DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2013-151

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 July 24, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 25, 2014, 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 record to show that she was not released from active duty (RELAD) on June 30, 2008, but was instead retained on active duty and medically retired on March 20, 2013, and to award her back pay and allowances offset by wages and veterans benefits for the period between her RELAD date and her retirement date. She stated that the Coast Guard erroneously released her from active duty without a proper separation physical, unjustly delayed her medical board processing, and is refusing to pay her for most of the period from July 1, 2008, to March 19, 2013, and unjustly counting that period as time lost.

The applicant alleged that a Headquarters physician told her that her pre-separation physical examination was not properly completed in 2008, when her extended active duty contract ended and she returned to the Reserve. She alleged that emails showed that her command had "maliciously sought to disrupt my health care and benefits," and a doctor told her that the Coast Guard should have retained her on active duty until her situation was resolved, but her command had not offered that option.

While in the Reserve and attending law school full-time, the applicant alleged, she tried to correct the situation, but her case was mismanaged and she did not press the issue "for fear of retaliation that would further inhibit my medical care." She alleged that she was told that because her medical conditions had arisen while she served on active duty, the Physical Disability Evaluation System (PDES) of medical boards would adjudicate all of her concerns and

that any procedural complaints would delay the processing of her case, so she did not complain. As an example of mismanagement, she noted that she paid for a trip to Headquarters to complete her physical examinations only to have them expire before the medical board convened to review her case. However, she alleged, after waiting four years for her case to be adjudicated, in April 2013, she was denied proper retired pay and retroactive benefits because she was not credited with continuing active service.

SUMMARY OF THE RECORD

On [redacted] the applicant accepted an appointment as an ensign in the Reserve. She signed a 3-year extended active duty contract the same day. She later extended her contract through June 30, 2008. In 2007, the applicant was selected for promotion to lieutenant. In February 2008, in anticipation of her pending promotion on March 10, 2008, she was required to decide whether she would integrate into the regular Coast Guard or be RELAD when her contract ended. She declined to integrate and so was slated to be R[redacted]n June 30, 2008.

Medical records show that the applicant was treated for migraine headaches and underwent surgery for bunions on both feet while on active duty. Her right foot was operated on and two screws were inserted in December 2006, and her left foot underwent the same procedure in August 2007. On November 5, 2007, the applicant consulted the senior medical officer at the [redacted] ISC clinic about her increasing migraine headaches. She reported h[redacted]to 4 episodes per month. She was referred to a neurologist. On November 16, 2007, a neurologist reported to the senior medical officer at the [redacted] ISC clinic that the applicant "has migraine with prodromes and probably also aura; the question of aura is however not entirely clear. She is on BCP and has severe migraine about once per month." The neurologist planned to adjust her medication. On January 16, 2008, the applicant consulted Dr. J at the ISC clinic, reported significant side effects fr[redacted]medication, and requested a second opinion and education on how to avoid the migraines.

On February 22, 2008, a second neurologist reported that the applicant complained that her migra[redacted]l been increasing and that she was now having them twice a week. Her migraines had included aura on three occasions in the past. If untreated, the applicant stated, her migraines could last for up to three days, but taking Imitrex at the onset would completely abort [redacted]neurologist adjusted her medication to include nightly amitriptyline as a prophylaxis.

On February 27, 2008, the applicant underwent a pre-separation physical examination at a [redacted] ISC clinic. On her Report of Medical History, the applicant noted several medical conditions, including allergies, sinus pressure, back pain, bilateral foot pain due to bunion surgery that left screws in her feet, trouble sleeping, and migraine headaches related to stress. Regarding her feet, she reported "continued pain, more severe in right foot. Unable to exercise more than 20 minutes, no extensive walking, unable to wear various types of shoes due to pain."

[redacted]

On the Report of Medical Examination, dated February 27, 2008, the physician, Dr. J, did not note any disqualifying defects but also did not check a box for indicating whether the applicant was fit for separation. A senior chief health specialist stamped the form noting that the

applicant had "0" disqualify defects, but he also did not note whether she had met the physical standards for separation.

On April 15, 2008, the applicant sent an email to Dr. J complaining of recurring pain in her right foot. She stated that "prolonged walking is a problem" and asked for a referral to her podiatrist.

