

**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. 2014-104**



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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 April 22, 2014, and assigned it to staff member [REDACTED] as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 9, 2015, 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 [REDACTED] was discharged from extended active duty (EAD) on July 16, 2012 and released into the Coast Guard Reserve. At a physical examination conducted shortly thereafter for retention purposes, the applicant was deemed not qualified for retention and was recommended for an evaluation by a medical evaluation board (MEB). In his application to the Board, the applicant objected to his July 16, 2012 release from active duty (RELAD), and asked the Board to correct his record by extending his active duty status until his medical status had been determined to allow him to continue his medical care and a smooth transition to the Veterans Administration for continuity of care.

Since the filing of his application with the Board, the applicant was evaluated by a MEB and processed through the Coast Guard's Physical Disability Evaluation System (PDES). The applicant was retired by reason of permanent disability on May 10, 2014.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard Reserve on April 18, 2002. He was called to active duty twice, from February 5, 2003 to June 25, 2003 and from October 17, 2005 to July 16, 2006. The applicant's record includes a Certificate of Release or Discharge from Active Duty, DD-214, issued upon his separation on July 16, 2006, showing that his net active service for the period was nine months. It also indicated that he had four months and 21 days of prior active



service. Cumulatively, the applicant thus had one year, one month, and 21 days of active service as of this DD-214.

The applicant signed an EAD contract effective in July 2006, where he was assigned duties as a Coast Guard recruiter. The applicant extended his EAD contract twice, in 2008 and in 2010, with the effective period of the last extension ending on July 16, 2012. Upon his separation from EAD on July 16, 2012 (also referred to here as the disputed RELAD), the applicant was issued another DD-214. This DD-214 noted that his net active service for this period was six years, and that his total prior active service was one year, one month, and 21 days. The DD-214 listed the applicant's reserve obligation termination date as May 16, 2013.

Beginning in October 2007, the applicant reported having lateral left knee pain and reported in a November 2007 that he had been experiencing pain since September 2007. A MRI in December 2007 revealed that the cause was a meniscus tear. On March 19, 2008, the applicant had a left knee surgery for the meniscus tear and underwent physical therapy throughout March and April 2008.

The applicant's medical record shows that in January 2008, the applicant began seeking treatment for left shoulder pain, which he stated had started in June or July 2007. The applicant had surgery on the shoulder on November 12, 2008.

Beginning in July 2008, the applicant began reporting back pain. In February 2009, the applicant reported having had lower back pain since November 2008. The applicant stated that he was also experiencing back spasms, during which the pain he was experiencing would increase from a 2 to a 7 on a 10 point scale. In May 2009, he was referred to a chiropractor for treatment. In August 2009, the applicant reported that he still had lower back pain.

In January 2010, the applicant reported having right knee pain and in February 2010 had a MRI examination of his knee. In a follow up appointment in April 2010, the applicant reported that he continued to have knee pain.

Also in 2010, the applicant reported to a naval medical center on multiple occasions with complaints of joint pain in his toes. On December 6, 2010, the applicant had surgery on his foot to treat degenerative joint disease.

In July 2009, the applicant also reported that he had been having worsening neck pain for over a year. On July 30, 2009, the applicant was given an MRI which showed that he had several herniated discs, caused by multilevel degenerative disc disease. In August 2009, the applicant was recommended for physical therapy and pain management and prescribed anti-inflammatory medication. In October and November 2009, the applicant continued to report that he was experiencing neck pain with radiation down his right arm and had been for months. In December 2009, the applicant was given a spinal steroid injection for his cervical pain. However, in January 2010, the applicant again reported having neck pain. The applicant continued to report having mild to severe neck pain, in addition to lower, mid-back and sacroiliac joint pain through to at least January 2012.



Due to his upcoming separation date from EAD as a Coast Guard recruiter, in April 2012 the applicant had a physical examination at a U.S. Army facility. The report of medical examination, DD-2808, prepared by the applicant's medical examiner listed the purpose of the examination as "separation." The applicant was found fit for duty.

During a subsequent physical examination on July 5, 2012, however, the applicant was referred to an orthopedist whom he saw on July 13, 2012. The Report of Medical Examination, DD-2808, prepared for this latter physical examination shows that the purpose of the examination was both for "retention" and "Medical Board." Under Item 74.a., for examinee's qualification for the purpose of the examination, the examiners noted that the applicant was not qualified for service/retention. In Item 78, recommendations, the examiners wrote "Medical Board." As noted by one of the medical examiners, a LTJG E, in his July 3, 2012 notes for the chronological record of medical care, SF-600, he had prepared, at the applicant's April 2012 separation physical, the doctor at the Army facility found the applicant "fit for service, even though he had disqualifying conditions...States has herniated discs cervical that cause constant numbness in Rt hand."

