

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2013-014**



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**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on October 31, 2012, 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 July 25, 2013, 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 reservist, asked the Board to correct the starting date of Active Duty for Health Care (ADHC) orders he received from November 19, 2009, to September 26, 2009. The orders were issued because while drilling at his unit on Saturday, September 26, the applicant tore the anterior cruciate ligament (ACL) in his left knee. As a result of the injury, he was not fit for duty and also unable to perform his civilian job as a firefighter for a few months.

The applicant alleged that Coast Guard policy provides that if a reservist is injured in the line of duty while drilling, he becomes entitled to basic pay and allowances as if he were on active duty, minus any civilian income earned, until fit for duty again. The applicant stated that because his command did not get around to issuing ADHC orders for him until November 19, 2009, he has not received all of the pay and allowances he should be entitled to. In support of his allegations, the applicant submitted the following documents:

- Unit IDT orders show that the applicant was directed to drill at his unit on the weekend of September 26 and 27, 2009, from 7:30 a.m. to 4:30 p.m.
- A print-out from a pay database shows that the applicant completed and was paid for his drills on the weekend of September 26 and 27, 2009.

- A civilian medical report dated October 2, 2009, shows that the degree of the applicant's injury was unknown. The doctor referred him for an MRI and advised him not to return to his civilian job as a firefighter because he was not supposed to run, jump, or climb ladders.
- A military medical report dated October 6, 2009, shows that a military doctor diagnosed the applicant with a "knee sprain" and told him not to run, jump, march, or perform boat or sea duty. An injury report was prepared showing that the applicant suffered a "hyperextension strain of left knee" while he was "present for duty" and "participating in Service planned recreation." The report states that he first sought treatment from a doctor on the morning of Sunday, September 27, 2009, at 8:00 a.m., and that he would be unfit for duty for 60 days.
- A memorandum dated October 22, 2009, shows that the District Commander determined that the applicant's "knee sprain" was incurred in the line of duty and authorized a Notice of Eligibility (NOE) for medical benefits for treatment of the applicant's injury effective as of September 27, 2009. The applicant accepted the NOE.
- A civilian medical report dated October 29, 2009, shows that a civilian doctor reviewed the report of an MRI conducted on October 8, 2009, with the applicant and his wife. The doctor advised them that the MRI showed a "complete tear" of the left ACL. They discussed the surgical and nonsurgical treatment options, and the applicant indicated that he was in favor of reconstructive surgery but that he would review the information provided by the doctor and let the doctor know his decision at a later date.
- ADHC orders dated November 20, 2009, show that the applicant was authorized ADHC from November 19, 2009, to March 18, 2010, so that he could undergo ACL surgery.
- A surgical report shows that the applicant's ACL was surgically repaired on November 20, 2009.

### **VIEWS OF THE COAST GUARD**

On May 23, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Chair grant relief in this case due to an apparent injustice.

The JAG stated that a reservist injured during a drill may receive ADHC orders because a "reservist who is unable to perform military duties due to an injury, illness, or disease incurred or aggravated in the line of duty is entitled to full pay and allowances ... less any earned income as provided under 37 U.S.C. 204(g)" and Chapter 6.A.4.a. of the Reserve Policy Manual. The JAG stated that there is no evidence in the record that ADHC was initially considered or discussed with the applicant, but it would have been authorized if the Reserve Personnel Management branch (RPM) of the Personnel Service Center had asked the Commandant for authorization to issue such orders because the applicant's injury was incurred in the line of duty and expected to disable him for at least 60 days even before the MRI revealed the ACL tear. RPM is not required

to offer ADHC orders, however, and instead issued an NOE for medical care until surgery was scheduled, at which point ADHC orders were authorized. The JAG argued that because the applicant “was not entitled to ADHC as a matter of law and [RPM] followed applicable policy, there is no error.”

The JAG stated that it appears that ADHC orders were not initially offered only because the injury was misdiagnosed as a sprain by a military doctor. Once RPM learned that the applicant had torn his ACL and that surgery was scheduled, ADHC orders were requested, authorized, and issued. If the ACL tear had been diagnosed sooner—for example, if an MRI had been performed when the applicant first went to the hospital on September 27, 2009—ADHC orders would presumably have been issued immediately.

