

**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. 2014-198**



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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on September 9, 2014, and prepared the draft decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 22, 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) in the Reserve, asked the Board to correct her record to show that she was not released from active duty (RELAD) on April 5, 2014, and was instead retained on active duty. She explained that while on terminal leave shortly before her enlistment ended, she ruptured her ACL. Therefore, she was not fit for duty when her enlistment ended on April 5, 2014, but she was RELAD nonetheless. The applicant stated that after she reported for her first drill weekend at her Reserve command, she discussed the problem with her new command, a Coast Guard attorney, and the Sector's chief health specialist, who all said that she should not have been RELAD and should have been sent for an additional physical examination after her injury to determine whether she was fit for duty. In support of these allegations, the applicant submitted copies of her medical records, which are included in the summary below.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard for four years on April 6, 2010, and earned the machinery technician rating. During her end-of-enlistment interview on October 15, 2013, the applicant stated that she had decided not to reenlist when her enlistment expired on April 5, 2014. Because she was not reenlisting, the remainder of her eight-year military service obligation would be spent in the Reserve.

In preparation for being RELAD, the applicant underwent a physical examination on December 18, 2013. She reported no significant medical problems and was found fit for duty. The next day, December 19, 2013, she began terminal leave.

On December 27, 2013, the applicant reported to sick call and was diagnosed with a right knee sprain. She was placed on light duty for seven days and advised to use crutches and a knee immobilizer to reduce the weight on her leg. The information she was given stated the following:

A sprain is an injury to the ligaments or capsule that holds a joint together. There are no broken bones. Most sprains take three to six weeks to heal. If the ligament is completely torn (severe sprain), it can take months to recover from. Most knee sprains are treated with a splint, knee immobilizer or elastic wrap for support. Severe sprains may require surgery.

The applicant was also prescribed Vicodin and Naproxen and advised to “[s]tay off the injured leg as much as possible until you can walk on it without pain. ... Keep your leg elevated to reduce pain and swelling.”

On January 6, 2014, while still on terminal leave, the applicant again sought treatment for her knee injury. She was advised that she should “continue on light duty with no physical exercises, no prolonged standing/walking until her knee sprain is sufficiently healed, which will likely take between 3 – 6 weeks. [She] is permitted no/partial weight bearing and is to use crutches and her knee brace to promote healing and prevent further injury.”

On January 20, 2014, while on terminal leave, the applicant reported that she continued to have discomfort and limited flexion and extension in her leg. She was advised to continue “light duty until her right knee has healed sufficiently to return to work without restrictions.” The applicant was also referred for an orthopedic consultation. On February 6, 2014, the orthopedist found that she had pain, instability, and an “internal derangement” in her right knee and referred her for an MRI.

On February 8, 2014, the MRI revealed a “[c]omplete rupture of the anterior cruciate ligament [ACL] which appears subacute. Intact posterior cruciate ligament. No visible meniscal tear.” She was scheduled for surgery.

On April 5, 2014, the applicant was RELAD when her enlistment ended. On the weekend of April 19 and 20, 2014, she reported to her new Reserve unit for a drill weekend and was credited with attending the drills.

On May 1, 2014, the applicant underwent a surgical repair of her ACL.

The applicant performed no drills from May through September 2014. During this time, she was credited with two Readiness Management Periods (RMPs),<sup>1</sup> on July 10 and August 11, 2014. She began performing drills in October 2014.

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<sup>1</sup> A Readiness Management Period is a short period of inactive duty for administrative purposes, such as fitness assessments, medical and dental appointments, all-hands meetings, etc. Reserve Policy Manual, Chap. 2.B.3.



On November 7, 2014, the applicant attended a military clinic to request a referral. The doctor noted that she had “suffered ACL tear almost a year ago, had the repair done May 1, 2014, needs ongoing care with ortho and PT, recovery is going a little slower than expected, but she is doing ok.” In addition, the doctor reported, “Pain Scale: 0 Pain Free, Pain Scale Comments: 2 – 3 with activity R knee.” The doctor referred her for more physical therapy and a follow-up with the orthopedic surgeon.