This recommendation was further explained by the other medical examiner performing the physical examination, a CAPT N, in the SF-600 she had prepared relating to the physical examination. In the CAPT N's July 13, 2012 notes on the SF-600, she noted that that the applicant stated he had not been given a physical examination when his EAD contract was extended in 2010, as it was presumed he was fit for full duty (FFD or FFFD) at that time given he had been able to perform his assigned duties as a Coast Guard recruiter. CAPT N wrote that at the present examination, "it was determined that he was not fit to perform the duties of a [REDACTED] (his rate) despite the fact that he had been fit to perform the recruiting duties he had been performing for the past 6 years. The patient concurs that he does not think he has been fit to perform duties within his rate since his injury in 2007."<sup>1</sup> On the last page of the SF-600, the examiner recommended that the applicant be evaluated for a medical examination board (MEB). CAPT N noted that while the applicant's UE radiculopathy (upper extremity nerve pain) had not limited the applicant's ability to perform recruiting duties, it "could potentially be rate limiting for an [REDACTED] expected to perform afloat duties."

Subsequent to an MEB, the applicant completed PDES processing and was retired by reason of permanent disability on May 10, 2014.

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

On August 7, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant alternate relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum, dated July 18, 2014, signed by Commander, Personnel Service Center (PSC). PSC submitted the following declarations to support its recommendation for alternate relief:

#### ***Release from EAD***

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<sup>1</sup> In her notes, CAPT N wrote that the applicant reported that he had experienced a sudden onset of neck pain during a physical therapy session for a knee surgery in 2007. The record reflects that the applicant had knee surgery in 2008.



With respect to the applicant's release from active duty after being discharged from EAD on July 16, 2012, PSC recommended that active duty orders be authorized for the applicant from July 17, 2012 until May 9, 2014<sup>2</sup> and all pay entitlements and allowances for the applicant adjusted to applicant's time in service. PSC also recommended that all bills incurred by the applicant and his dependents for any necessary treatment of any medical conditions during this period be reimbursed, given that no such bills would have been incurred by the applicant had he been retained on active duty.

PSC explained that reservists performing EAD are considered removed from the Coast Guard's Ready Reserve<sup>3</sup> and are counted in the active component end strength of the regular Coast Guard, in accordance with the Reserve Policy Manual (RPM), COMDTINST M1001.28A. Because the applicant had been performing EAD and his conditions were incurred or aggravated while on EAD, "it was determined that the Applicant was not entitled to Reserve Incapacitation Benefits to include active duty orders under 10 U.S.C. 12301(h) (also known as Medical Hold (Med Hold)) and 10 U.S.C. 12322 (also known as Active duty for Health Care (ADHC)), in accordance with COMDTINST 1001.28A, ch.6.A.6.e and ALCGRSV 058/10..."

In recommending active duty orders, however, PSC reasoned that "[w]hile technically not illegal or against Coast Guard policies," the Coast Guard's failure to retain the applicant on active duty until he met retention standards or was separated or retired through PDES "may satisfy the [] 'shocks the sense of injustice' principle..."

PSC also noted that the applicant had been receiving treatment for chronic conditions that affected his abilities to perform the duties of his rate and rank as a [REDACTED] at the time of the disputed RELAD, yet he still maintained FFD status while performing and discharged from EAD. The PSC explained that the FFD status during that time period was inaccurate. This discrepancy was caused by several factors. First, because the applicant was able to reasonably perform his assigned duties as a Coast Guard recruiter while on EAD, he was presumed to be in FFD status during that time and at the time of his release. Second, while the applicant was receiving treatment for chronic conditions that affected his abilities to perform the duties of his rate and rank as a [REDACTED], the majority of his treatment was being coordinated with civilian providers and a U.S. Army hospital. Given that the U.S. Army profiles members' medical duty status differently from the Coast Guard, the FFD status the applicant maintained throughout his EAD did not accurately reflect the severity of his conditions.

#### ***Correction to Applicant's DD-214***

PSC noted that in its review of his records, it discovered that the applicant's active duty time from October 17, 2005 to July 16, 2006 was not accounted for on his DD-124. As a result, PSC recommended that his DD-214 be corrected to account for this time.

