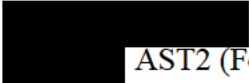


**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2019-134**

 AST2 (Former)

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on January 26, 2018, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 29, 2020, 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 Aviation Survival Technician Petty Officer 2<sup>nd</sup> Class (AST2/E-5) who was honorably discharged on May 22, 2017, asked the Board to correct his record by changing his separation to a medical retirement.

The applicant stated that in early 2014, he began experiencing medical issues. Some of these issues included seizures, limited range of motion of various extremities, PTSD, and osteoarthritis. He alleged that his diagnoses were the result of hard evidence, such as x-rays, rather than subjective conclusions based on information provided by him to his doctors. On April 20, 2016, the Formal Physical Evaluation Board (FPEB) determined that the applicant was unfit for duty and that his physical disabilities were combat-related.

Before the Physical Disability Evaluation System (PDES) process was complete, the applicant alleged, his chain of command took it upon themselves to question the medical evidence and accused him of faking his disabilities. The applicant described this as a "vindictive campaign" to deny him the medical retirement that he was entitled to receive.

The applicant put forth several arguments in support of his medical retirement. First, he alleged that the Coast Guard acted improperly and with malice in delaying his exit from the Coast Guard. He stated that his end of enlistment was December 2016. However, the Coast Guard held him until March 2017. He conceded that the Coast Guard is permitted to involuntarily extend a

member while on active duty. However, he argued that an involuntary extension should only be done upon good cause. He argued that his chain of command's final determination not to pursue court-martial against him raises the issue of whether there was good cause to involuntarily extend his enlistment.

Second, the applicant argued that even if the Coast Guard had properly "flagged" the applicant for an impending judicial action, the Coast Guard had an independent duty to ensure that his ultimate discharge from the Coast Guard took into consideration his medical issues. The applicant argued that there is no evidence to refute the doctors' findings that he suffered various and severe medical conditions. As such, he argued, he is entitled to a medical retirement. Instead, he was forced to accept a discharge with no acknowledgement of the medical issues in his record.

Third, the applicant argued that the Coast Guard failed to take into account his PTSD when alleging misconduct. The applicant quoted an article published in *Frontiers in Psychology* that stated:

U.S. Coast Guard (CG) personnel face occupational stressors (e.g., search and rescue) which compound daily life stressors encountered by civilians. However, the degree CG personnel express stress-related mental health symptoms of posttraumatic stress disorder (PTSD) and major depressive disorder (MDD) is understudied as a military branch, and little is known concerning the interplay of vulnerabilities and neurocognitive outcomes in CG personnel.

The applicant also cited a Memorandum from the Department of Defense entitled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder." The applicant argued that the memorandum instructed services to do a better job in recognizing and treating PTSD.

Fourth, the applicant argued that he did not waive his rights to the PDES process. To support this allegation, the applicant pointed to his separation paperwork, dated March 20, 2017, on which he hand-wrote the following: "In making this election [Honorable Discharge] I do not waive my rights under PDES... I object to administrative separation process and request to be medically retired IAW [in accordance with] with my PDES case." He argued that since the Coast Guard accepted his separation paperwork with the condition that he was not waiving his rights to the PDES process, it was incumbent upon the Coast Guard to permit the PDES process to conclude.

The applicant concluded by stating that he should have been given a medical evaluation prior to his discharge. He argued that a medical retirement, relying on his Coast Guard medical records, is the legal and equitable recourse to this matter.

In support of his allegations, the applicant submitted numerous copies of Coast Guard records, which are included in the Summary of the Record below. Additionally, the applicant submitted numerous medical records.

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on March 1, 2004. On July 14, 2006, he became an Aviation Survival Technician and worked as a Rescue Swimmer for the remainder of his Service.

On December 12, 2014, the applicant's Commanding Officer (CO) recommended to Commander, Personnel Service Center that the applicant be found unfit for duty and separated from the Coast Guard. He determined that the applicant's medical condition was incurred in the line of duty, and not the result of his own misconduct. He noted that at the time, the applicant served in a limited duty capacity performing administrative and training functions at the unit. He stated that that as a result of his medical conditions, the applicant was incapable of being put into the fleet and could not perform the prescribed duties associated with his grade.