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

On March 17, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG stated that the applicant’s “continued performance to drill with the Selected Reserves at ... satisfies the ‘fitness for duty’ presumption for the time period for which the applicant requests back payment.” The JAG also adopted the findings and analysis provided in a memorandum submitted by the Personnel Service Center (PSC).

PSC stated that the record shows that the injury the applicant incurred prior to her release “did affect her ability to perform her duties in that she experienced pain and was prescribed light duty.” PSC argued, however, that under Chapter 2.C.2.e. of the Physical Disability Evaluation System (PDES) Manual, even if

a member has impairments, adequate performance of duties qualifies as “fit for duty” and thus eligible for separation in accordance original enlistment contracts. The standard of “adequacy” in the applicant’s performance of duties is met based on the fact that she continued to serve until her scheduled date of separation without surgery and drilled in the SELRES, demonstrating a presumption of fitness to perform her duties. The presumption of fitness is not overcome in the applicant’s case because she was adequately performing her duties despite her injury and did not suffer an “acute, grave illness, or injury” prior to or coincident with her separation processing. Moreover, the applicant received full coverage from TAMP while receiving and recovering from surgery and, with an Honorable Discharge, is entitled to medical coverage from the Department of Veterans Affairs as well.

### **APPLICANT’S RESPONSES TO THE VIEWS OF THE COAST GUARD**

On March 19, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to respond within thirty days. The Board did not receive a response.

### **APPLICABLE LAW**

#### ***Military Separations Manual***

Article 1.B.6.a. of the Military Separations Manual provides that before separation, every enlisted member, except those being discharged or retired for physical or mental disability, shall be given a complete physical examination in accordance with the Coast Guard Medical Manual. Article 1.B.6.d.(4) states that when the examination finds a disqualifying temporary impairment



and the member does not want to reenlist, “the member may consent to remain in service under Article 1.B.11.f. of this Manual so necessary treatment may be given and a medical board convened if indicated. If the member does not consent to remain in the Service, a medical board is convened under Chapter 2 of this Manual and the member remains in service under Article 1.B.11.i. of this Manual.”

Article 1.B.11.f. of the Military Separations Manual states the following:

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

### *Medical and PDES Manuals*

Chapter 3.F. of the Coast Guard Medical Manual, COMDTINST M6000.1E, 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.

Chapter 3.F.12.b.(3) of the Medical Manual states that an internal derangement of the knee may be disqualifying 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, each knee must flex to at least 90 degrees and hyperextend no more than 15 degrees.

Chapter 2.C.2. of the PDES Manual, COMDTINST M1850.2D, states the following:

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:

- (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 ...

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 promo-



tions, 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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e. An evaluatee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found not fit for duty even though the member is currently physically capable of performing all assigned duties. Conversely, an evaluatee convalescing from a disease or injury that reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found fit for duty. ...

### ***Reserve Entitlements***

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" but "the total pay and allowances shall be reduced by the amount of [non-military] income. In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered."

Title 37 U.S.C. § 204(h)(1) provides that "[a] member 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 loss of earned income 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; ..."

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

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

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

Chapter 6.A.4. of the RPM states the following:

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

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

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

a. A Notice of Eligibility (NOE) for authorized medical treatment is issued to a reservist following service on active duty to document eligibility for medical care as a result of an injury, illness, or disease incurred or aggravated in the line of duty. ...

b. Servicing ISC (pf)s will issue each NOE for a period not to exceed three months and may authorize reimbursement for travel incident to medical and dental care in connection with the NOE. ...

c. Upon determination that the member will require treatment beyond the first three-month period of the NOE, commands shall notify the servicing ISC (pf) and may request extensions in one-month increments. Requests for NOE extensions shall indicate whether or not a medical board has been initiated. ISC (pf)s may not authorize extensions to allow an NOE to exceed six months.

