

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-228



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on July 25, 2017, 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 October 19, 2018, 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 former Reservist and yeoman, asked the Board to correct her record by raising her disability percentage from 20% to 50% and by awarding her active duty back pay from April 10, 2011, when she was released from active duty, to December 6, 2015, when she was separated from the Reserve. If not awarded active duty back pay, the applicant requested incapacitation benefits.

The applicant explained that while she was deployed on active duty she injured her left knee while riding a bicycle. She argued that she should not have been released from active duty in 2011 and instead should have been kept on active duty pending medical boards and further medical determinations regarding her condition. She further argued that the Formal Physical Evaluation Board (FPEB) "went against" doctor recommendations and "discharged [her] with 20%." She asserted that due to the nature and history of her knee injury, the pain and limitations the injury caused her, and the surgeons' professional opinions, the disability rating was "either unjust or simply an error."

In support of her application, the applicant provided many documents, the most pertinent of which are discussed below in the Summary of the Record.

SUMMARY OF THE RECORD

The record contains MRI images of the applicant's left knee dated May 24, 2010, which were taken at a private hospital and received from the VA. There is no evidence that the applicant was on active duty at the time.

The applicant's Reserve Orders show that she served on Title 14 active duty orders from December 12, 2010, to February 9, 2011, and on Title 10 active duty orders from February 10, 2011, to April 10, 2011.

While on active duty, the applicant visited the clinic on January 20, 2011, complaining of pain in her left knee and a knot in her groin. She told the doctor that she had previously injured her left knee and had had surgery to repair the meniscus, and she was concerned that she had aggravated the injury. She was diagnosed with a knee sprain and told to take ibuprofen and return in two weeks if her condition did not improve. She was released without limitations.

On March 22, 2011, the applicant returned to the clinic stating that she had a constant ache on the inside of her left knee and that squatting or sitting still for a long time caused pain. A certified physician's assistant found that the applicant had a full range of motion, passive and active, and no swelling, deformity, tenderness, or instability. The applicant reported that the knee did not lock up or buckle. The applicant was prescribed Naproxen, referred for physical therapy, and released without limitations. On March 23, 2011, the applicant came back to the clinic to be seen by a doctor, who diagnosed the applicant with a left knee sprain and told her not to climb, run, or do high-impact exercises except as indicated by her physical therapist.

On April 6, 2011, the applicant returned to the clinic and stated that her pain was the same. The physician's assistant reported no significant changes in her condition. He noted that because she was being demobilized, she should follow up with her physician at her permanent unit and possibly have an MRI. She was released without limitations.

The applicant was released from active duty on April 10, 2011, when her orders expired.

On April 12, 2011, the applicant returned to the clinic regarding her demobilization. She stated that she had aggravated an injury to her left knee and disagreed with their determination that she was fit for duty and demobilization. The doctor noted that they "reviewed/addressed all questions and concerns with patient regarding current mobilization/ demobilization." The applicant was released without limitations and advised to follow up as needed with her primary physician.

On April 20, 2011, the applicant consulted her primary physician at her permanent unit. She told the doctor that she had disagreed with the finding that she was fit for duty. The doctor diagnosed a left knee sprain but reported that she might have an ACL injury and should have an MRI because physical therapy, anti-inflammatories, and wearing a knee brace had not helped. She was found fit for limited duty in that she should not perform boat or sea duty, climb, or stand or walk for prolonged periods.

On June 6, 2011, the applicant's command conducted a line of duty determination. The report states that the applicant had been diagnosed with a "Possible ACL injury, however definitive diagnosis cannot be made without an MRI as per ... Clinic Doctor." The Injury Report states that the applicant was first seen for this injury by a medical officer on January 20, 2011; that she was present for and performing duty at the time of the injury; and that the injury was not the result of misconduct. The box for notes on the circumstances of the injury states:

Reserve member was ... in support of ... from 12Dec2010 to 09Feb2011 then transitioned to ADOS ISO ... from 10Feb2011 to 10Apr2011, with no break in service. On 20Jan2011 at 0835, mbr was seen by ... Primary Care ... with a complaint of left knee pain and a knot in groin area. Mbr stated that while returning from active duty, mbr had an accident on a bicycle. Mbr fell from bike, the handle bars impacted in the groin area, and mbr twisted left knee while falling.