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<sup>2</sup> The applicant was retired by reason of permanent disability on May 10, 2014, after completing the PDES process. Although not mentioned in the PSC memorandum, presumably the active duty orders dating from July 17, 2012 to May 9, 2014 were recommended by PSC to cover the period between the applicant's July 16, 2012 separation from EAD and his May 10, 2014 retirement.

<sup>3</sup> The Coast Guard Reserve is made up of three component categories: Ready Reserve (which includes the Selected Reserve and Individual Ready Reserve), Standby Reserve, and Retired Reserve.



## **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On August 14, 2014, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The applicant responded on August 25, 2014 that he had no objection to the Coast Guard's advisory opinion's recommendation to grant him alternate relief.

## **APPLICABLE LAW & POLICY**

### ***Extended Active Duty***

In July 2012, policies governing the treatment of Coast Guard Reserve members were contained in the Reserve Policy Manual (RPM), COMDTINST M1001.28A. Chapter 3.A.4.b. defines Extended Active Duty (EAD) as "active duty for reservists who serve in an Active component duty status. It is used to provide Reserve support to fill occasional personnel shortages in specific pay grades, ratings or specialties when active duty Coast Guard resources fall short of requirements."

Chapter 1.C.2.b.1. explicitly states, "reservists performing...Extended Active Duty are removed from the Ready Reserve and counted in the active component end strength."

### ***Physical Fitness Standards***

In July 2012, policies governing the fitness standards for active duty and reserve Coast Guard members were contained in the Coast Guard Medical Manual, COMDTINST M6000.1E. Chapter 1.B.10.a.(1)(f). establishes three duty status types for active duty and reserve personnel:

- (1) Fit for Full Duty (FFD). The member is able to perform the essential duties of the member's office, grade, rank, or rating. This includes the physical ability to perform world wide assignment....
- (2) Fit for Limited Duty (FLD). The interim status of a member who is temporarily unable to perform all of the duties of the member's office, grade, rank, or rating. This includes the physical ability to perform world wide assignment. A member placed in this temporary status will have duty limitations specified, such as: no prolonged standing, lifting, climbing; or unfit for sea or flying duty.
- (3) Not Fit for Duty (NFD). The member is unable to perform the essential duties of the member's office, grade, rank, or rating. (If needed specific instructions should be given (i.e. confined to rack, sick in quarters or sick at home).

Chapter 3.A. of COMDTINST M6000.1E provides that all Coast Guard members are required to be medically ready for deployment and that conformance to the physical standards prescribed by the Commandant is mandatory.

As stated in Chapter 3.F.c., members are generally presumed to be in FFD status:

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 determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or reserves on extended active duty considered permanently unfit for duty shall be referred to a Medical Evaluation Board (MEB) for appropriate disposition. Reservists in any status not found 'fit for duty' six months after incurring/aggravating an injury or illness, or reservists who are unlikely to be found 'fit for duty' within six months after incurring/aggravating an injury or illness shall be referred to a Medical Evaluation Board....

To evaluate a member's duty status, Chapter 3.A.7.c(1) states that a complete physical examination is required within 12 months for retirement, involuntary separation, or release from any active duty (RELAD) of 30 days or longer into the Ready Reserves (selected drilling or IRR).

Chapter 3.9.a. provides that in some instances, a physical examination performed for one purpose or category may be substituted to meet another requirement. For example, a previous examination may be substituted if there has been no significant change in the examinee's medical status, or if a review of the previous examination report indicates that the examinee meets the physical standards of the present requirement.

#### ***Active Duty Orders for Medical Hold/Treatment Purposes***

10 U.S.C. § 12301(h)<sup>4</sup>, states, "When authorized by the Secretary of Defense, the Secretary of a military department may, with the consent of the member, order a member of a reserve component to active duty (A) to receive authorized medical care; [or] (B) to be medically evaluated for disability or other purposes." Additionally, such member ordered to active duty may "be retained on active duty, if the Secretary concerned considers it appropriate, for medical treatment for a condition associated with the study or evaluation, if that treatment of the member is otherwise authorized by law." Such orders are known as Medical Hold orders. [REDACTED]

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 (A) active duty for a period of 30 days or less; [OR] (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."

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<sup>4</sup> 10 U.S.C. § 12301(h) is inapplicable to the Coast Guard because it authorizes only the Secretaries of "military departments" to order reservists to active duty to receive medical care. 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, 10 U.S.C. § 12301(h) is cited by the Coast Guard as the basis of its medical hold orders, discussed below, and as a result is included in this discussion here.