The JAG argued, however, that an injustice was committed because the applicant’s injury was misdiagnosed, which delayed the issuance of the ADHC orders, and then the orders were not backdated to the date of his injury. Regarding the misdiagnoses, the JAG stated that they should not be excused because the standard of care required performing an MRI before diagnosing the injury, and it was not done until two weeks after the injury. The JAG stated that RPM appears to have waited until surgery was scheduled to issue the ADHC orders, but surgery is not a proper criterion on which to issue the orders under ALCGRSV 061/10. The JAG stated that once RPM knew the extent of the injury, ADHC orders should have been issued, and there is no policy prohibiting backdating such orders.

The JAG stated that the NOE issued by the command to authorize payment for the applicant’s medical treatment was insufficient. By the time the NOE was issued on October 22, 2009, the applicant had already run through all of his accumulated sick and personal leave at his civilian employment. While on an NOE, a reservist can apply for incapacitation pay to be reimbursed for lost civilian income, but because the applicant had already used up all of his leave and been paid for those days, after the NOE was issued, the applicant was advised that his request would be denied. The JAG alleged that the applicant would not have had to use his sick and personal leave at his civilian employment had his condition not been misdiagnosed and had RPM timely issued ADHC orders.

The JAG submitted copies of emails supporting these claims. He also submitted a memorandum from the Personnel Service Center (PSC) claiming that its decision not to backdate the ADHC orders was correct because the applicant was initially diagnosed with only a sprain and did not undergo surgery until November 20, 2009. PSC noted that due to the NOE, the applicant “may file for incapacitation pay for civilian income lost due to his injury.” The JAG argued, however, that RPM’s failure to backdate the applicant’s ADHC orders “shocks the sense of justice” and so should be corrected by the Board.<sup>1</sup> He noted that the Board has authority to decide whether an injustice exists on a case-by-case basis<sup>2</sup> and argued that the unusual circumstances of this case warrant exercising that authority.

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<sup>1</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (“‘Injustice’, when not also ‘error’, is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal.”).

<sup>2</sup> CGBCMR Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

## APPLICANT'S RESPONSES TO THE VIEWS OF THE COAST GUARD

On June 18, 2013, the applicant submitted a response to the views of the Coast Guard in which he agreed with the JAG's recommendation for relief.

### APPLICABLE LAW

Title 10 U.S.C. § 1074a(a)(1) states in pertinent part that “[e]ach member of a uniformed service who incurs or aggravates an injury, illness, or disease in the line of duty while performing ... (B) inactive-duty training” and not as a result of gross negligence or misconduct is entitled to

(1) the medical and dental care appropriate for the treatment of the injury, illness, or disease of that person until the resulting disability cannot be materially improved by further hospitalization or treatment; and

(2) subsistence during hospitalization.

Under 10 U.S.C. § 1074a(e), a member injured in the line of duty in accordance with § 1074a(a) who is ordered to active duty for health care or recuperation for more than 30 days “is entitled to medical and dental care on the same basis and to the same extent as members covered by section 1074(a) of this title [which provides medical and dental care for active duty members] while the member remains on active duty.”

Title 10 U.S.C. § 12322 states, “A member of a uniformed service described in paragraph (1)(B) or (2)(B) of section 1074a(a) of this title may be ordered to active duty, and a member of a uniformed service described in paragraph (1)(A) or (2)(A) of such section may be continued on active duty, for a period of more than 30 days while the member is being treated for (or recovering from) an injury, illness, or disease incurred or aggravated in the line of duty as described in any of such paragraphs.”

Title 37 U.S.C. § 204(g) states, “A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated-- ... (B) in line of duty while performing inactive-duty training” but “the total pay and allowances shall be reduced by the amount of [non-military] income. In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.”

### *Reserve Regulations*

Chapter 6 of the Reserve Policy Manual (RPM) covers the Reserve incapacitation system. Chapter 6.A.1. provides the following general policy:

Medical and dental care shall be provided for reservists incurring or aggravating an injury, illness, or disease in the line of duty, and physical examinations shall be authorized to determine fitness for duty or disability processing. Pay and allowances shall be authorized, to the extent permitted by law, for reservists who are not medically qualified to perform military duties, because of an injury, illness, or disease incurred or aggravated in the line of duty. Pay and allowances shall also be

authorized, to the extent permitted by law, for reservists who are fit to perform military duties but experience a loss of earned income because of an injury, illness, or disease incurred or aggravated in the line of duty.

