

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-120

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 May 8, 2014, and prepared the draft decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 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] (E-4) who retired from the Reserve on July 1, 2012, asked the Board to correct his record to show that, instead of being retired based on his years of service, he was transferred to the Temporary Disabled Retired List (TDRL). The applicant alleged that he was told during his final physical examination that he should "limit [his] duties on [his] knees and couldn't maintain [REDACTED] duties any longer because of [his] knees which also caused hip issues." The applicant alleged that after being told this, he asked to be processed for a disability retirement, but this request was denied. He also alleged that the Department of Veterans' Affairs (DVA) has denied him benefits for his hip condition because it was not documented before his retirement. In support of his application, the applicant submitted various documents, which are summarized with his military and medical records below.

SUMMARY OF THE RECORD

On September 12, 1988, the applicant enlisted in the Coast Guard. On May 21, 1989, the applicant went to his cutter's health clinic complaining of pain in his right knee since he had fallen while running at work. He was diagnosed with a right knee strain, advised to keep it wrapped for a while, and found fit for full duty.

The applicant was released from active duty into the Reserve on September 11, 1990, but he reenlisted on active duty on May 28, 1991. On January 14, 1992, the applicant went to a Coast Guard clinic to refill a prescription for Motrin for recurring knee pain.

On September 18, 1992, the applicant sought treatment for left knee pain he had been experiencing since he had fallen on his knee about 2.5 months earlier. He reported that he had not experienced pain immediately but had experienced pain in his left knee during exercise since the fall. The doctor reported that his range of motion (ROM) was good and prescribed Motrin and rest.

On October 27, 1992, the applicant reported that he needed to wear a knee brace to play basketball. The doctor noted that the applicant had a full, painless range of motion, diagnosed “chronic knee overuse symptoms,” and advised him to wear the knee brace and avoid over stressing his knee.

On November 1, 1994, the applicant was treated for bursitis, swelling and bruising of his left knee, following a game of flag football.

On February 1, 1996, the applicant was discharged from active duty. He immediately reenlisted in the Reserve. In 1997, he began drilling regularly as a member of the Selected Reserve.¹ He continued serving in the Selected Reserve until he retired in 2012.

As a reservist, the applicant underwent a periodic health assessment (PHA) on February 3, 2010, to determine his fitness for deployment. He reported “some problems with mild knee pains. He does not find this to limit his activity in any way.” When asked about his pain level on a scale of zero to ten, the applicant responded “zero,” and he denied having any “unresolved operational or deployment health issues” or any other health issues requiring attention. The doctor noted the applicant’s “bilateral knee problems” but stated that he had “no limitations.” The applicant signed this form.

In October 2010, the applicant completed 20 years of satisfactory service for retirement purposes. He was notified that he had qualified for retirement and could request it.

At his next PHA on January 10, 2011, the applicant complained of “progressively worsening knee pain over the past several years.” He told the doctor that his knee pain had “reached the point where he is unable to tolerate standing and walking while aboard ship for an entire day.” He told the doctor that when underway on a cutter, the swells would “take their toll” and his knees would be “extremely sore.” He also stated that his knees would occasionally “buckle or give way on him.” He told the doctor that he also occasionally experienced hip pain when he was picking things up from the floor without bending his left knee. He stated that he had been seeing his personal, civilian physician for his knee pains, that xrays had shown degenerative changes, and that his physician had told him that he might need bilateral knee replacements in the future. Upon inquiry, the applicant stated that he was not undergoing any treatment for his knee pain and had not been prescribed any medication for it. The doctor reported that the applicant

¹ Members of the Selected Reserve drill one weekend per month and perform annual training for about two weeks each year. They are paid for their service.

was “very concerned and frustrated as he does not feel that he can tolerate a full day standing aboard a ship now as the pain has reached a point in his knees where it has become intolerable.” The doctor examined the applicant and reported the following:

- The applicant’s gait was smooth and coordinated, with no antalgia, and his neurological system was within normal limits.
- In his right and left legs, he had “tenderness present over the anteromedial aspect of the knee just above the joint line” and “mild attenuation of active flexion at the knee.”
- He had a “positive McMurray’s test” in both his right and left knees.
- “Anterior translation stressing” produced pain in his right knee but not in his left.
- For both knees, the applicant was “able to perform a deep knee bend and squat but with noticeable hesitation and discomfort as he moves to stand back up.”
- “Varus and valgus stressing reveal[ed] good stability” in both knees.
- The applicant had a full range of motion in his lower back, could do straight leg raises with both legs, and had good reflexes and strength.

The doctor’s assessment was that the applicant suffered from “chronic bilateral knee pain likely due to osteoarthritic and degenerative changes.” He recommended that the applicant “refrain from any running or jogging” and stated that the applicant “may need some restrictions as far as time spent standing and walking during the day aboard ship. At this point, I would recommend that he not stand or walk more than 3 – 5 hours during the day as tolerated.” The doctor noted that the applicant should consult an orthopedic specialist for treatment recommendations.

On March 29, 2011, a health specialist first class (HS1) sent an email to the applicant stating that he had reviewed the applicant’s PHA and asking the applicant to call him.

