

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2016-165**



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**FINAL DECISION**

This proceeding was conducted according to 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 completed application on July 20, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 8, 2017, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant asked the Board to correct his record by correcting his DD Form 214 to reflect that he was not released from active duty on July 31, 2012, but remained on active duty until June 21, 2013. The applicant stated that this error was made while he was on medical hold orders and that he was involuntarily taken off of active duty. He stated that the medical hold was for injuries he sustained while on deployment, where he was receiving imminent danger pay.

The applicant explained that after he received a documented Line of Duty (LOD) injury while he was deployed in support of Operation Iraqi Freedom, he was retained on active duty orders in order to receive healthcare. On November 12, 2010, a Medical Evaluation Board (MEB) was initiated, and the MEB's report was administratively checked into the Physical Disability Evaluation System (PDES) on May 24, 2011. However, while he was undergoing PDES processing, he received notification that on July 31, 2012, he would be involuntarily released from active duty. He clarified that he did not request to be released from active duty, and he claimed that he never received counseling on the consequences of an involuntary separation. The applicant stated that he submitted an appeal of the termination of his medical hold orders on June 20, 2012, but that the request was denied and he instead received a Notice of Eligibility (NOE) on July 25, 2012, which would made him eligible to receive continued health care without remaining on active duty. The applicant stated that the effective date of the NOE was August 1, 2012. He added that he continued healthcare with the NOE until he was placed on the Temporary Disability Retirement List (TDRL) on June 20, 2013.

The applicant stated that due to his injuries he was unable to return to a civilian job. He alleged that the Coast Guard only compensated him with incapacitation pay for some of the months he was on an NOE. The applicant alleged that from the date he was taken off of active duty, July 31, 2012, until the date he was placed on the TDRL, June 21, 2013, he should have been receiving active duty pay, basic housing allowance, and per diem as he had been since being placed on medical hold. The applicant added that due to being placed on the TDRL, he lost all continuity of treatment with his civilian doctors and had a knee surgery cancelled that he still had not received as of preparing his application to the BCMR.

According to 10 U.S.C. § 1218(d), the applicant claimed, a member of a reserve component who was deployed in an area in which imminent danger pay is authorized must be evaluated for physical disability that could result in separation or retirement for disability. He added that if the member is found to have a condition that may result in separation or retirement, the member shall be retained on active duty during the disability evaluation process until the member is either cleared for continuation on active duty or is separated, retired, or placed on the TDRL. Such a member may also request termination of active duty, but the member may only be released from active duty once he has received counseling on the consequences of such termination.

Regarding the timing of his application, the applicant stated that he had originally appealed his time in service issues to the Deployable Operations Group but was denied. He stated that he asked his command what could be done and was told that there was nothing he could do. He said that a representative from Veterans' Affairs informed him of the BCMR. The applicant also added that he was "very reluctant to take action on this matter because of the continued let downs and injustices" he has encountered. The applicant emailed his application to the Board at 8:38 p.m. on June 20, 2016. It was date stamped by the Chair on the morning of June 21, 2016.

In support of his claims, the applicant provided documents to substantiate his arguments and the relevant events. The documents are summarized below in the Summary of the Record.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard Reserve on June 27, 2005, for a period of 6 years. He received a DD-214 covering the period of June 27, 2005, to January 20, 2006, for completing his initial active duty training.

The applicant submitted a print-out from "Online Pay Master" as evidence that he was receiving imminent danger pay. The print-out states that the effective date was December 1, 2008, and the end date was July 1, 2009. In addition, a print-out from the applicant's assignment history shows that he was on title 10 orders from October 1, 2008, to August 6, 2009. The applicant then served on "ADOS-AC" orders from August 7, 2009, until July 31, 2012.<sup>1</sup>

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<sup>1</sup> "ADOS" refers to active duty for operational support, which is a category of active duty performed by reservists.

On May 14, 2009, the applicant was examined at a medical unit in Kuwait. The diagnosis section states the following:

30 DEC 2008 Inversion Sprain...  
30 Mar 2009 R/O Bursitis, patellar...  
14 May 2009 Knee pain, Right Knee...  
08 Jul 2009 (DEMOB)

The comments section of this document also states that the applicant “was performing unit security functions at time of injury. No negligence on his part was found. Injury appears to have occurred due to repetitious functions of unit security.”