On April 24, 2008, the applicant had a follow-up appointment with her podiatrist, who reported that she "has not specific complaints other than some slight neuritis around the mid foot." He [redacted] "parasthesias [numbness], probably due to nerve irritation," and he told that "the next possibility would be to remove the screws," but for now she "will wear shoe gear that is comfortable and see how it does and will give her a corticosteroid injection if it returns."

On April 25, 2008, the applicant's doctor reported that [redacted] had begun taking Imitrex and amitriptyline in February, when she was having migraines about twice a week. Since taking the medication, "[h]er migraines have decreased significantly and are now occurring only two or three times per month." If she took Imitrex when she noticed a migraine starting, the medication "always aborts it." The applicant reported "no significant disabling adverse effects on these medications."

[redacted]

At a follow-up examination on May 8, 2008, the podiatrist reported there the applicant reported "much less" paresthesia i[redacted]ght foot than at the time of her last visit. "She elects to have another corticosteroid injection versus removal of the screw … She will return here as needed."

The ap[redacted] was RELAD into the Reserve on June 30, 2008, but performed active duty for training (ADT) from July 1 to July11, 2008. On July 11, 2008, she visited the clinic to renew her prescriptions for her migraine medications.

On[redacted], 2008, a nurse serving as a Health Affairs Program Manager in the Reserve Policy and Planning Division at Coast Guard Headquarters sent an email following up on telephone conversation with three officers, one of whom, a lieutenant commander serving as the [redacted] elsewhere identifies the applicant as his wife. The nurse stated that the applicant had TRS insurance coverage and so should be able to get her prescription filled at a pharmacy. The nurse also noted that she had spoken to the applicant, and the applicant was found fit for duty (FFD) during her separation physical. She noted, however, that a reservist who is[redacted]FD should either be retained on active duty until her situation is resolved or, if the reservist does not consent to retention, be offered a Notice of Eligibility (NOE) for continuing medical care and benefits in 3-month increments.

On August 13, 2008, the same nurse sent an email to the applicant, her spouse, Dr. J and the senior chief health specialist at the [redacted] clinic, and others. She noted that the applicant would be drilling that day and would go to the clinic to obtain relief for her foot pain. She stated that if the pain continued, the applicant should have another physical to determine her fitness for duty and that, if the doctor determined that she had a disqualifying medical condition and had

had it before she was RELAD, then the command should request an NOE for continuing treatment of her foot pain. The nurse stated that she had consulted the member and that "the NOE would be the better choice than returning her to active duty (especially since she is attending law school at present)." She noted that to issue the NOE, a line of duty determination would have to be conducted.

Also on August 13, 2008, the applicant went to the clinic and complained of increasing pain in her feet. The physician noted that her podiatrist had discussed with her the possibility of removing the screws, one of which was palpable, but she had elected steroid injections instead. The applica[redacted] she was not having to use as much Imitrex to ward off migraines since she was RELAD. The doctor found her fit for limited duty (FFLD) for 30 days due to chronic foot pain and recommended that she seek an NOE for further podiatry/orthopedic treatment.

On September 15, 2008, the commanding officer of the [redacted] Integrated Support Command (ISC) advised the applicant and her command that her verbal request for an NOE on August 13, 2008, was disapproved. He stated that she had had surgery on her right foot in December 2006 and surgery on her left foot in August 2007, had failed to follow up with Dr. J, her physician at the clinic after the surgery, and had been found fit for separation during her separation physical in February 2008. Therefore, pursuant to Chapter 6.A.3.b. of the Reserve Policy [redacted], her foot condition was not a disqualifying condition. He further [redacted] hat when she complained of foot pain on April 15, 2008, she was referred to the podiatrist that had performed her surgery. The podiatrist advise[redacted] hat he could remove the screws surgically, but the applicant elected to undergo cortisone shots instead of surgery. The applicant had been told to follow up with Dr. J following this consultation with the podiatrist but again failed to do so. There was no documentation of any foot pain in her record from April 15, 2008, until August 15, 2008. Therefore the [redacted] ISC would not support her eligibility for an NOE. However, a line of duty determination had been initiated.

On September 24, 2008, the applicant's husband advised the nurse that the ISC was recommendin[redacted]ion of the applicant's request for an NOE. The nurse replied on October 14, 2008, stating that she had contacted the senior chief health specialist at the ISC, who had confirmed this information. She suggested that the applicant try to "fleet it up" and get a second [redacted] Maintenance and Logistics Command (MLC).

