on February 3, 2007. Full PDES processing takes at least a few months to complete and sometimes up to a full year. The record shows that her command followed the correct procedures under Article 12.B.11.f.1. of the Personnel Manual when she declined to remain on active duty past her end of enlistment so that she could be fully evaluated and processed under the PDES.

3. Although the applicant alleged that she was threatened and coerced into waiving her rights, she submitted no evidence whatsoever to support her allegation. The regulations required the applicant either to waive her right to PDES processing and disability benefits or to remain on active duty so that the Coast Guard could evaluate her medical conditions in accordance with the PDES and, if necessary, separate her with disability benefits. The applicant chose to waive her rights rather than remain on active duty so that her medical conditions could be evaluated under the PDES. The applicant has failed to prove by a preponderance of the evidence that her separation on February 3, 2007, without PDES processing or disability benefits was erroneous or unjust.¹

4. Accordingly, the applicant's request should be denied.

¹ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice, but is not technically illegal"); see Decision of the Deputy General Counsel in BCMR Docket No. 2002-040.

ORDER

The application of [REDACTED] for correction of her military record is denied.