### ***Line of Duty Determinations***

Article 7.A.1. of the Administrative Investigations Manual (AIM) states that “[w]hen a military member becomes ill or is injured, certain statutory rights or benefits accrue to the member if the disability was attributed to military service, *i.e.*, in the Line of Duty (LOD), and not due to the member’s own misconduct. A report of investigation may be necessary to provide the basis for LOD/Misconduct determinations by the Coast Guard, as well as by other agencies.” Article 7.B.2. states that line of duty determinations are used to determine a reservist’s eligibility for medical care as well as pay and allowances under 37 U.S.C. § 204. Article 7.F. describes the LOD as follows:

1. General Rule. LOD determination authorities shall presume that a Coast Guard member’s death (on active duty), disease or injury was incurred in the LOD and not due to misconduct unless clear and convincing evidence shows otherwise.

2. Definitions.

a. Clear and convincing evidence. This term means such evidence as would convince an ordinarily prudent-minded person beyond a well-founded doubt. It is a higher degree than preponderance of the evidence (“more likely than not”) standard, but it does not require proof beyond a reasonable doubt as in criminal cases.

b. Misconduct. Death, injury or disease is the result of a member’s misconduct if it is either intentionally incurred or is the result of willful neglect that demonstrates a reckless disregard for the foreseeable and likely consequences of the conduct involved. Simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct. The fact that the conduct violates a

law, regulation, or order - or the fact that the conduct is engaged in while the individual is intoxicated - does not, of itself, constitute a basis for a determination of misconduct.

### FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

2. The applicant alleged that her release from active duty (RELAD) on April 5, 2014, was improper and unjust because she had recently torn her ACL and required surgery, which was performed on May 1, 2014, as well as medical care and physical therapy for months thereafter. 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>2</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>3</sup>

3. The record shows that while on terminal leave a few weeks before her scheduled RELAD date and after she had already completed her pre-separation physical examination, the applicant incurred a "complete rupture" of her ACL. The applicant did not state how she injured her ACL, and there is no line of duty determination in the record. Because a line of duty determination is necessary to determine the applicant's legal entitlements, the Board will direct the Coast Guard to conduct one.

4. It is clear from the record that while the applicant's release from active duty was pending and she was still on active duty, she incurred an internal derangement of the knee—a complete rupture of her ACL—that required surgery. She was told to keep her leg raised, to not put weight on the knee, to use crutches, and to wear a brace immobilizing her knee. She was also placed in a "limited duty" status, but she was on terminal leave and not performing duty. Under Chapter 3.F.12.b.(3) of the Medical Manual, members with an "internal derangement of the knee" may be processed for a medical separation if there remains "residual instability following remedial measures." Thus, the Medical Manual clearly assumes that if an active duty member ruptures an ACL in the line of active duty surgery will occur *before* the Coast Guard separates the member.

5. The Coast Guard argued that relief should be denied because the applicant continued to perform her duty and so, under Chapter 2.C.2.b. of the PDES Manual, she was presumptively fit for duty at the time of her discharge. The Coast Guard's basis for making this argument when the Coast Guard admits that the applicant was on terminal leave and not performing *any* duty, as well as being on crutches, in a leg brace, and in need of surgery, is not apparent in the

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<sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>3</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).



record. After being RELAD on April 5, 2014, the applicant did report to her new Reserve command on the unit's next drill weekend, April 19 and 20, 2014, to discuss her situation and report that she was having surgery in ten days, only to be told by that command, a chief health specialist, and a legal officer that she should not have been RELAD at all and should have been retained on active duty. Following her surgery on May 1, 2014, the applicant was convalescing and clearly unfit for duty. The record shows that she was called in for RMPs—presumably medical appointments to assess her recovery and fitness for duty—in July and August, 2014, but she was unfit to drill until October 2014. Moreover, medical notes dated November 7, 2014, show that she still needed more physical therapy at that time.

6. Chapter 2.C.2.b.(1) of the PDES Manual, which the Coast Guard relied on, states that “[c]ontinued 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.” The Coast Guard, without seeking or submitting any medical opinion, argued that the applicant does not fall within exception (a) or (b) because her performance of duty was “adequate” after she ruptured her ACL and ignored the fact that she was on crutches, in a leg brace, and on terminal leave—not actually performing any duty at all, much less “adequately.” In fact, under Chapter 2.C.2.b.(1), because the applicant was not actually performing duty after she ruptured her ACL, no presumption of fitness was created at all. In addition, the applicant's “complete rupture” of her ACL and need for surgery appears to place her squarely within exception (a) or (b).