On November 25, 2008, the applicant's command forwarded the September 15, 2008, memorandum from ISC to MLC and requested a review of whether the applicant was eligible for b[redacted] The command noted that the applicant had reported for duty as a drilling reservist in July and had provided the command with email strings that "seem to support her contention that she left active duty with a number of outstanding medical issues that had not been fully resolved prior to her release from active duty."

On January 28, 2009, the applic[redacted]s advised to make arrangements to appear for an appointment with a medical officer to determine whether issuing an NOE was appropriate. She received short-term active duty orders from March 10 to 12, 2009, for the medical evaluation. Presumably because she was in school, the evaluation occurred on June 25, 2009, instead. On

her Report of Medical History, the applicant reported that she had "continued pain, moderate to severe neuritis" in her feet that would begin after just 5 minutes of walking and that she could not wear standard Oxford shoes. Regarding her migraines, she stated that they continued to occur two or three times per month, and she had to lie down when they began. The applicant reported numerous chronic medical conditions, most of which the Dr. C noted to be "NCD"—not considered disabling. He noted, however, that her foot pain and poorly controlled migraines required evaluation by a medical board.

On February 26, 2010, Dr. C, a Coast Guard doctor in Washington, DC, where the applicant was at [redacted]ol, sent an email to the applicant's command noting that in 2009 he had "repeated a RELAD physical that was improperly completed" on the applicant, and he had identified "a number of potential disqualifying conditions." Dr. C stated that the applicant had continued to serve in the Reserve but had recently advised him over the phone that during the past 30 days her conditions had worsened, she could no longer drill, she was getting migraines several times per week, and her foot required a second surg[redacted]Based upon this level of impairment, both conditions [migraines and feet] have become disqualifying." Dr. C stated that the applicant was not FFD and should be excused from drilling for 90 days and that he had agreed to perform a physical examination for a medical board for her on April 23, 2010.

On April 10, 2010, the applicant apparently underwent another physical examination. [redacted]eport of Medical History and Report of Medical Examination are [redacted] identical to those prepared on June 25, 2009. On the Report of Medical Examination, Dr. C noted that the applicant was not qualified for ser[redacted]pecifically world-wide deployment because of frequent, uncontrolled migraines and bilateral chronic foot pain. He also advised her to consult an orthopedic surgeon about possible additional surgery on her right foot.

Pursua[redacted]he medical board, Dr. C also prepared a Narrative Summary of the applicant's condition in which he stated that the applicant's original RELAD physical in February 2008 "did not meet the spirit of the standard as outline in policy" because she "had active medical conditions that should have been addressed prior to being released to the selected reserve." When the [redacted]ISC did not support her request for an NOE after she was RELAD, the MLC had Dr. C do a repeat RELAD physical examination in June 2009. At the time, she reported numerous chronic conditions, and her "migraines and foot pain remain disqualifying and unfit-[redacted]rding the applicant's foot pain, Dr. C noted in his Narrative Summary that she stated that her foot pain had "never completely resolved post surgery," and she was sometimes unable to wear military shoes or boots. She had recently decided to undergo surgery, which was pending. Regarding her migraine headaches, Dr. C stated that the applicant began ta[redacted]mitrix for them in 2007, and the applicant tried multiple medications by discontinued taking them "due to side-effects or lack of efficacy." Her migraines would increase with stress. During a consul[redacted]with another neurologist in February 2008, the applicant reported having about two migraines per week, and she resumed taking Imitrix and began taking amitriptyline as a prophylaxis (preventive). During a follow-up consultation in April 2008, she reported improvement in both the frequency and [redacted]ensity of her headaches. However, the applicant was currently reporting having migraines two to three times per week. Dr. C concluded that she was not FFD and recommended that she be medically discharged.

On June 23, 2010, Dr. C wrote an email noting that he had completed the medical board report and intended to submit it within 30 days. He stated that the applicant "has been on medically directed limited duty since September 2009 and has not been able to drill" and that this status should continue through December 31, 2010.

On September 9, 2010, the applicant's husband contacted Dr. C and asked about the applicant's status. He noted that because the applicant's separation physical was incomplete, she had not yet been rated by the Department of Veterans' Affairs (DVA) and could not compete for jobs as a disabled veteran.

[redacted]

On October 1, 2010, the medical board report was completed.