On September 21, 2015, an Informal Physical Evaluation Board (IPEB) determined that the applicant was physically unfit for duty and recommended placing him on the Permanent Disability Retired List (PDRL). The IPEB assigned the applicant a 70% combined disability rating based on the following findings: Spondylolisthesis (L4-L5) with forward flexion of the thoracolumbar spine 30 degrees or less; Epilepsy (petit-mal) with at least 1 major seizure in the last 2 years or at least 2 minor seizures in the last six months; Osteoarthritis with X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups; left-sided cartilage, semilunar, removal of, symptomatic; and right-sided ankle limited range of motion rated analogous to pain. The IPEB indicated that the applicant's disability was not the result of willful neglect, intentional misconduct, or unauthorized absence by the applicant; was incurred while the applicant was entitled to basic pay; and was the proximate result of performance of active duty or inactive duty training or incurred in the line of duty during war or national emergency. The IPEB determined that the applicant's medical conditions prevented him from performing the duties required of a service member of his rate or rank. Further, the IPEB determined that the applicant's physical disabilities were not combat-related. The applicant did not accept the IPEB's recommendation and demanded a hearing before a Formal Physical Evaluation Board (FPEB).

On March 16, 2016, the FPEB convened to determine the fitness of the applicant.<sup>1</sup> During the hearing, the FPEB asked the applicant several questions related to his disabilities. First, the FPEB asked the applicant how injuries to his cervical spine impaired his daily life. The applicant responded: "Daily living, it prevents me from driving. First of all, that's probably the most important thing." Next, regarding the applicant's PTSD, the FPEB asked the applicant to explain the events that led to the onset of his symptoms. The applicant responded:

I was exposed the first time off of [redacted]. I was shot at multiple times... our whole crew was. Lieutenant [redacted] was our pilot, thank God, and Lieutenant [redacted] was our co-pilot. Both were prior Army pilots and recognized in their MBGs quickly that the strokes of light zooming past us, our helicopter, with me looking outside the door trying to see who was getting thrown in the water. Because there was a joint effort, and there were drug runners and panga boats off of [redacted] throwing people in the water as well as drugs at the time and were shooting at us because we were assisting law enforcement in efforts to apprehend the suspects. Thankfully none of us got shot. That was the first exposure to live round fire. Being shot at basically by drug runners.

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<sup>1</sup> The BCMR was provided access to the audio files of the Formal Physical Evaluation Board hearing.

The FPEB then asked about the applicant's migraines. He explained that they can last up to three days. The FPEB asked whether he was completely incapacitated when he experienced migraines, to which he responded, "yes." The FPEB followed up by asking: "So, you're unable to do anything at that time?" The applicant responded "Yes, sir." Next, the FPEB asked the applicant how often he used his wheelchair. The applicant responded:

I'm in the wheelchair if I have to go long-distances... there are a few doctors that I see, specialists outside of the Coast Guard base, that are a little bit further from the parking lot. And so, my mother and my youngest brother, they will push me because I can't walk that far with the cane. If it's a short distance, I can make it with the cane. I just can't stand for too long.

The FPEB asked the applicant to explain what happens if he were to walk a long distance. He stated, "usually, my lower extremities would give out due to muscle weakness or nerve pain." He further explained that the nerve pain was due to a vertebra putting pressure on his sciatic nerve. Finally, the FPEB asked the applicant about his shoulders. He stated the following:

I really can't use them, I can't extend them, my arms out in front of me, they're usually stuck... I can't really use them. There's a lot of grinding. Crunching... There's a lot of pain and stiffness. I can't really raise them past a certain point either way. They are down to my side so I can use the cane for assistance but I can't lift them up.

The FPEB asked if he cannot do activities that require his shoulders to be above his chest. The applicant responded, "that's correct."

On April 11, 2016, the applicant had a routine follow-up with his neurologist. He was diagnosed with chronic migraines. The neurologist reported that the applicant described his migraines as follows: 30 out of 30 days, few hours each, with frequent photophobia, phonophobia, unilaterally predominant pulsatile pain, frequent dizziness, nausea, and vomiting.