On June 9, 2011, the applicant was determined to be fit for limited duty due to her left knee injury. She was approved for a Notice of Eligibility (NOE) which authorized treatment and medication for her condition beginning on June 10, 2011. The NOE was initially approved for two months. Additional documentation in her file shows that the NOE was extended a total of nineteen times until it expired on October 31, 2015.

On August 9, 2011, the applicant underwent surgery to repair a meniscus tear in her left knee. Following the surgery, she underwent physical therapy (PT). On March 9, 2012, she attended the clinic for a determination of her duty status and extension of her NOE. She was found fit for limited duty and her NOE was extended to provide for more physical therapy. Emails in the record show that the applicant continued to perform military duty on a limited duty basis.

On June 7, 2012, the applicant went to the clinic "to discuss option of TLD [temporary limited duty] vs. IMB [Initial Medical Board]. ... [The applicant] expresses desire to proceed with TLD process, continue PT," instead of being processed for a disability evaluation by an IMB. On June 9, the Health Services Administrator signed a TLD designation for the applicant, noting that she was fit for limited duty but expected to return to a fit for full duty status within six months. Her NOE was extended again through September. A higher authority denied the TLD designation on June 29, 2012, because of the duration of the applicant's limited duty status but her command was apparently not informed of the denial.

In October 2012, the applicant requested another extension of the NOE. She stated that she wanted to attend physical therapy three times per week and could do so while continuing her civilian work. The record shows that the applicant continued to perform duty in a limited duty status and attend physical therapy. The NOE was extended again.

On January 11, 2013, a medical board convened and diagnosed the applicant's left knee as having patellofemoral syndrome, chondromalacia, osteoarthritis, patellar subluxation, and tendonitis. She was found not to meet the retention standards and referred for processing for a medical separation under the Physical Disability Evaluation System (PDES). However, the applicant underwent more surgery on her left knee in June 2013 and returned to physical therapy. Then again in June 2014, she underwent more surgery on her left knee and returned to physical therapy.

On May 18, 2015, the applicant appeared at a hearing of the FPEB. She was found to be disabled by “cartilage, semilunar removal of, symptomatic” and “left knee, other impairment of: recurrent subluxation or lateral instability, slight.” The FPEB rated both disabilities as 10% disabling, leading to a combined of 20% disability rating. The FPEB noted that the applicant’s “medical conditions continue to prevent her from performing the duties required of a service member of her rank.” Therefore, the FPEB recommended that the applicant be separated with severance pay.

On August 4, 2015, the applicant was diagnosed by a civilian health care provider with complex regional pain syndrome of her left lower extremity and neuropathy of left sural nerve.

On August 25, 2015, the applicant’s primary care physician, a military provider, confirmed the new diagnoses of complex regional pain syndrome (Type II) and identified the second diagnosis as lateral sural nerve neuralgia. The military physician also diagnosed the applicant with fibromyalgia. The doctor noted that the diagnosis of fibromyalgia was not directly related to the other two conditions but it could exacerbate their symptoms.

The applicant was medically discharged on December 6, 2015. She received an honorable characterization of service. The narrative reason states “physical disability with severance pay.”

VIEWS OF THE COAST GUARD

On December 28, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case. The JAG noted that while the applicant is eligible to apply for incapacitation pay while authorized under an NOE, she is not automatically entitled to it. The JAG argued that in order to receive incapacitation pay under 37 U.S.C. § 204(h)(1), a Reserve member who is physically able to perform her military duties must demonstrate a loss of earned income from nonmilitary or self-employment as a result of the injury incurred or aggravated in the line of duty. The JAG asserted that the applicant did not provide any evidence of a loss of earned income nor did she demonstrate that she was physically capable of performing her military duties during her injury. Therefore, the JAG argued, there is no basis to grant her incapacitation pay. In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is timely and therefore should be considered on the merits. PSC argued that while the applicant’s NOE expired on October 31, 2015, she was eligible for NOE benefits until she was separated on December 6, 2015. PSC stated that it was unclear why an NOE extension was not requested to cover this period. PSC recommended that the NOE extend from April 11, 2011, the date the applicant was released from active duty, to December 6, 2015.

Regarding incapacitation pay, PSC stated that the applicant was eligible to request this while she was authorized under an NOE. PSC noted that there is no evidence that the applicant had requested incapacitation pay. PSC stated that the applicant may submit a request for incapacitation pay through CGPSC-RPM-3.