On November 16, 2010, Dr. C sent unidentified medical personnel an email noting that the applicant's PDES processing had stalled but was "back on track." He noted that he thought her medical issues "should have been taken care of on [active du[redacted]lthough she had returned to drilling after her RELAD, her condition "did not improve and actually got worse." He noted that although he had issued a not fit for duty (NFFD) notice while her medical board was pending, the database still showed that she was required to drill. In response, he was advised that her status had been switched to "no drills"

[redacted] On February 23, 2011, the Senior Health Services Officer at the [redacted]ISC sent the applicant an email requesting to meet with her about her medical board package. Subsequent emails between the applicant, her [redacted]d, and Dr. C indicate that the applicant did not want to meet with this doctor alone and felt she was being accused of lying about her condition. On February 24, 2011, the doctor sent the applicant another email stating that the doctor was mistaken in that she did not need to meet with the applicant before forwarding the medical board package. She noted that [redacted]plicant's command would have to provide an endorsement.

On March 14, 2011, the applicant acknowledged the findings of the medical board and stated that she did not want to rebut them.

[redacted]

On April 8, 2011, the applicant's command endorsed the medical board report and recommended that she be medically separated. The command stated that the applicant "has been [redacted]l limited duty since February 2010, and she has not been able to fully drill or complete assigned military duties since late 2009."

On September 28, 2012, an Informal Physical Evaluation Board (IPEB) convened and fo[redacted]e applicant to be 60% disabled based on her migraines and foot pain, which she had incurred while on active duty. The IPEB recommended that she be permanently retired. The applicant consulted [redacted]unsel and on January 16, 2013, accepted the findings and disposition of the IPEB and waived her right to a formal hearing. The IPEB's recommendation was approved on March 7, 2013, and she was medically retired on March 20, 2013.

[redacted]

VIEWS OF THE COAST GUARD

On February 6, 2014, the Judge Advocate General submitted an advisory opinion in which he recommended that the Board grant alternative relief in this case based on the findings, analysis, and recommendation provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC admitted that on the report of the applicant's pre-separation physical, Dr. J failed to check a box to indicate whether the applicant met the standards for separation, even though she reported that the applicant had no disqualifying defects. In addition, PSC noted, in April 2008, the applicant told a specialist that her migraines had decreased, reported only slight discomfort/ pain in her feet to her podiatrist, and elected cortisone injections instead of surgery to remove the screws. Moreover, PSC stated, the applicant should have been evaluated for retention, rather than separation, because she was returning to the Reserve.[1]

PSC stated that the applicant elected to leave active duty and so was RELAD on June 30, 2008, and transferred to the Selected Reserve (SELRES) on July 1, 2008. She had been accepted to attend law school beginning in August 2008.

Although RELAD on June 30, 2008, the applicant performed active duty for training (ADT) as a reservist from July 1 to 11, 2008. On July 11th, she again sought treatment for her migraines. She did not seek further treatment for her feet until August 13, 2008.

PSC submitted the applicant's drill records and noted that she performed drills regularly throughout 2008 and 2009 but stopped drilling in January 2010, after which Dr. C concluded that the applicant was not FFD and had reached maximum medical improvement, and a medical board was initiated. However, the medical board was not completed until April 8, 2011. PSC stated that the applicant's last day of duty was March 19, 2013, and she was retired due to her physical disability on March 20, 2013.

PSC stated that the applicant incurred her disabilities in the line of duty and so, under 10 U.S.C. § 1074a, was entitled to medical care until her disability could not be materially improved by further treatment. Therefore, PSC concluded, the applicant should have been given an NOE when she requested one in August 2008. PSC alleged that the reasons cited for not giving her an NOE on September 15, 2008, were incorrect because even though her continued performance of duty without complaint created a presumption of fitness, a presumption of fitness does not preclude the possibility of medical conditions needing treatment. However, except for the 30 days of limited duty the applicant was given on August 13, 2008, there is no other documentation of her being unfit for duty or fit for limited duty only until September 2009, and she continued to drill until January 2010. Therefore, she was presumably fit for duty during that period.

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[1] Under Chapter 3.B.6. of the Medical Manual, the medical standards for separation are actually the same as those for retention in Chapter 3.F. of the manual, but Chapter 3.A.8. states that if the examiner finds that a member has a condition that is disqualifying but not actually disabling, the member may request a temporary or permanent waiver to avoid separation.