On May 24, 2011, a chief health specialist (HSC) made an entry in the applicant’s medical record, summarizing the medical history of his knees. The HSC noted that the applicant had not undergone any physical therapy or surgeries to address his knee problems. The applicant had told the HSC that he was considering not reenlisting when his enlistment ended in August 2011 because “he can no longer tolerate the pain.” The HSC noted that the applicant was fit for full duty but taking Motrin for knee and hip pain.

On July 9, 2011, the applicant submitted a request to retire, form CG-2055A,² from the Reserve as of November 1, 2011, when he would have 21 years of satisfactory service. He noted in his email that he was waiting for the HSC “to get back to me on disability retirement to be documented on DD 214.”³ On July 20, 2011, a yeoman in the Reserve Personnel Management (RPM) office noted in an email that the applicant’s enlistment would end on August 24, 2011, but it would take at least 90 days to process his request, so he would need to extend his enlistment to avoid discharge.

² Form CG-2055A is a Reserve Retirement Transfer Request for reservists who have completed 20 years of qualifying service for retirement purposes and wish to transfer to retired status.

³ Reservists serving on inactive duty do not receive DD 214s upon separation or retirement from inactive duty because DD 214s are issued to document extended periods of active duty. *See* COMDTINST M1900.4D.

The applicant sought treatment for bilateral knee and hip pain on October 27, 2011. A medical report he submitted shows that following xrays, the doctor stated that the applicant's pain was "in a radicular pattern going down his left leg" and that he complained of numbness in both legs. The doctor also noted that the applicant's left hip had a "shallow socket" and showed some degeneration of the joint. He referred the applicant for an MRI and an EMG and noted that he would call the applicant about his diagnosis after these tests were done. The applicant submitted the referral forms for the EMG and MRI but not the results of these tests.

The applicant's request to retire was approved, and he retired on July 1, 2012, with 22 years of satisfactory service toward retirement. However, he was then 42 years old and will not begin receiving Reserve retired pay until he attains age 60. His drill record shows that he drilled and performed annual training regularly from 1997 through June 2012.

VIEWS OF THE COAST GUARD

On October 3, 2014, a staff Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case. In so doing, she adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) for this case.

PSC noted that up through 2010, when the applicant qualified for retirement, he reported that his knee problems did not limit his ability to serve. However, during his 2011 PHA, he reported being unable to tolerate standing aboard a ship all day. Nevertheless, PSC noted, the record shows that he continued to perform his duties regularly until he retired and under Chapter 2.C.2.b.(1) of the PDES Manual, such continued performance of duty creates a presumption of fitness for duty. PSC stated that the applicant requested retirement, and a "member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the condition is acute, grave, or other significant deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement." The applicant noted that no pre-separation physical examination was required or conducted prior to his retirement in 2012 because the applicant was not serving on active duty. PSC concluded that the applicant is not entitled to relief and that he may seek treatment and benefits for his conditions through the DVA.

The JAG stated that the HSC's summary dated May 24, 2011, shows that the applicant might have a disqualifying injury, which would trigger a medical board, but the applicant did not object when he was found fit for duty. The JAG stated that if truly unfit for duty, the applicant would likely have spoken with his command and there would be documentation in his record regarding his inability to perform his duties, but there is none. Moreover, the JAG noted, to be placed on the TDRL, as the applicant requested, a member must be at least 30% disabled, and there is no evidence that he had a disability rated 30% or higher.

APPLICANT'S RESPONSES TO THE VIEWS OF THE COAST GUARD

On October 9, 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 requested a 53-day extension and responded on December 19, 2014. He disagreed with the Coast Guard and stated that he only

asked to retire because he was “unable to continue the high standard of work I have accomplished during 20 plus years of service while serving as a [REDACTED]. He stated that serving on [REDACTED] “is very hard on a member’s body. I wasn’t looking to retire as a [REDACTED] I was hoping for another 10 plus years of service to my country and hopefully a few promotions.”

The applicant pointed out that he incurred the original injuries to his knees while serving on active duty, and he has spent “thousands of dollars” over the years on “over the counter medication, braces and doctors’ appointments through my own private medical insurance and out of pocket costs.” The applicant stated that he takes Motrin and Alleve every day, and doctors had told him that there was no “fix” for his condition.

The applicant stated that he requested a medical retirement, but his request was denied, and he was told that he would be processed for a normal retirement instead. The applicant argued that he should have been permanently retired by reason of disability pursuant to his request. Instead, however, he extended his enlistment several times while PSC processed his retirement request.

The applicant noted that if he had undergone a pre-separation physical examination, his hip pain would have been documented in his record. He stated that he asked about getting such an examination but no one ever answered this question.

APPLICABLE REGULATIONS

Chapter 3.F. of the Medical Manual lists the conditions that may be disqualifying for retention in the Service. Chapter 3.F.1.c. 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 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. See Reserve Policy Manual, COMDTINST M1001.28 (series), Chapter 6, “Reserve Incapacitation System”.