On November 12, 2010, the applicant’s Commanding Officer (CO) sent a Medical Evaluation Board Command Endorsement to the Coast Guard Personnel Service Center. The memorandum includes the following:

[The applicant] is currently Available for Limited Duty (AFLD) and it is unlikely that he will be Available for Full Duty (AFFD) in the future. As an Operations Specialist (OS), his duties normally involve tactical command, control, communications and intelligence. Operation Specialists perform functions ranging from search and rescue, law enforcement case execution, air control and intelligence analysis... While assigned to a PSU [Port Security Unit] Operation Specialists are responsible for the maintenance and operation of the units C41 equipment. They are normally assigned to shoreside or waterside security and are expected to meet the same operational qualifications and readiness as security personnel in the unit.

[The applicant] is currently assigned to PSU... His assigned duties are administrative due to his NFFD and non-deployable status. [The applicant] is currently unable to perform these duties due to his condition and it is unlikely that the evaluatee will recover full and stable function. [The applicant’s] current medical condition was incurred in the line of duty, and not as the result of their own misconduct.

On May 24, 2011, the applicant received an email from a disability evaluation specialist with the Personnel Service Center (PSC). The email states “Your Medical Evaluation Board has been administratively checked in by the Personnel Service Center, Physical Disability Evaluation Branch... Your case is being placed in the queue for the IPEB (Informal Physical Evaluation Board).”

On May 30, 2012, the applicant received a Notice of Transition of Reserve Incapacitation Benefits from Medical Hold Status to Notice of Eligibility (NOE). The Notice includes the following:

PSC...has conducted a review of your reserve incapacitation case. This review indicates that retention on active duty is no longer necessary for you to receive appropriate medical care and treatment. Effective 31 July 2012, you shall be released from active duty and provided a Notice of Eligibility (NOE) for authorized medical care and treatment for your documented line of duty injury. Medical care and treatment will continue under the NOE until you are found Available for Full Duty (AFFD), or your condition can no longer be improved by further treatment and you have been separated or retired as the result of a Coast Guard Physical Disability Evaluation System (PDES) determination. I recommend that you contact your SPO without delay, and provide notification of your RELAD [release from active duty] date, to ensure maximum demobilization processing time.

Your NOE will be provided via separate correspondence and will be effective 01 August 2012. While your NOE remains in effect, you are required to report your medical status to your command every 30 days with

an updated Physician's Report... In addition to medical care and treatment, a NOE provides authorization for incapacitation pay as compensation for a reservist's documented loss of earned income from non-military of self-employment.

On June 11, 2012, the applicant's orthopedic specialist prepared a letter on behalf of the applicant. The letter includes the following:

[The applicant] is here today for follow-up of his left knee and his low back. Regarding his left knee, he has had quite a complicated history, including three surgeries on the knee, multiple cortisone injections, physical therapy, and visco supplementation. He has also had a reinjury to his left knee and is about to start a course of physical therapy... He also has a complaint of low back pain with intermittent buttock pain that radiates down his left leg. It is worse with prolonged sitting or standing. He is scheduled to be seen...for evaluation of degenerative disc disease with possible herniated nucleus pulposus...

At the present time, [the applicant] has had a recent flare-up of his left knee after a twisting injury. We have received authorization to begin a course of physical therapy...I do feel that given the complex nature of his problem and the long relationship I have had with him, the continuity of care in allowing him to continue his care with me would be important and I am recommending that he be allowed to continue his care with us in an effort to provide some resolution to a young active-duty Coast Guard officer who was injured while on duty. I also feel it would be quite difficult for him to make prolonged drives because of his underlying low back condition. This can easily be exacerbated by drives and prolonged sitting. Therefore, having him stay in the local area appears to make the most sense from a medical standpoint.