PSC stated that under 37 U.S.C. § 204, a reservist who is not FFD due to a medical condition incurred in the line of duty is entitled to pay and allowances offset by any civilian income earned, and a reservist who is FFD or fit for limited duty but loses civilian income due to such a condition is entitled to the amount of lost civilian income. In neither case, however, may the amount exceed the pay and allowances of an active duty officer of the same rank, and authorization of such pay and allowances "does not constitute active duty orders, nor would the member earn retirement points." Therefore, PSC concluded the following:

- The applicant is not entitled to have her record corrected to show that she remained on acti[redacted]rch 19, 2013. PSC noted that the applicant wanted to leave active duty, never requested to be recalled to active duty, and would have been unable to attend law school had the Coast Guard retained her on active duty.

- The applicant should be granted an NOE to cover her medical care for her migraines and foot pain, as well as travel and transportation, from Aug[redacted]008, when she requested the NOE, until March 19, 2013, when she was retired, in accordance with 10 U.S.C. §§ 1074a and 1074.

- The applicant should be authorized full pay and allowances, offset by any earned income, drill pay, and DVA benefits, from September 1, 2009, when she was retroactively placed [redacted] in a not FFD status through March 19, 2013. [redacted]

- If the applicant can demo[redacted] loss of civilian income for her month of limited duty starting on August 13, 2008, she should be authorized compensation.

- The applicant should use the incapacitation process outlined in ALCGRSV 015/12 to submit [redacted]ims.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On [redacted] 4, 2014, the applicant responded to the views of the Coast Guard and disagreed with them. She alleged that if the paperwork for her pre-separation physical examination had been properly completed, "it would have highlighted the need to keep me on active duty [redacted]dical conditions were addressed." She alleged that she could have deferred attending law school to remain on active duty and that but for her improper RELAD, she "would not have had to fight for continued medical treatment of service-connected issues."

[redacted]The applicant alleged that her commanding officer wrote the September 15, 2008, memorandum refusing her request for an NOE "in retaliation for uncovering the myriad of mistakes made by Sector [redacted] medical." She alleged that there were casual discussions of her returning to active duty but because she was told she would have to leave law school to return to active duty and accept a billet, she perceived this as "a veiled threat to punish [her] for showing their mistakes" and feared she would be deployed to Guam. She felt she was being discredited and bullied and "did not see leaving law school as a rational decision." Because she never actually received a formal offer to return to active duty, she could not have sought a deferment anyway.

The applicant alleged that she suffered injustice due to the errors on her pre-separation physical examination paperwork for five years and that returning her to active duty for that period is warranted to correct the injustices. However, if the Board does not return her to active duty, she does not object to the relief recommended by the Coast Guard.

APPLICABLE REGULATIONS

Coast Guard Personnel Manual

Und[redacted]6.a. of the Personnel Manual in effect in 2008, each member must undergo a physical examination prior to being RELAD. Article 12.B.6.b. states that when the examination is completed, 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. states that if a member objects to a finding of physically qualified for separation, the report of the examination and the member's writt[redacted]ctions shall be sent to the Coast Guard Personnel Command (CGPC) for review. If necessary, the member may remain on active duty beyond the expected separation date.

Coast Guard Medical Manual

[redacted] Chapter 3.B.3.a.1. of the Medical Manual in effect in 2008 states t[redacted]n completing the Report of Medical Examination, DD-2808, pursuant to a physical examination,

> [redacted]
> [w]hen the results of all tests have been received and evaluated, and all findings recorded, the examiner shall consult the appropriate standards of this chapter to determine if any of the defects noted are disqualifying for the purpose of the physical examination. …

Chapter [redacted].c. of the Medical Manual states the following:

> Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determinati[redacted]ness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or selected reserves on extended active duty considered permanently unfit for duty shall be referred to an Initial Medical Board for appropriate disposition.

[redacted] Chapter [redacted] of the Medical Manual states the following:

> This section lists certain medical conditions and defects that are normally disqualifying. … Its major objective is to achieve uniform disposition of cases arising under the law, but it is not a [redacted]andate that possession of one or more of the listed conditions or physical defects (and any other not listed) means automatic retirement or separation. If the member's condition is disqualifying but he/she can perform his/her duty, a waiver request could be submitted in lieu of immediate referral to [redacted]al Medical Board. If the request is denied, then an Initial Medical Board is required.