Title 10 U.S.C. § 12322, entitled “Active Duty for Health Care” (also known as ADHC), 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 - ... (A) in line of duty while performing active duty...”

### ***Coast Guard Policies for Enlisted Regular and Reserve Separation***

The Military Separations Manual, COMDTINST M1000.4, was in operation at the time in question. Article 1.B.1.b. states that Article 1 of the manual provides instructions for the separation of “all regular Coast Guard and Coast Guard Reserve active duty enlisted members.”<sup>5</sup>

Article 1.B.11.f.(1)(a) of the manual provides, “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....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.”

### ***Coast Guard Reserve’s Incapacitation System***

Chapter 6.A.1. of the Reserve Policy Manual (RPM), COMDTINST M1001.28A, states that for reservists injured in the line of duty generally:

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.

Chapter 6.A.6. of the manual is entitled “Authority to Order or Continue a Reservist on Active Duty to Receive Authorized Healthcare.” Chapter 6.A.6.a. establishes that a reservist on

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<sup>5</sup> Article 1 of the Military Separations Manual is applicable to reservists on EAD. Article 1.B.1.b. directs the reader to refer to the RPM for processing Selected Reserve (SELRES) and Individual Ready Reserve (IRR) members for separation. Article 8.B.1 of the RPM notes, “[t]he modifications in this section apply to enlisted reservists not serving on extended active duty (EAD). For enlisted reservists not serving on EAD, the Headquarters point of contact is Personnel Command (CGPC-rpm)...” (emphasis added).

active duty for 31 days or more, who incurs or aggravates an injury, illness, or disease in the line of duty shall “be continued on active duty upon the expiration of call or order to active duty until the member is determined FFFD or the member is separated or retired as a result of a PDES determination.” Subsection (e) of Chapter 6.A.6. further clarifies that “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>6</sup>] to receive authorized medical care or to be medically evaluated for a disability.” As described in the Coast Guard message ALGCGRSV 058/10, “Retention of Reservists on Medical Hold,” the retention of a reservist who has become ill or injured while serving on orders for a period of 31 days or more is known as a “Medical Hold.”

Chapter 6.A.3.a. of the RPM provides that 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. The following subsection 6.A.3.b. also establishes that medical and dental “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....Each case in which the member is projected to remain incapacitated for more than six months shall be referred to the PDES.”

Chapter 6.A.6.e. also establishes CGPC-rpm may also “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 [Active Duty Health Care]).”

Chapter 6.A.6.f. states that a reservist who has been ordered to active duty or who has been continued on active duty as detailed in Chapter 6.A.6. is entitled to medical and dental care on the same basis and to the same extent as an active duty member, under 10 U.S.C. § 1074(a).

## 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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.<sup>7</sup> The application was timely filed within three years of the date the applicant’s July 17, 2012 release from active duty (RELAD) was entered in the applicant’s military record.<sup>8</sup>

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<sup>6</sup> See footnote 4.

<sup>7</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>8</sup> 10 U.S.C. § 1552(b).



2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>9</sup>

3. The applicant asked that the Board to extend his active duty status until his medical status was determined. In essence, the applicant requested his record be corrected to show that he was not released from, but retained on, active duty until the date his Physical Disability Evaluation System (PDES) processing was completed. He alleged that his July 16, 2012 RELAD discontinued his medical care. 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.<sup>10</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>11</sup>

4. Under 10 U.S.C. § 1552, the Board is authorized to "correct an error or remove an injustice" in any Coast Guard military record. "Error" means a mistake of a significant fact or law and includes a violation by the Coast Guard of its own regulations.<sup>12</sup> For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."<sup>13</sup> The Board has authority to determine whether an injustice exists on a "case-by-case basis."<sup>14</sup> Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"<sup>15</sup> and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."<sup>16</sup>

5. The applicant did not submit any information with his request to this Board establishing how the disputed RELAD is erroneous or unjust. However, the applicant stated that he had no objection to the Coast Guard Advisory Opinion's recommendations, including that he receive alternate relief in the form of active duty orders from July 17, 2012 to May 9, 2014, the period of time covering the disputed RELAD to his retirement for permanent disability. Because

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<sup>9</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>10</sup> 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)).

<sup>11</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).

<sup>12</sup> See *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("Error" means legal or factual error.); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations.").