On June 20, 2012, the applicant prepared an Appeal to Notice of Transition of Reserve Incapacitation Benefits from Medical Hold Status to NOE. The Appeal includes the following:

I respectfully request to remain on medical hold status. I strongly feel that the decision to transition me to NOE status has been made without due consideration of the circumstances resulting in my injuries, my specific conditions, doctor patient relationships, and of the detrimental implications of a loss in continuity of care.

As a reserve member of Port Security Unit..., I was involuntarily recalled to Title 10 active duty in September of 2008 in support of Operation Iraqi Freedom. My injuries occurred in April of 2009, in the line of duty, while serving in a designated combat zone. LT...who at the time of deployment was PSU's medical officer, can attest to the fact that proper treatment for my injuries was not given while deployed in theater. I understand the Coast Guard's frustration with the extended amount of time I have been on medical hold; however, much of the delays rest on missteps taken by...Clinic in referring me out in a timely manner to qualified specialists for specific injuries. It took months for CG medical personnel to request authorization for initial medical tests, MRIs, and surgeries. Because of these delays, some of my conditions were exacerbated requiring yet additional surgeries. The nature of the surgeries I have received have required extensive physical therapy and rehabilitation.

I am currently under the care of five different specialists...If placed on NOE I would have to return to my home of record...over 120 miles away, and would virtually have to start my treatment process over again with physicians who are unfamiliar with my unique medical situation. As indicated in the attached physician's correspondence,<sup>2</sup> a commute of this nature would further aggravate my current condition. The continuity of my physicians care would be greatly jeopardized if I was forced to find treatment elsewhere. I understand that RPM [Reserve Personnel Management] is unaware of my unique situation and the circumstances resulting in my injuries, and the long bureaucratic process involved in receiving appropriate treatment. I am not a malingerer. I am not looking for a handout. I am a veteran who was injured in a combat zone in the service of my country and I just want to receive treatment, get better, and continue to serve my country. I respectfully request RPM consider my appeal and the impact of denial.

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<sup>2</sup> The applicant included a copy of the June 11, 2012, letter from his physician with his Appeal.

On June 28, 2012, the applicant's Commander sent an endorsement of the applicant's June 20, 2012, appeal. The endorsement includes:

Forwarded with my highest recommendation. I understand and fully support the Coast Guard's efforts to find ways to systematically save money and eliminate waste. Shifting members from Medical Hold status to NOE is a prudent fiscal step for some cases. Based on the facts presented to me regarding the state of [the applicant's] rate of recuperation, I am concerned about his long term well being and successful recovery.

[The applicant] was injured while serving in direct support of Operation Iraqi Freedom with PSU...in 2009. Since then he has been on Medical Hold status working closely with the medical staff at Base...Clinic and with local physicians and therapists. He suffered setbacks early on caused by mistakes with medical care, but is now in a program yielding significant improvements. Transferring [the applicant] to NOE would require a change in care givers, thus hindering his current rate of recovery. [The applicant's] performance while on active duty has been strong and he is an asset to the unit and the Coast Guard. He is currently entering into the Information Physical Evaluation Board portion of the Medical Board process and should be retained on medical hold until the medical board process has run its course to conclusion. Thank you for your consideration to retain [the applicant] on Medical Hold status in support of our shipmate's full recovery.

On July 19, 2012, the applicant received a response to his appeal of termination of medical hold orders. The response states that the applicant's appeal was denied because "the reasons for retention were not substantiated by additional documentation that would justify approval of appeal." The response further states that the applicant would be able to receive appropriate medical care via an NOE authorization.

On July 25, 2012, the applicant received his NOE for Medical Benefits. The Notice includes the following:

Your duty status is determined to be Fit for Limited Duty as a result of [injuries] incurred in the line of duty while performing active duty as directed by reference (a)<sup>3</sup>... You are hereby issued a Notice of Eligibility (NOE) for medical treatment, beginning 0000, 01 AUG 2012. This NOE entitled you to care appropriate for the injury until it cannot be materially improved by further hospitalization or treatment or until separated via the Physical Disability Evaluation System (PDES)... The continued provisions of this NOE are contingent upon final determination of service connection, and/or in the absence of misconduct or fraud regarding your condition. Treatment and medication are authorized only for the condition covered by this NOE, at the treatment facility designated by your command. You are required to obtain, and submit to your command, updated prognosis and duty status information from your designated medical provider at least every 30 days, commencing from the date of this NOE Memo.