The list mentioned in Chapter [redacted] includes, in Chapter 3.F.15.h., migraines when "[m]anifested by frequent incapacitating attacks or attacks that last for several consecutive days and unrelieved by treatment." Under Chapter 3.F.12.b.(2)(a), the applicant's foot condition,

"hallux valgus" may be disqualifying "[w]hen moderately severe, with exostosis or rigidity and pronounced symptoms; or severe with arthritic changes."

According to Chapter 3.B.6. of the Medical Manual, which is entitled "Separation Not Appropriate by Reason of Physical Disability,"

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

Physical Disability Evaluation System (PDES) Manual

Article 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." Article 2.B.2. states that a member "is presumed fit to perform the duties of his or her office, grade, rank or rating. The presumption stands unless rebutted by a preponderance of evidence."

Article 2.C.2. of the PDES Manual states the following:

> Fit For Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:
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> a. The sole standard 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. Each case is to be considered by relating the nature and degree of physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. In addition, before separation or permanent retirement may be ordered:
>
> (1) There must be findings that the disability:
> (a) is of a permanent nature and stable, and
> (b) was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.
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> 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:
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> (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:
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> (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 him or her 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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i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of phys[redacted]hough a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the Department of Veterans Affairs for disability compensation after release from active duty.

[redacted]

Laws Concerning Incapacitation Pay

Title 37 U.S.C. § 204 provides the following:

(g)(1) A member of a reserve component of a uniformed service is entitled to the pay and [redacted] allowances provided by law or regulation for a member of a regular component [redacted] 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 -

(A) in line of duty while performing active duty;

• • •

(2) In the case of a member who receives earned income from nonmilitary employment or self-employment performed in any month in which the member is otherwise entitled to pay and allowances under paragraph (1), the total pay and allowances shall be reduced by the amount of such 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.

(h)([redacted]mber of a reserve component of a uniformed service who is physically able to perform his military duties, is entitled, upon request, to a portion of the monthly 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 for each month for which the member demonstrates a [redacted]come from nonmilitary employment or self-employment as a result of an injury, illness, or disease incurred or aggravated -

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training … ;

• • •

[redacted] (2) The monthly entitlement may not exceed the member's demonstrated loss of earned income from nonmilitary or self-employment. In calculating such loss of income, income from an income protection [redacted]acation pay, or sick leave which the member elects to receive shall be considered.

(i)(1) The total amount of pay and allowances paid under subsections (g) and (h) and compensation paid under section 206(a) of this title for any period may not exceed the amount of 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 for that period.

> (2) Pay and allowances may not be paid under subsection (g) or (h) for a period of more than six months. The Secretary concerned may extend such period in any case if the Secretary determines that it is in the interests of fairness and equity to do so.

Article 6.A.1. of the Reserve Policy Manual in effect in 2008 provides the following:

> 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 Article 6.A.2, "earned income" is defined as "[i]ncome from nonmilitary employment, including self-employment. This includes normal wages, salaries, professional fees, tips, or other compensation for personal services actually rendered, as well as income from taxable unemployment benefits, income protection plans, vacation pay, and sick leave that the member elects to receive."

Under Article 6.A.3.a., a "reservist who incurs or aggravates an injury, illness, or disease in the line of duty is entitled to medical and/or dental treatment as authorized by 10 U.S.C. 1074 or 1074a in an approved medical treatment facility or authorized civilian healthcare provider." Article 6.A.3.b. provides the following:

> Medical and dental care shall be provided until the member is found fit for military duty, or the injury, illness, or disease cannot be materially improved by further hospitalization or treatment and the member has been separated or retired as the result of a Coast Guard Physical Disability Evaluation System (PDES) determination (See Physical Disability Evaluation System, COMDTINST M1850.2 (series)). Each case in which the member is projected to remain incapacitated for more than six months shall be referred to the PDES.

According to Article 6.A.4. of the RPM,

> b. A reservist who is unable to perform military duties due to an injury, illness, or disease incurred 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). A member in receipt of incapacitation pay who is unable to perform military duties, i.e., Not Fit For Duty (NFFD), shall not be allowed to attend IDT periods or ADT, and shall not acquire retirement points by performing IDT or ADT. However, he or she may earn retirement points in order to satisfy the requirements for a qualifying year of service by completing authorized correspondence courses.
>
> c. A reservist who is able to perform military duties but demonstrates a loss of earned income as a result of an injury, illness, or disease incurred or aggravated in the line of duty is entitled to pay and allowances, including all incentive and special pay to which entitled, if otherwise eligible, but not to exceed the amount of the demonstrated loss of earned income or the amount equal that provided by law or regulation for an active duty member of corresponding grade and length of service, whichever is less. …