<sup>13</sup> *Reale*, 208 Ct. Cl. At 1011; but see 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

<sup>14</sup> Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

<sup>15</sup> *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

<sup>16</sup> *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

the applicant agreed with the recommendations of the Coast Guard Advisory Opinion, the Board will assume that the applicant agrees with the Coast Guard's supporting analysis.

6. The record shows that around 2007 and 2008, the applicant began experiencing and reporting chronic physical ailments conditions that were identified by Coast Guard medical examiners in his July 2012 physical examination as cause to refer him to a medical evaluation board and later qualified him for retirement for reason of permanent disability on May 10, 2014. At the time the conditions began, the applicant was performing EAD as a Coast Guard recruiter. The record also shows the applicant continued to seek treatment for these chronic conditions up until (and after) his RELAD on July 16, 2012, meaning that the conditions were either incurred or aggravated while the applicant was on EAD. While the applicant's original EAD contract was scheduled to end in 2008, his EAD contract was extended to 2010 and then to 2012. The applicant was not given a physical examination at each extension, as it was presumed that he was Fit for Full Duty (FFD) because he was able to perform his assigned duties as a Coast Guard recruiter. The applicant was given a physical examination for separation from EAD in April 2012. Similarly, it was found by the examiner performing the applicant's separation physical examination that he was FFD at the time of his release from EAD. In its advisory opinion, the Coast Guard acknowledged that the FFD finding "did not accurately reflect the severity" of the applicant's conditions and explained that the applicant's U.S. Army and civilian healthcare providers were unfamiliar with the Coast Guard's physical fitness standards. As a result, the applicant's compromised FFD status was not flagged by the Coast Guard while he was performing EAD so that he could be referred to the PDES at the time of the disputed RELAD, as was later done. The Board finds that a preponderance of evidence in the record shows that the applicant was assigned a FFD medical status in error at his EAD separation physical examination.

7. The Coast Guard's Medical Manual and the Military Separations Manual establish that a service member who has been injured on active duty is entitled to remain on active duty, so that his or her separation from active is delayed, until his or her medical status has been determined. Chapter 3.c.f. of the Coast Guard Medical Manual states, "Active duty or reserves on extended active duty considered permanently unfit for duty shall be referred to a Medical Evaluation Board (MEB) for appropriate disposition." Article 1.B.11.f. of the Military Separations Manual provides that an active duty member "whose enlistment expires while he or she suffers from a disease or injury incident to service...may remain in the Service after the normal enlistment expiration date... [until] a medical board ascertains the disease or injury is of a character that prevents recovery" to the point he or she meets the physical requirements for separation or reenlistment. Given its finding that the applicant was assigned a FFD medical status in error at his EAD separation physical examination, the Board also finds that a preponderance of evidence in the record shows that the applicant should have been referred for a MEB at the time of his separation physical, which would have also delayed the date of his RELAD until such time that his PDES processing was complete and his medical status determined. Accordingly, the Board also finds that an error was made when the applicant was released from EAD on July 16, 2012.

8. The record shows that at his July 2012 retention physical examination, the applicant was recommended for a MEB, and thus referred to the PDES. Because he had incurred or aggravated his conditions while performing EAD, the Coast Guard at the time did not find that the applicant was entitled to benefits under its Reserve Incapacitation System in the form of active



duty status through either medical hold or ADHC orders pending the outcome of his PDES determination. However, in its August 6, 2014 advisory opinion, the Coast Guard reconsidered and found that this failure to retain the applicant on active duty “may satisfy the ‘shocks the sense of injustice’ principle...”

It is well-established in the Coast Guard’s policies that members referred for medical evaluation may be retained on or given active duty status until the pending determination is made. As discussed above, had the applicant been referred for medical evaluation at his separation physical examination, his separation from active duty would have been delayed pending the evaluation’s outcome pursuant to the Coast Guard’s Medical Manual and Military Separations Manual. Similarly, under the Coast Guard’s Reserve Incapacitation System, a reservist who incurs or aggravates an injury, illness, or disease in the line of duty is entitled to be continued on active duty until he or she meets retention standards or is separated or retired through the PDES, whether: (a) the reservist was on active duty for 31 days or more, pursuant to Chapter 6.A.6.a. of the RPM; or (b) the reservist was performing inactive duty or active duty of 30 days or less, pursuant to Chapter 6.A.6.e. of the manual and 10 U.S.C. § 12322. Chapter 6.A.6.e. of the manual also authorizes the issuance of active duty orders for reservists, “under 10 U.S.C. 12301(h) to receive authorized medical care or to be medically evaluated for a disability.”<sup>17</sup>