While the provisions of this NOE are in effect, the following conditions apply:

- a. You may not perform any type of duty while in a Not Fit for Full Duty (NFFD) status. You may attend IDT drills at the discretion of your command while in a Fit For Limited Duty (FFLD) status if appropriate training can be accomplished without aggravating the injury covered under this NOE memo. No active duty of any type is authorized until you are deemed Available for Full Duty (AFFD) from your military primary care manager (PCM).

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<sup>3</sup> Reference (a) states "Member's orders dated 01 OCT 2008 to 06 AUG 2009." This aligns with the dates the applicant's assignment history states he was on Title 10 orders.

- b. This NOE shall remain in effect until 30 SEP 2012 unless extended by Coast Guard Personnel Service Center, Reserve Personnel Management (CG-PSC-rpm-3). Any charges incurred after this date will not be covered by this NOE.

The applicant received a DD-214 which covers the period from October 1, 2008, to July 31, 2012. The applicant's net active duty service in this period was 3 years and 10 months. His prior active service was 6 months and 28 days. His prior inactive service was 2 years, 6 months, and 10 days. In the Remarks section it states "Dates of service in a designated imminent danger pay area: 04DEC2008 to 01JUL2009. The bottom portion of the DD-214, which includes information regarding the type and character of separation, reenlistment eligibility, and reason for separation, was not available in the applicant's record.

On June 13, 2013, the applicant received a Fourth Extension for NOE. The memorandum states that an extension from June 1, 2013, through June 20, 2013 was authorized and that all other provisions remained the same.

The applicant received another DD-214 on June 20, 2013. The date entered active duty for this period states 0000 years, 00 months, and 00 days. The net prior active service states 4 years, 6 months, and 14 days. The applicant received an honorable characterization of service, with the type of separation stating "Retirement/Resume Retirement." The narrative reason for separation is "Disability, Temporary."

On March 24, 2015, the IPEB prepared its Findings and Recommended Disposition and found the applicant unfit to perform his duties and recommended that he be removed from the TDRL and be permanently retired. His permanent retirement was effective July 29, 2015. The conditions evaluated were "R chondromalacia patella rated analogous to bursitis; L chondromalacia patella rated analogous to bursitis;<sup>4</sup> [and] Vertebral fracture or dislocation,<sup>5</sup> combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees." The IPEB found that all three of these conditions were incurred while the applicant was entitled to receive basic pay and that they were the "proximate result of performance of active duty...or incurred in the line of duty during war or national emergency." The applicant was assigned a 10% disability rating for each condition, and was assigned a 30% disability rating overall.

On October 8, 2015, the applicant received a letter from PSC stating that the IPEB had found him unfit to perform his regular duties due to permanent physical disability. He was informed that the Physical Evaluation Board had determined that his name should be removed from the TDRL and that the applicant should be permanently retired. The applicant was informed that he was permanently retired with an effective date of July 29, 2015.

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

On December 9, 2016, the Judge Advocate General of the Coast Guard provided an advisory opinion in which he recommended that the Board deny relief. In so doing, he adopted

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<sup>4</sup> Chondromalacia patella is also known as "runner's knee." It involves damage to the cartilage under the knee cap.

<sup>5</sup> Vertebral fracture or dislocation can cause bone fragments to pinch and damage spinal nerves or the spinal cord.

the findings and recommendations of the Personnel Service Center (PSC). PSC first stated that the application was not timely, as the applicant was discharged in 2013, and should not be considered by the Board beyond a cursory review.

PSC stated that reservists are not entitled to a DD-214 unless they complete a period of 90 days or more per the Department of Defense Instruction (DoDI) 1336.01. PSC stated that the applicant served a period of ADOS-AC active duty orders from March 7, 2010, to July 31, 2012, which is included in his DD-214.