> d. Pay and allowances shall be paid only during the period a member remains not fit for military duties or demonstrates a loss of earned income as a result of an injury, illness, or disease incurred or aggravated in the line of duty. The member's entitlement to incapacitation pay shall terminate on the date that one of the following actions occurs:
>
> (1) The member is found FFFD,
>
> (2) The member no longer demonstrates a loss of earned income,
>
> (3) The member is separated or retired, or
>
> (4) Commandant (G-WTR) determines that it is no longer in the interest of fairness and equity to continue pay and allowances under 37 U.S.C. 204(g) or 204(h).
>
> e. Payment in any particular case may not be made for more than six months without review of the case by Commandant (G-WTR) to ensure that continuation of military pay and allowances is warranted. In making the determination whether pay and allowances should continue beyond the initial six months, Commandant (G-WTR) shall consider if the member has resumed his or her civilian occupation, undertaken a new position in the same occupation, or taken a position in a new occupation. These factors are to be used when determining if it is in the interest of fairness and equity to continue benefits.

Under Article 6.B.3.a., a "Notice of Eligibility (NOE) for authorized medical treatment is issued to a reservist not serving 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." NOEs should be issued "as soon as possible but not later than three working days after the initial medical evaluation and prognosis is completed." RPM, Art. 6.B.3.b. Under Article 6.b.3.c., "[u]pon 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. … ISC (pf)s may not authorize extensions to allow an NOE to exceed six months." Article 6.B.3.d. provides that "[a]s soon as a medical officer or designed authority determines that a reservist is expected to remain incapacitated for more than six months, the case shall be referred to the Coast Guard Physical Disability Evaluation System (PDES)."

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.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in her record.[2] The applicant knew upon her release from active duty in 2008 that she was suffering migraines and foot pain and was not being retained on active duty. Therefore, her request for correction of her record to show that she was retained on active duty is untimely. Although the applicant alleged that she discovered the error much more recently, the Board finds that she was clearly aware of the alleged error she has asked the Board to correct when she was RELAD in 2008.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[3] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the

[2] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[3] 10 U.S.C. § 1552(b).

Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[4] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[5] Although the applicant in this case delayed filing her application without apparent justification and a cursory review of the record shows that her request for retention on active duty lacks merit, the Board will excuse the untimeliness and consider the case on the merits because the Coast Guard has identified an error committed in this case that warrants relief.

4. The applicant alleged that her RELAD on June 30, 2008, was erroneous and unjust because she was suffering from debilitating migraines and foot pain at the time and should have been retained on active duty. She pointed out that the paperwork for her pre-separation physical was improperly completed and alleged that if it had been properly completed, she would have been retained on active duty. When considering allegations of error and injustice, the Board begins its analysis 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.[6] 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."[7]

5. The record shows that during the applicant's pre-separation physical examination on February 27, 2008, Dr. J clearly noted the applicant's diagnoses of migraines and bilateral hallus valgus but failed to check a box to indicate whether she was fit for duty/retention/separation.[8] Under Chapter 3.F.15.h. of the Medical Manual, migraines may be disqualifying for retention when "[m]anifested by frequent incapacitating attacks or attacks that last for several consecutive days and unrelieved by treatment." The applicant's medical records show that at the time, her migraines were being controlled by medication. Under Chapter 3.F.12.b.(2)(a), the applicant's foot condition, "hallux valgus" may be disqualifying "[w]hen moderately severe, with exostosis or rigidity and pronounced symptoms; or severe with arthritic changes." Those words are not mentioned in her records although she did complain of "continued pain, more severe in right foot. Unable to exercise more than 20 minutes, no extensive walking, unable to wear various types of shoes due to pain." The applicant, however, was continuing to perform active duty and was not found to be NFFD or FFLD. Therefore, she was presumptively FFD.