Chapter 3.F.12.b. states that an “internal derangement of the knee” may be disqualifying for retention on active duty if there is “[r]esidual instability following remedial measures, if more than moderate; or with recurring episodes of effusion or locking, resulting in frequent incapacitation.” In addition, the knee should flex (bend) to at least 90 degrees, and while lying flat, upward flexion of the knee should be no more than 15 degrees.

Chapter 2.C.2. of the Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, states the following:

Fit For Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:

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 evaluatee 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:

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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:

(1) Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the 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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f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluatee is not fit for duty by reason of physical disability:

(1) inability to perform all duties of the office, grade, rank, or rating in every geographic location and under every conceivable circumstance. ...

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(5) the presence of one or more physical defects that are sufficient to require referral for evaluation ...

(6) pending voluntary or involuntary separation, retirement, or release to inactive status (see article 2.C.2.b.(1)).

h. An evaluatee found unfit to perform assigned duties because of a physical disability normally will be retired or separated. ...

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 physical disability.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's separation.

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.⁴

3. The applicant alleged that his retirement for completing at least 20 years of qualifying Reserve service was erroneous and unjust and that he should have been processed under the PDES and medically retired, instead, based on the condition of his knees. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ 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."⁶

4. The Board finds that the applicant has not proven by a preponderance of the evidence that his command erred by not convening a medical board to initiate PDES processing. The record shows that he incurred knee injuries while on active duty and suffered incidents of knee pain while exercising on active duty in the late 1980s and early 1990s. In 2010, just before he completed 20 years of qualifying service, the doctor conducting his PHA noted that the applicant claimed that the condition of his knees did not limit his performance of duties "in any way." However, in 2011, after he qualified for retirement, the applicant told a doctor conducting his PHA that the pain had progressively become intolerable over the course of several years and he could no longer stand for an entire day on an underway cutter without ending up with very sore knees. The applicant's statements to the doctor during the January 2011 PHA and to the HSC in May 2011 are the only evidence that his knee condition interfered with his performance of duty, and his record shows that he continued to drill regularly and perform annual training until his retirement on July 1, 2012. In January 2011, the doctor referred the applicant to an orthopedic specialist for treatment, presumably physical therapy or surgery, but there is no evidence that the applicant underwent remedial measures. He alleged that there was no "fix" for his knee condition, but there is no medical evidence supporting this claim.

⁴ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *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).

⁵ 33 C.F.R. § 52.24(b).

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

5. Chapter 3.F.12.b. of the Medical Manual states that an “internal derangement of the knee” may be disqualifying for retention on active duty if there is “[r]esidual instability following remedial measures, if more than moderate; or with recurring episodes of effusion or locking, resulting in frequent incapacitation.” In addition, the knee should flex (bend) to at least 90 degrees when raised while lying flat, and upward flexion at the knee should be no more than 15 degrees. The medical records show that the range of motion in the applicant’s knees met these standards. There is no evidence that the applicant underwent remedial measures or that his knee was unstable following such measures. Nor is there any evidence of “recurring episodes of effusion or locking, resulting in frequent incapacitation,” as required under Chapter 3.F.12.b. Because the applicant has not shown that he had a disqualifying condition that required his command to convene a medical board and process him under the PDES, he has not shown that he was entitled to PDES processing or a medical separation.

6. The applicant alleged that he requested a disability retirement and that the Coast Guard unjustly disapproved his request and instead processed him for a “normal” retirement. The record shows that on July 9, 2011, the applicant submitted a CG-2055A requesting a retirement based on his 20 years of qualifying service. Although the applicant claimed that this was a request for a disability retirement, the CG-2055A is not a form for requesting disability retirement; it is a form for requesting an administrative retirement based on at least 20 years of qualifying service. The applicant has not shown that the Coast Guard erred or committed an injustice in processing this form and approving his retirement request.

7. Under Article 2.C.2.b. of the PDES Manual, a member who has continued to perform his duty despite impairments and is being processed for an administrative retirement may not be processed for a medical separation unless the preponderance of the evidence shows that the member is physically unable to perform his duties adequately or has suffered an “acute grave illness or injury or other deterioration of the member’s physical condition ... immediately prior to or coincident with processing for separation or retirement.” The record shows that the applicant continued to drill and perform annual training up until his retirement despite his knee condition. The preponderance of the evidence does not show that he could not perform his duties adequately or that he suffered an acute, grave deterioration of his knee condition immediately before or coincident with his administrative retirement.

8. The applicant alleged that his record is erroneous and unjust because it contains insufficient evidence that he incurred a disability of his hip while serving the Coast Guard. His Coast Guard medical records show that he complained of hip pain during the PHA on January 10, 2011, and while consulting the HSC on May 24, 2011. The applicant has not proven by a preponderance of the evidence that the lack of additional documentation of his hip condition in his military medical record is erroneous or unjust.

9. Accordingly, relief should be denied because the applicant has not proven by a preponderance of the evidence that his administrative retirement based on his years of service, with no PDES processing or medical separation, is erroneous or unjust.

ORDER

The application of [REDACTED] SCGR (Retired), for correction of his military record is denied.

April 9, 2015