PSC also argued that ALCOAST 161/12 clarified that PSC-RPM has the sole authority to determine whether a reservist is retained on active duty for medical hold, or if he is released from active duty and given an NOE for authorized medical care treatment. PSC-RPM determined in the applicant's case that an NOE was sufficient, and PSC therefore claimed that he was properly removed from active duty. PSC also pointed out that the applicant appealed this determination, and it was reconsidered and confirmed to be the appropriate action. PSC stated that the applicant has not proven by a preponderance of the evidence that his release from active duty and transition to NOE was erroneous or unjust.

In reference to the applicant's June 20, 2013, DD-214, PSC stated that the applicant should not have received this DD-214 in accordance with DoDI 1336.01. Upon transfer to NOE status, the applicant was released from active duty. He was therefore ineligible to receive a DD-214 for the NOE period as it is not active duty service. Because the applicant should not have been issued this DD-214, PSC recommended that it be removed from the record, and further recommended that the Board deny the applicant's request.

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

On December 13, 2016, the Chair sent a copy of the Coast Guard's advisory opinion to the applicant and invited a response within 30 days. On January 13, 2017, the applicant responded and stated that he disagreed with the advisory opinion. He reiterated that 10 U.S.C. § 1218(d) clearly applied to him, as he was deployed and receiving imminent danger pay when he was injured. He stated that he was recalled to active duty on title 10 orders on October 8, 2008, and when he returned from deployment on July 3, 2009, he was placed on medical hold for treatment of a T8 vertebrae fracture and torn ligaments in both knees and left ankle. The applicant clarified that at no time was he taken off of medical hold or found to be fit for duty from the time he returned from deployment until he was medically retired on June 21, 2013. The applicant added that during this period he was placed on three different sets of orders, and he was unsure as to why.<sup>6</sup>

The applicant stated that he was unsure if the Coast Guard was "overlooking" when and where he sustained his injuries. He stated that it is standard protocol for a Reserve member injured while on ADOS-AC orders to be placed on NOE status. The applicant argued, however,

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<sup>6</sup> As outlined in the Summary of the Record, the applicant was on Title 10 orders from October 1, 2008, until August 6, 2009. He was then on ADOS-AC orders from August 7, 2009, until July 31, 2012. However, in that period, he had two different sets of ADOS-AC orders. The first from August 7, 2009, to March 6, 2010, and the second from March 7, 2010, to July 31, 2012. During all three of these orders he was assigned to the Port Security Unit.

that he was not on ADOS-AC orders when he was injured. He stated that he was placed onto ADOS-AC orders while receiving medical treatment and pending a Medical Evaluation Board. The applicant claimed that other Reserve members who were injured while deployed were placed on ADOS-AC orders while receiving medical treatment, and they were kept on active duty until medically retired.

The applicant provided a few emails from a Health Specialist (HS) who worked at PSC-RPM in the Reserve Incapacitation office. The applicant stated that he did not personally know the HS, but that the HS contacted the applicant after reviewing the files. The applicant stated that it is because of this HS that the applicant decided to pursue this matter with the BCMR.

The first email the applicant received from the HS was on May 29, 2014. The HS informed the applicant of 10 U.S.C. § 1218(d) and 14 U.S.C. § 705(c). The email also includes the following:

I've recently began review of previous case files in search of members who were injured while entitled to imminent danger pay, involuntarily released from active duty, and processed through the physical disability evaluation system. Your file has a good argument for a successful BCMR. I am working towards a policy change to keep situations like yours from happening again. A successful BCMR may entitle you to full pay and allowances from the date of your RELAD to the date of your placement on TDRL.

On August 28, 2014, the HS emailed the applicant again. It includes the following:

To start I'd like to explain how your case was brought to my attention. Your case caught my attention because you were receiving imminent danger pay when you incurred disability. You were involuntarily released from active duty as evident in your appeal of that release. This disability was processed through the Physical Disability Evaluation System and led to your placement on TDRL. This may constitute an injustice (reference 10 USC 1218).

I've been in this position for a little over a year now and have seen some pitfalls in the Reserve Incapacitation program. I spent a lot of hours doing research on the way reservists are treated in other services. Some of our procedures may not allow for a mirror image of benefits offered by other services. 14 USC 705(c) seems to have a clear intent that Coast Guard benefits should mirror the benefits offered to Navy Reservists. There are various references for this, most notably in the DODI 1241.2. Paragraph 2 of this reference reports applicability to the Coast Guard, even if we are not operating under the Navy. Paragraph 6.6.3.2. of DODI 1241.2 is another great reference for addition into your BCMR.