Regarding the rating of the applicant’s disabilities, PSC stated that the applicant has provided evidence to show the following diagnoses by a preponderance of the evidence:

- Left knee cartilage, semilunar, removal of, symptomatic Rated at 10%
- Left knee, other impairment of: recurrent subluxation or lateral instability slight Rated at 10%
- Scar(s), unstable or painful: one or two scars that are unstable or painful Rated at 10%
- Complex regional pain syndrome rated analogous to left-sided incomplete paralysis of the anterior tibia (deep peroneal (sural nerve branch)) (severe with tropic changes) Rated at 20%
- Fibromyalgia (fibrositis, primary fibromyalgia syndrome) with widespread musculoskeletal pain and tender points, with or without associated fatigue, sleep disturbance, stiffness, paresthesias, headache, irritable bowel symptoms, depression, anxiety, or Ranaud’s-like symptoms: that are episodic, with exacerbations often precipitated by environmental or emotional stress or by overexertion, but that are present more than one-third of the time Rated at 20%

PSC stated that the combined rating using the rounded VASRD scale is 50%. PSC stated that the applicant’s condition prevented her from performing her duties and the condition reached a stable level. Her condition was not considered combat related. Therefore, the applicant should have been placed on the Permanent Disability Retired List. PSC argued that had the FPEB been able to review all of the evidence regarding the diagnoses from August 2015, the applicant would likely have been medically retired as opposed to discharged with a 20% disability rating. PSC therefore recommended that the applicant be medically retired with a 50% disability rating as of her separation date of December 6, 2015.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 22, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Title 37 U.S.C. § 204(g) states the following:

(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.

Title 37 U.S.C. § 204(h)(1) states:

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 non-military employment or self-employment as a result of an injury, illness, or disease incurred or aggravated –

(A) In the line of duty while performing active duty

Title 37 U.S.C. § 204(h)(2) states that the monthly entitlement “may not exceed the member’s demonstrated loss of earned income from nonmilitary of self-employment.” Section 204(h)(2)(i)(2) states that such pay and allowances may not be paid for a period of longer than six months.

The Reserve Policy Manual, COMDTINST M1001.28A, Article 6.A.3. states that medical care “shall be provided until the member is found fit for military duty, or the injury ... cannot be materially improved by further hospitalization or treatment and the member has been separated or retired as the result of a Coast Guard Physical Disability Evaluation System (PDES) determination.” Article 6.A.4. states:

A reservist who is able to perform military duties but demonstrates a loss of earned income as a result of an injury, illness, or disease incurred or aggravated in the line of duty is entitled to pay and allowances, including all incentive and special pay to which entitled, if otherwise eligible but not to exceed the amount of demonstrated loss of earned income or the amount equal that provided by law or regulation for an active duty member of corresponding grade and length of service, whichever is less.

Figure 6-1 of the Reserve Policy Manual, titled Incapacitation Benefits, shows that if a member is physically disabled in the line of duty while serving on active duty or while traveling directly to or from active duty and she is fit for military duty but can show low civilian income, then she is entitled to active duty pay and allowances for the period of the orders. “Thereafter, the member is entitled, upon request, to a portion of pay and allowances in an amount equal to lost civilian earned income or full pay and allowances, whichever is less, for not more than a total of 6 months.”

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.

2. The applicant alleged that the Coast Guard's handling of her release from active duty with regards to her left knee injury was erroneous and unjust. 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.¹ 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."²

3. The record shows that the applicant originally injured her left knee in 2010 while not on active duty but reinjured it while on active duty in January 2011. There is no dispute that the injury was incurred in the line of duty and was not a result of misconduct. Therefore, she was entitled to medical treatment for her injuries while she was a member of the Reserve.³ These benefits are normally provided to members by issuing an NOE.⁴ The record shows that the applicant was not issued an NOE until June 10, 2011, several months after her release from active duty. Further, her NOE was allowed to expire on October 31, 2015, several months before she was separated from the Coast Guard, and she alleged that there were other gaps in her coverage. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that her record should be corrected to show that she was issued an NOE for the entire period from April 11, 2011, to December 6, 2015, so that any medical expenses she incurred because of her knee injury during this time frame not yet covered by the Coast Guard may be reimbursed.