Chapter 1.C.2.b.1 of the Reserve Policy Manual explicitly notes that reservists performing EAD are removed from the Ready Reserve and are counted in the active component end strength. In certain places, such as Chapter 8.B (Separation of Enlisted Personnel), the RPM makes clear that policies for reservists performing EAD are provided in the Military Separations Manual and not the RPM. The RPM, however, does not explicitly state that reservists incurring or aggravating injuries, illness, or disease in the line of duty while performing EAD are not entitled to benefits under the Coast Guard’s Reserve Incapacitation System. Regardless, the Board finds that the policies considered in their totality demonstrate the Coast Guard’s intent, in at least the limited instance where a service member is to be medically evaluated for fitness for duty, that service members may be authorized to be ordered to or continued on active duty until a determination is made, if the service member incurred or aggravated an injury, illness, or disease while in the line of duty.

The applicant incurred or aggravated his chronic physical conditions while performing extended active duty. He was referred for a medical evaluation board, completed the PDES process, and was retired by reason of permanent disability. However, unlike regular Coast Guard members or non-EAD reservists in similar situations, the applicant was not ordered to or continued on active duty until such determination was made. As a result, the applicant did not receive the same medical care, insurance coverage, or pay and allowances. Given this hardship to the applicant and the equitable intent of the Coast Guard’s policies, the Board agrees with the Coast

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<sup>17</sup> It should be noted that the Coast Guard’s policy under Chapter 6.A.6.e. of the Reserve Policy Manual references 10 U.S.C. § 12301(h) as its underlying authority. However, 10 U.S.C. § 12301(h) is inapplicable to the Coast Guard because it authorizes only the Secretaries of “military departments” to order reservists to active duty to receive medical care. 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.” The Board recommends that the Coast Guard review and amend this policy for its underlying statutory authority.

Guard's advisory opinion that the failure to retain the applicant on active duty until he was retired through the PDES shocks the sense of justice.

9. Accordingly, the Board agrees with the Coast Guard that relief should be granted by correcting the applicant's record to show that he was issued active duty orders from July 17, 2012 to May 9, 2014, the period of time between the disputed RELAD and the applicant's retirement for permanent disability. All pay entitlements and allowances should be adjusted to applicant's time in service. All medical bills incurred by the applicant and his dependents (as applicable) as appropriate for this change in the applicant's record should be reimbursed.

10. In its advisory opinion, the Coast Guard noted that the record shows that the applicant was on active duty from October 17, 2005 to July 16, 2006. The Board has reviewed the record and while it does not appear that the applicant's DD-214 does not account for this time,<sup>18</sup> it does appear that the total prior active service listed in his DD-214 may be in error. In addition, the constructive period of active duty created pursuant to this decision should be added to the DD 214. The Board will therefore direct the Coast Guard to review the applicant's DD-214 and make corrections to accurately reflect the applicant's total active service and his date and type of separation.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>18</sup> The applicant's DD-214 for his separation from EAD on July 16, 2012 noted that his net active service for the period was 6 years, and that his total prior active service was 1 year, 1 month, and 21 days (for a cumulative 7 years, 1 month, and 21 days). This conforms with the active service time accounted for in his immediately preceding DD-214. In his immediately preceding DD-214, for his period of active duty from October 17, 2005 to July 16, 2006, the form showed that his net active service for that period was 9 months. It also indicated that he had 4 months and 21 days of prior active service. Adding his prior and net active service, the applicant thus had 1 year, 1 month, and 21 days of active service as of this DD-214 and does not seem to be in error. However, the applicant's DD-214 for his retirement from the Coast Guard Reserves indicates that his total prior active service time was 7 years, 5 months, and 12 days. This amount appears to exceed his total active service time as of his July 16, 2012 release from EAD, which was 7 years, 1 month, and 21 days.



**ORDER**

The application of [REDACTED], USCGR (retired), for correction of his military record is granted as follows:

The Coast Guard shall correct his record to show that he served on active duty from July 17, 2012 through May 9, 2014. The Coast Guard shall pay him any amount due in pay and allowances for this period and shall ensure that he is reimbursed for any medical expenses incurred by him or his dependents during this period that they would not have had to pay out of pocket if he had been serving on active duty.

The Coast Guard shall also amend his DD-214 to ensure that it accurately documents all periods of his active duty service as well as his new separation date and type.

January 9, 2015