6. The applicant was RELAD on June 30, 2008, at her own request. She had been offered integration into the regular Coast Guard but rejected it because she was planning to

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[4] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[5] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[6] 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R.§ 52.24(b)).
[7] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).
[8] Although the Coast Guard claimed that the doctor applied the wrong standards in February 2008, under the Medical Manual, the physical standards for fitness for retention and fitness for separation are essentially the same.

attend law school full-time beginning in August 2008. Chapter 3.B.6. of the Medical Manual states that when a member is being separated from active duty for reasons other than disability and the "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 [Article 2.C.2.b. of the PDES Manual] are also met. Otherwise the member is suitable for separation." Therefore, because the applicant was separated from active duty at her own request and not because of a medical condition, Dr. J should only have referred her for a medical board and possible retention on active duty for PDES processing if the conditions listed in Article 2.C.2.b. of the PDES Manual were met.

7. Article 2.C.2.b.(2) of the PDES Manual states that "[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." Those paragraphs require a member to rebut her fitness for duty by showing that she was physically unable to perform her duties adequately or was disabled by an acute, grave illness or injury or other deteriorating physical condition that rendered her unfit. The record does not show that the applicant was physically unable to perform her duties or that she suffered an acute, grave injury or other significant deterioration in her condition coincident with her separation processing in the spring of 2008. When her podiatrist suggested surgery to remove the surgical screws that were causing the applicant pain—surgery that would likely have delayed her RELAD date—she opted for corticosteroid injections instead, and her neurologist noted that she told him her migraines had decreased significantly and that taking Imitrix "always aborts it." In light of the medical evidence and the fact that the applicant was being released from active duty to attend school and not because of her medical conditions, the Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard committed an error or injustice by not convening a medical board for her in 2008 and by releasing her in accordance with her request rather than retaining her on active duty. As Article 2.C.2.b. of the PDES Manual states,

> The law that provides for disability retirement or separation (10 U.S.C. 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.

8. As the Coast Guard pointed out, however, the applicant should have received an NOE when she requested one on August 13, 2008, because she needed and was entitled to medical care for conditions she had incurred while on active duty.[9] The records show that she was found FFLD for 30 days on August 13, 2008, but after that 30-day period ended, she drilled fairly regularly until January 2010, when she advised Dr. C over the phone that her conditions had worsened and she could no longer drill. According to the Coast Guard, when Dr. C later complained that the Coast Guard's database did not properly reflect the applicant's NFFD status, the database was retroactively corrected to show that she had been NFFD since September 1,

[9] 10 U.S.C. § 1074.

2009.[10] Subsequently, Dr. C completed a medical board and the applicant was separated from the Reserve on March 19, 2013, and retired from the Reserve with a 60% disability rating on March 20, 2013.

9. As the Coast Guard noted, reservists who are NFFD due to disabilities incurred in the line of duty are entitled not only to medical care but to pay and allowances offset by civilian income, and a reservist who is FFD but loses civilian income due to such a disability is entitled to compensation for that lost income.[11] Therefore, the Board finds that the relief recommended by the Coast Guard should be granted in that the applicant—

- should receive an NOE to cover her medical care for her migraines and foot pain, as well as travel and transportation, from August 13, 2008, until March 19, 2013;

- should be authorized full pay and allowances, offset by any earned income, drill pay, and DVA benefits, from when she became officially NFFD on September 1, 2009, through March 19, 2013; and

- should be authorized compensation if she can demonstrate loss of civilian income for her 30 days of limited duty starting on August 13, 2008.

(ORDER AND SIGNATURES ON NEXT PAGE)

[10] It is not apparent to the Board why this date was chosen since the applicant did in fact continue to drill through January 2010, and so was presumptively FFD through January 2010. However, since the earlier date of September 1, 2009, appears to be in the applicant's favor and the Coast Guard adopted it based on Dr. C's statement, the Board will accept it as the date she officially became NFFD.
[11] 37 U.S.C. § 204.

ORDER

The application of [redacted], USCGR (Retired), for correction of her military record is denied but the following alternative relief is granted:

a) Her record shall be corrected to show that she received an NOE covering the medical care for her migraines and foot pain, as well as travel and transportation for that care, from August 13, 2008, through March 19, 2013.

b) She shall receive full pay and allowances, reduced by any legal offset, such as earned income, drill pay, and DVA benefits, for the period September 1, 2009, through March 19, 2013, in accordance with 37 U.S.C. § 204.

c) If she can demonstrate a loss of civilian income because of her disability during the 30-day period starting on August 13, 2008, she shall be compensated in accordance with 37 U.S.C. § 204.

d) She shall use the incapacitation process outlined in ALCGRSV 015/12 to submit her claims within 180 days of the date of this decision.

No other relief is granted.

April 25, 2014

[redacted]