Below...may help with a BCMR submission...

Ref: (a) Section 1218 of Title 10, United States Code  
(b) Section 705 of Title 14, United States Code  
(c) Section 12301 of Title 10, United States Code

1. Paragraph (d) of reference (a), states that the secretary of a military department will require a member of a reserve component who was mobilized and deployed to an area in which imminent danger pay is authorized must be evaluated for physical or mental disability that could result in separation or retirement for disability. If a member is found to have a condition that may result in separation or retirement, that member shall be retained on active duty during the disability evaluation process until such time as such member is:

- a. Cleared by appropriate authorities for continuation on active duty; or
- b. Separated, retired, or placed on the Temporary Disability Retired List (TDRL) or inactive status list.



2. Reference (a) states that a member described above may request termination of active duty at any time during the demobilization or disability evaluation process. Each member submitting such request shall only be released from active duty after the member receives counseling of the consequences of termination of active duty. Each release from active duty shall be thoroughly documented.

3. Paragraph (c) of reference (b) applies to Coast Guard and states that a member who suffers sickness, disease, injury or death is entitled to the same benefits as prescribed by law for a member of the navy reserve who suffers sickness, disease, injury, or death under similar conditions. The Coast Guard uses this law to authorize orders under paragraph (h) of reference (c).

4. [The applicant] had documented Line of Duty (LOD) injuries incurred while in receipt of imminent danger pay... Injuries were incurred while on Operation Contingency Orders (OCO) in support of Operation Iraqi Freedom (OIF)... [The applicant] was retained on active duty orders to receive healthcare until 31 July 2012. A Medical Evaluation Board (MEB) was initiated on 12 November 2010... This MEB was administratively checked in with the Physical Disability Evaluation System (PDES) on 24 May 2011... On 30 May 2012, [the applicant] received notification that he would be involuntarily released from active duty on 31 July 2012... [The applicant] did not request release from active duty, and there is no documentation of counseling for consequences of termination of active duty. He submitted an appeal of termination of medical hold orders on 20 JUN 2012. He received a Notice of Eligibility (NOE) on 25 July 2012 for continued healthcare without remaining on active duty... NOE effective date of 01 August 2012. [The applicant] continued his healthcare with NOE until he was placed on TDRL on 20 June 2012.

### APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 1218(d), as applicable from October 28, 2009, to December 18, 2014, states the following:

(1) The Secretary of a military department shall ensure that each member of a reserve component under the jurisdiction of the Secretary who is determined, after a mobilization and deployment to an area in which imminent danger pay is authorized..., to require evaluation for a physical or mental disability which could result in separation or retirement for disability under this chapter or placement on the temporary disability retired list or inactive status list under this chapter is retained on active duty during the disability evaluation process until such time as such member is

- (A) cleared by appropriate authorities for continuation on active duty; or
- (B) separated, retired, or placed on the temporary disability retired list or inactive status list.

Title 10 U.S.C. § 101a(8) defines “military departments” to mean the Departments of the Army, the Navy, and the Air Force.

Title 14 U.S.C. § 705(c), which is specific to the Coast Guard Reserve, states that a “member of the Reserve who suffers sickness, disease, disability, or death is entitled to the same benefits as prescribed by law for a member of the Navy Reserve who suffers sickness, disease, disability, or death under similar conditions.”

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

- (g)(1) A member of a reserve component of a uniformed service is entitled to the pay and 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;...

(2) In the case of a member who receives earned income from nonmilitary employment or self-employment performed in any month in which the member is otherwise entitled to pay and allowances under paragraph (1), the total pay and allowances shall be reduced by the amount of such income. In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

On April 6, 2012, the Commandant issued ALCOAST 161/12, which states the following:

A member on active duty under a call or order to active duty for a period of 30 days or less (ADHC [active duty for health care]) or 31 days or more (medical hold), who incurs or aggravates an injury, illness, or disease in the line of duty may, with the consent of the member and at the discretion of the service, be retained on active duty or considered for release based on the extent and care required for the injury, illness or disease.