4. The applicant alleged that she should not have been released from active duty when her orders expired in April 2011, but she was found fit for duty at the time and her medical records show that she had no instability, no swelling, no locking, and a full range of motion in her left knee at that time. Therefore, in accordance with Chapter 3.F.12. of the Medical Manual, her left knee condition did not render her unfit for duty in April 2011. Accordingly, the applicant has not proven by a preponderance of the evidence that the Coast Guard erred in finding that she was fit for separation and release from active duty in April 2011.

5. Under 37 U.S.C. § 204(g), a reservist who is unfit to perform military duty but loses civilian income because of an injury incurred in the line of duty is entitled to active duty pay minus all civilian income earned, while under 37 U.S.C. §204(h), a reservist who is fit to perform military duty but loses civilian income because of an injury incurred in the line of duty may apply for "incapacitation pay," and be reimbursed for her lost civilian income. The record shows that the applicant continued to drill as a reservist yeoman and work at a civilian job following her release from active duty in April 2011, and she was issued NOEs to cover her medical costs for her knee injury. A reservist with an NOE is eligible for incapacitation benefits.⁵ The Coast Guard recommended denying this portion of the applicant's request because she had not provided evidence to demonstrate "a loss of earned income from non-military employment or self-employment" incurred in the line of duty.⁶ The Board agrees that the applicant has not *yet* provided

¹ 33 C.F.R. § 52.24(b).

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

³ 10 U.S.C. § 1074a(a)(1); 37 U.S.C. § 204(g).

⁴ Reserve Policy Manual (RPM), Article 6.B.3.

⁵ 37 U.S.C. § 204(h)(1); RPM, Article 6.A.4.

⁶ 37 U.S.C. § 204(h)(1).

such evidence, but that does not mean that it does not exist. The applicant should be given 180 days to apply for incapacitation pay in accordance 37 U.S.C. § 204(h)(1). If she does so with satisfactory evidence, the Coast Guard should pay her all appropriate incapacitation pay and allowances she is owed under applicable law and regulation.

6. The applicant asked to be retroactively medically retired with a 50% rating. The FPEB assessed her knee condition as only 20% disabling on May 18, 2015, six months before her discharge. However, she was subsequently diagnosed with complex regional pain syndrome (Type II), lateral sural nerve neuralgia, and fibromyalgia by a military provider on August 25, 2015, before she was discharged, and there is no evidence that the FPEB reconsidered its determination in light of these new diagnoses. The Coast Guard recommended granting relief in this regard and argued that had the FPEB had access to these additional diagnoses, the applicant would have received a 50% disability rating and would have been medically retired. The Board agrees because under Chapter 3.F.15. of the Medical Manual, neuralgias and other neurological conditions that cause pain that interferes with the performance of duty despite treatment are unfitting conditions warranting processing under the PDES. In light of the Coast Guard's assessment of her disability, the Board finds that her record should be corrected to show that she was medically retired with a 50% disability rating as of December 6, 2015. She should receive all due back pay as a result of this correction.

7. Accordingly, relief should be granted by correcting the applicant's record to show that she was issued an NOE for the entire period from April 11, 2011, to December 6, 2015. The applicant should be given 180 days to apply for incapacitation pay and reimbursement for medical expenses incurred because of her left knee condition during this period and if she provides satisfactory evidence, the Coast Guard should pay her all appropriate incapacitation pay and allowances. The applicant's record should also be corrected to show that she was medically retired with a 50% disability rating as of December 6, 2015, and she should receive all resulting back pay.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

The Coast Guard shall correct her record to show that she was issued an NOE for the entire period from April 11, 2011, to December 6, 2015. The Coast Guard shall also provide her with information about how to apply for reimbursement for her medical expenses and incapacitation pay and allowances under 37 U.S.C. § 204(h). After the Coast Guard has provided her with this information, she shall have 180 days to apply and submit evidence to the Coast Guard to receive incapacitation pay and allowances, including reimbursement for medical expenses she incurred because of her left knee condition from April 11, 2011, to December 6, 2015, that have not yet been reimbursed. If she submits to the Coast Guard a satisfactory application and evidence of lost civilian income and/or unreimbursed medical expenses within the 180-day period, the Coast Guard shall pay her incapacitation pay and allowances as required by law and regulation.

Her record shall also be corrected to show that she was medically retired on December 6, 2015, with a 50% disability rating, and the Coast Guard shall pay her back pay and allowances.

No further relief is granted.

October 19, 2018