7. The Coast Guard also argued that the applicant was fit for separation, despite her “impairment,” under Chapter 2.C.2.e. of the PDES Manual. This provision states that “an evaluatee convalescing from a disease or injury that reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found fit for duty.” Again, the Coast Guard failed to submit any medical opinion or evidence showing that her condition met these terms after she tore her ACL and before her surgery. Moreover, when she was RELAD on April 5, 2014, the applicant was clearly not yet “convalescing” because her ACL was completely ruptured and surgery was pending. Therefore, the Board finds that Chapter 2.C.2.e. is inapplicable to her situation.

8. Article 1.B.11.f. of the Military Separations Manual provides that “[a]n 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. ... A member in this category ordinarily will remain up to six months after the enlistment expiration date.” Based on this regulation and all of the evidence of record, the Board finds that if the applicant's ACL rupture was incurred in the line of



duty (not due to intentional misconduct or willful neglect),<sup>4</sup> the Coast Guard erred by failing to retain her on active duty for six months after her RELAD date. Although the Coast Guard argued that her medical expenses for the six months after her RELAD date were covered by TAMP, this argument ignores the fact that the applicant, a machinery technician, was unfit for duty or civilian work for most or all of that period. It also ignores the fact that she continued to require physical therapy and medical coverage long after her 180 days of TAMP coverage expired. Therefore, the Board finds that the applicant's record should be corrected by changing her RELAD date from April 5, 2014, to October 5, 2014, if the line of duty determination shows that her ACL was ruptured in the line of duty (not due to intentional misconduct or willful neglect).

9. Under Chapter 6.B.3. of the Reserve Policy Manual, reservists who incur medical and travel expenses because of medical treatment for an injury incurred in the line of duty are entitled to a Notice of Eligibility (NOE), issued in three-month increments, so that they can be reimbursed for those expenses. Because the applicant's medical records show that she was referred for more physical therapy in November 2014, the Board finds that if her ACL rupture was incurred in the line of duty, her record should be corrected to show that she was issued an NOE after being RELAD on October 5, 2014.

10. The record indicates that the applicant began drilling in October 2014 even though she still needed physical therapy. Under 37 U.S.C. § 204(g) and (h) and Chapter 6.A.4. of the Reserve Policy Manual, a reservist who is unfit for military service or who loses civilian income because of a disability incurred in the line of duty is entitled to pay and allowances offset by any civilian income earned during the same period. The applicant should be informed of her entitlement under these laws so that she may apply if necessary.

11. Accordingly, the Board finds that the Coast Guard should conduct a line of duty determination on the applicant's ACL rupture in December 2013. If the line of duty determination shows that she ruptured her ACL due to her own intentional misconduct or willful neglect, no further relief should be granted. However, if the line of duty determination shows that she incurred the injury in the line of duty, her RELAD date should be corrected to October 5, 2014; she should be issued an NOE for the three-month period beginning on October 6, 2014, so that she may be reimbursed for expenses; she should be advised of reservists' rights under 37 U.S.C. § 204(g) and (h); and she should receive any back pay and allowances due her subject to legal offsets.

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

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<sup>4</sup> Administrative Investigations Manual, COMDTINST M5830.1A, Article 7.F. (defining "line of duty").

**ORDER**

The application of [REDACTED] USCGR, for correction of her military record is granted as follows:

The Coast Guard shall conduct a line of duty determination for the injury to her ACL on December 27, 2013. If the line of duty determination shows that she tore her ACL due to her own intentional misconduct or willful neglect, no further relief is granted.

If the line of duty determination shows that she incurred the injury in the line of duty, her RELAD date shall be corrected to October 5, 2014; she shall be issued an NOE for the three-month period beginning on October 6, 2014, so that she may be reimbursed for appropriate medical and travel expenses; she shall be advised of reservists' rights under 37 U.S.C. § 204(g) and (h); and she shall receive any back pay and allowances due her as a result of these corrections subject to legal offsets.

May 22, 2015