Effective immediately...COMDT (CG-PSC-RPM) has sole authority to determine whether a reservist is recalled to, retained and/or extended on active duty for medical hold or ADHC status, or is released from active duty and authorized NOE for authorized medical care and treatment. This authority will be exercised with careful consideration of the facts of each case, including the severity of the injury/illness, waiver requirements..., member duty status, and consultation with PSC medical officers... Incapacitation pay shall be authorized for reservists with an approved NOE.

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).

Under Article 6.B.3.a., a “Notice of Eligibility (NOE) for authorized medical treatment is issued to a reservist not serving on active duty, to document eligibility for medical care as a result of an injury, illness, or disease incurred or aggravated in the line of duty.” Article 6.B.3.d. provides that “[a]s soon as a medical officer or designated authority determines that a reservist is expected to remain incapacitated for more than six months, the case shall be referred to the Coast Guard Physical Disability Evaluation System (PDES).”

Department of Defense Instruction 1336.01 was issued on August 20, 2009, and Paragraph 2.d. states that personnel being separated from a period of active duty for training, full-time training duty, or active duty for special work will be furnished a DD-214 when they have served 90 days or more, or when required by the Secretary of the Military Department concerned for shorter periods.

Title 10 U.S.C. § 12301 states the following:

(h)(1) 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

### 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.
2. An application must be filed within three years of the applicant’s discovery of the alleged error or injustice in his record, as required by 10 U.S.C. § 1552(b). The record shows that the applicant knew that he was being released from active duty on July 31, 2012, and he is challenging his release from active duty on that date. Therefore, his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>7</sup> In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”<sup>8</sup> to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the

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<sup>7</sup> 10 U.S.C. § 1552(b).

<sup>8</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

merits would need to be to justify a full review.”<sup>9</sup> Although the applicant in this case did delay filing his application, the evidence of record reveals a significant, prejudicial error in his record, as explained below, and so the Board finds that it is in the interest of justice to excuse the untimeliness of the application.

4. Regarding the delay of the application, the record indicates that the applicant was undergoing medical treatment and PDES processing after his release from active duty. In addition, he alleged that he was unaware of the BCMR until recently, although he should have received information about the BCMR upon his release from active duty. However, there is no Page 7 in the applicant’s record as required by Article 1.B.36.h.(6) of the Military Separations Manual showing that he received separation counseling. Such counseling would have included counseling regarding the correction boards, including the BCMR. Moreover, as discussed below, the record shows that the Coast Guard violated a statute in releasing the applicant from active duty on July 31, 2012. Therefore, the Board finds that it is in the interest of justice to waive the three-year statute of limitations, as allowed by 10 U.S.C. § 1552(b).

5. The applicant alleged that the Coast Guard committed an error by releasing him from active duty on July 31, 2012, instead of keeping him on active duty through June 21, 2013, the date he was placed on the TDRL. 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>

6. The applicant’s argument rests on 10 U.S.C. § 1218(d). Title 10 U.S.C. pertains to the Armed Forces operating under the Department of Defense and only certain sections apply to the Coast Guard. The first question, then, is whether § 1218(d) applies to the Coast Guard. Section 1218(d) addresses the “Secretary of a military department,” rather than the “Secretary concerned,” and under 10 U.S.C. § 101a(8), the “military departments” are defined to mean the Departments of the Army, the Navy, and the Air Force. Therefore, on its face, § 1218(d) appears to apply only to the Secretaries of the Army, Navy, and Air Force, and not to the Secretary of Homeland Security. However, 14 U.S.C. § 705(c), which expressly applies to the Coast Guard, specifically states that a “member of the Reserve who suffers sickness, disease, disability, or death is entitled to the same benefits as prescribed by law for a member of the Navy Reserve who suffers sickness, disease, disability, or death under similar conditions.” While there is no definition of “benefit” in either title 10 or 14, the Board finds that § 1218 of title 10 clearly

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<sup>9</sup> *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

<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).

confers a significant benefit on Reserve members of the Navy.<sup>12</sup> Therefore, the Board finds that in accordance with 14 U.S.C. § 705(c), § 1218 of title 10 does apply to Coast Guard Reserve members.