Under Chapter 6.A.3. of the RPM, a reservist injured in the line of duty is entitled to medical and/or dental treatment for the injury as authorized by 10 U.S.C. § 1074a until the member is fit for military duty or the member has been separated under the Physical Disability Evaluation System.

Chapter 6.A.4., which the JAG cited in the advisory opinion, states the following:

a. A reservist who incurs or aggravates an injury, illness, or disease in the line of duty is entitled to pay and allowances, and travel and transportation incident to medical and/or dental care, in accordance with 37 U.S.C. 204 and 206. The amount of incapacitation pay and allowance authorized is determined in accordance with DoD 7000.14-R, Volume 7A, DoD Financial Management Regulation, Military Pay Policy and Procedures – Active Duty and Reserve Pay, and is summarized below.

b. A reservist who is unable to perform military duties due to an injury, illness, or disease incurred or aggravated in the line of duty is entitled to full pay and allowances, including all incentive and special pays to which entitled, if otherwise eligible, less any earned income as provided under 37 U.S.C. 204(g).

Chapter 6.A.6.e. authorizes ADHC orders as follows:

Personnel Command (CGPC-rpm) may authorize a reservist to be ordered to or retained on active duty, with the consent of the member, under 10 U.S.C. 12301(h)<sup>3</sup> to receive authorized medical care or to be medically evaluated for a disability, and may authorize a reservist to be ordered to or continued on active duty while the member is being treated for, or recovering from, an injury, illness, or disease incurred or aggravated in the line of duty while performing inactive duty or active duty for a period of 30 days or less as authorized by 10 U.S.C. 12322 (ADHC). Such authorization shall normally be provided only after consultation with Commandant (CG-1311), and only for members expected to remain not fit for military duties for more than 30 days, when it is in the interest of fairness and equity to provide certain healthcare or dependent benefits.

ALCGRSV 061/10, issued on October 26, 2010, further explains ADHC orders “to outline when ADHC may be appropriate and to clarify the ADHC process with particular emphasis on ADHC authorization, notification procedures and reserve orders preparation and approval.” The message also states the following:

ADHC order may be appropriate when a reservist (in a qualifying duty status) suffers an injury or illness or such severity that the injury or illness cannot be adequately treated with a Notice of Eligibility (NOE) and/or it is determined to be in the best interest of fairness and equity to provide certain healthcare benefits or dependent benefits. While each case is unique, ADHC determinations will be evaluated based on: the severity of illness/injury, prognosis/expected recovery time, anticipated time for return to available for full duty (AFFD) status, line of duty (LOD)

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<sup>3</sup> Title 10 U.S.C. § 12301(h) is actually inapplicable because it authorizes only the Secretaries of “military departments” to order reservists to active duty to receive medical care, and for the purposes of Title 10, “military departments” are defined at 10 U.S.C. 101(a)(8) as follows: “The term ‘military departments’ means the Department of the Army, the Department of the Navy, and the Department of the Air Force.” However, the Coast Guard may issue ADHC orders under 10 U.S.C. § 12322.

determination, input from the medical officer, and the member's documented consent to be recalled to or retained on active duty.

Chapter 6.B.3. of the RPM states the following about NOEs:

- a. A Notice of Eligibility (NOE) for authorized medical treatment is issued to a reservist following service on active duty to document eligibility for medical care as a result of an injury, illness, or disease incurred or aggravated in the line of duty. ...
- b. Servicing ISC (pf)s will issue each NOE for a period not to exceed three months and may authorize reimbursement for travel incident to medical and dental care in connection with the NOE. ...
- c. Upon determination that the member will require treatment beyond the first three-month period of the NOE, commands shall notify the servicing ISC (pf) and may request extensions in one-month increments. Requests for NOE extensions shall indicate whether or not a medical board has been initiated. ISC (pf)s may not authorize extensions to allow an NOE to exceed six months.

### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed on October 31, 2012, within three years of the applicant's discovery that RPM had issued ADHC orders that were not backdated to the date of the applicant's injury.<sup>4</sup>

2. The applicant alleged that the start date of his ADHC orders is erroneous and unjust and should be backdated from November 19, 2009, to September 26, 2009, the date he tore his left ACL while serving on inactive duty. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>5</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>6</sup>

3. The record shows that on September 26, 2009, the applicant tore his left ACL while serving on inactive duty. His injury, which was incurred "in the line of duty," was originally misdiagnosed as a sprain by both civilian and military doctors without the benefit of an MRI. Nevertheless, the military doctor reported that he would be unfit for duty for at least 60 days. Almost a month after the injury, on October 22, 2009, the District Commander authorized an NOE for medical treatment of the applicant's "knee sprain" effective as of September 27, 2009. The applicant accepted the NOE, but there is no evidence that he was ever offered ADHC

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<sup>4</sup> 10 U.S.C. § 1552(b).

<sup>5</sup> 33 C.F.R. § 52.24(b).

<sup>6</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

orders until after his condition was properly diagnosed on October 29, 2009, and his surgery was scheduled for November 22, 2009. ADHC orders were finally issued on November 20, 2009, but they were backdated by only one day and covered the four months from November 19, 2009, to March 18, 2010.

4. PSC argued that no error was committed because RPM followed correct procedures by first issuing an NOE in response to the diagnosis of a sprain and then issuing ADHC orders when the applicant's surgery was scheduled. PSC also argued that there has been no injustice because, with an NOE backdated to September 27, 2009, the applicant "may file for incapacitation pay for civilian income lost due to his injury." The JAG stated, however, that whether surgery occurs is not a proper criterion for deciding whether to issue ADHC orders under ALCGRSV 061/10, which was issued in 2010. The criteria in effect in 2009 are not clear but presumably included the severity of the injury and expected length of the recovery period, which surgery may affect.<sup>7</sup> RPM could have issued ADHC orders for the applicant on September 27, 2009, based on "the interest of fairness and equity to provide certain healthcare or dependent benefits," because he was "expected to remain not fit for military duties for more than 30 days."<sup>8</sup> The recovery period for the applicant's misdiagnosed sprain was thought to be 60 days, which exceeds the 30-day minimum for ADHC orders but falls within the 90-day maximum of an initial NOE.<sup>9</sup> If the diagnosis of sprain had been correct, an NOE might well have been an adequate response to the injury as sprains can heal quickly. The actual diagnosis—a torn ACL needing surgical repair—apparently had a four-month recovery period because RPM issued ADHC orders lasting four months, from November 19, 2009, through March 18, 2010. Four months exceeds the 90-day maximum of an initial NOE.

5. As the JAG argued, the preponderance of the evidence shows that medical errors—the doctors' misdiagnoses and a delayed MRI—caused an NOE to be issued in lieu of ADHC orders. Had the applicant's injury been properly diagnosed and surgery scheduled in a timely manner, the ADHC orders would have been issued much closer to the time of the injury and likely backdated to the date of injury. Therefore, the applicant has proved that the start date of his ADHC orders constitutes an injustice. His ADHC orders should be backdated to September 27, 2009.

6. The Board notes that the pay and allowances the applicant receives while on ADHC orders must be reduced by any civilian income he earned during the period, including "income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered."<sup>10</sup> The record shows that the applicant used up his paid leave at his civilian job, but as the JAG noted, had he timely received ADHC orders, the applicant would not have needed to use his paid leave and could have requested unpaid leave. The Board has no authority to correct the applicant's civilian leave and pay records, but he may be able to get those records corrected by his civilian employer in the interest of justice.

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<sup>7</sup> ALCGRSV 061/10.

<sup>8</sup> Reserve Policy Manual, Chap. 6.A.6.e.

<sup>9</sup> Reserve Policy Manual, Chaps. 6.A.6.e. and 6.B.3.b.

<sup>10</sup> 37 U.S.C. § 204(g).

**ORDER**

The application of [REDACTED] USCGR, for correction of his military record is granted. The Coast Guard shall correct the starting date of his ADHC orders from November 19, 2009, to September 27, 2009, so that the ADHC orders cover the entire period from September 27, 2009, to March 18, 2010. The Coast Guard shall pay him any amount due as a result of this correction.