7. For 10 U.S.C. § 1218(d) to be applicable, a Reserve member must have been mobilized and deployed to an area in which imminent danger pay was authorized. The applicant's records show that he was involuntarily called to active duty on title 10 orders on October 1, 2008, and he deployed to Kuwait, where imminent danger pay was authorized, on December 1, 2008. His medical records show that the applicant was treated for knee and back injuries between December 2008 and May 2009, while he was in Kuwait and receiving imminent danger pay. He was demobilized as a result of those injuries in July 2009 and released from active duty on July 31, 2009, with an NOE pursuant to Article 6.B.3.a. of the Reserve Policy Manual to provide certain benefits because the Coast Guard acknowledged that he had incurred his injuries while on active duty. The record further shows that the applicant was processed under the PDES as a result of these same injuries and then separated from the Reserve on June 20, 2013, and placed on the TDRL as of June 21, 2013. Therefore, the Board finds that the applicant has shown by a preponderance of the evidence that he was mobilized and deployed to an area in which he was authorized to receive imminent danger pay at the time he incurred the injuries for which he was later demobilized, given an NOE, processed under the PDES, separated from the Reserve, and placed on the TDRL.

8. Title 10 U.S.C. § 1218 requires that a reserve member who requires a physical evaluation which could result in separation or retirement be "retained on active duty during the disability evaluation process until such time as such member is...separated, retired, or placed on the temporary disability retired list." The record shows, however, that the applicant was released from active duty on July 31, 2012, despite his objections, instead of being retained on active duty while he was processed under the PDES, as required by 10 U.S.C. § 1218(d) and 14 U.S.C. § 705. To justify its actions, the Coast Guard cited ALCOAST 161/12, released on April 6, 2012, which states that PSC has the "sole authority to determine whether a reservist is...retained and/or extended on active duty for medical hold...or is released from active duty and authorized NOE for authorized medical care." The statutes and the Coast Guard's policy in ALCOAST 161/12 therefore conflict at least with regard to reservists who are being processed under the PDES for injuries incurred while they are entitled to imminent danger pay, and the statutes trump Coast Guard policy. While the ALCOAST gives PSC discretion as to whether or not to keep a reserve member on active duty, 10 U.S.C. § 1218(d) and 14 U.S.C. § 705 required the Coast Guard to retain the applicant on active duty until he was placed on the TDRL because he was a reserve member who was injured while receiving imminent danger pay and was processed under the PDES and placed on the TDRL because of those injuries. The Board finds, therefore, that the Coast Guard erred in releasing the applicant from active duty on July 31, 2012, almost 11 months before the date he was placed on the TDRL.

9. Accordingly, the Board finds that the applicant's request for relief should be granted. To effect relief, the applicant's record should be corrected to show that he was not

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<sup>12</sup> "Benefit" is defined by the Merriam-Webster dictionary as "something that produces good or helpful results or effects or that promotes well-being." Alternatively, it is defined as "financial help in time of sickness, old age, or unemployment."

released from active duty on July 31, 2012, but was retained on active duty through June 20, 2013, and he should receive the back pay and allowances owed as a result of this correction. The applicant's erroneous DD-214 dated June 20, 2013, with zeros, instead of a date of entry, in block 12.a. should be removed from his record, and the Coast Guard should ensure that the applicant is issued a complete, corrected DD-214, including the appropriate information in blocks 23 through 30.

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

**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 was not released from active duty on July 31, 2012, but was instead retained on active duty through June 20, 2013;
- The Coast Guard shall pay him the back pay and allowances owed as a result of this correction subject to any legal offsets;
- The Coast Guard shall remove the erroneous DD-214 with zeros indicating no date of entry in block 12.a. and a separation date of June 20, 2013, from his record; and
- The Coast Guard shall issue him a complete, corrected DD-214 with a separation date of June 20, 2013, including the information in blocks 23 through 30.

June 8, 2017