On April 20, 2016, the FPEB determined that the applicant was physically unfit for duty and recommended placing him on the Permanent Disability Retired List (PDRL). The FPEB assigned the applicant a 90% combined disability rating based on the following findings: Migraine; Major Depressive Disorder; Spondylolisthesis (L4-L5) with forward flexion of the thoracolumbar spine 30 degrees or less; Epilepsy (petit-mal) with at least 1 major seizure in the last 2 years or at least 2 minor seizures in the last six months; Osteoarthritis with X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups; left-sided cartilage, semilunar, removal of, symptomatic; and right-sided ankle limited range of motion rated analogous to pain; and right-sided wrist, limitation of motion with dorsiflexion less than 15 degrees. The FPEB indicated that the applicant's disability was not the result of willful neglect, intentional misconduct, or unauthorized absence by the applicant; was incurred while the applicant was entitled to basic pay; and was the proximate result of performance of active duty or inactive duty training or incurred in the line of duty during war or national emergency. The FPEB determined that the applicant's medical conditions prevented him from performing the duties required of a service member of his rate or rank. Further, the FPEB determined that the applicant's disabilities were combat-related.

The applicant, through counsel, rebutted the FPEB's findings and sought reconsideration of the following medical conditions: 1) injury to the cervical spine based on limited motion; 2) injury

to the right arm based on limited motion; and 3) re-classification of member's mental health condition currently listed as Major Depressive Disorder to be rated as Posttraumatic Stress Disorder (PTSD). However, the FPEB did not modify its findings. As such, the Physical Review Council was required to review the applicant's case.

On June 28, 2016, a staff psychiatrist at the Department of Veterans Affairs (VA) wrote a letter to document the applicant's PTSD treatment. The psychiatrist stated that the applicant had been actively participating in group treatment since his PTSD program intake on March 10, 2016. The psychiatrist stated that the applicant appeared to benefit from these sessions. The psychiatrist further stated that the applicant reported significant worsening of symptoms when he is on base due to triggers that bring back traumatic memories. The psychiatrist stated that, in consultation with the applicant's psychologist, she had determined that the applicant could benefit from being placed on Home Awaiting Order Status while he waited for his medical retirement to be approved.

On July 22, 2016, the Coast Guard Legal Service Command (LSC) requested the assistance of the Coast Guard Investigative Service (CGIS). LSC asked CGIS to surveil the applicant on suspicion of possible Malingering.

On July 25, 2016, CGIS noted that it had been informed of a potential Malingering case involving the applicant. CGIS was informed that the applicant had been on limited duty status since 2014 and was in the process of being medically separated from the Coast Guard. Since 2014, the applicant had used a cane to walk around while on the Base due to leg and knee problems. However, the applicant had been seen in photos on Facebook without using a cane for support.

On July 28, 2016, the applicant received a Page 7 from his Commanding Officer (CO). The CO stated that the applicant was required to report to the Base daily from 0700 to 1530 in uniform. If he received a Duty Status Profile from medical, he was required to submit it to his Chief for review before leaving the Base. The Chief would then review the Duty Profile Status and provide specific guidance regarding his duty status. The applicant was further required to show all medical appointment documentation at least 48 hours in advance of any scheduled appointment. That same day, CGIS conducted surveillance of the applicant. He was observed exiting medical while using a cane for assistance and showing a visible, labored limp in his walk.

On July 29, 2016, the applicant went to the Health Services Division on Base. The stated reason for his visit was: "PTSD Symptoms/Anxiety, Stress, and early stages of a migraine (previously diagnosed with chronic migraines)." The applicant was placed on Sick in Quarters (SIQ) leave for 3 days.

Also on July 29, 2016, CGIS conducted surveillance of the applicant. On that day, the surveillance team noted that the applicant walked up the stairs to his residence without the assistance of a cane. The team further noted that the applicant walked with normal physical motion and without any labored movements. Later that day, the applicant exited his residence without a cane and walked to his vehicle. Once at his vehicle, he removed something and then walked back up the stairs in a "faster than normal pace and appeared to be carrying a pair of shoes in his right hand and clothes in his left hand." About an hour later, the applicant again exited his residence without a cane and proceeded to place a backpack and swim fins into his vehicle. Then, he walked normally back up the stairs and into his residence. About fifteen minutes later, the applicant was observed

walking to his vehicle while carrying an infant baby. He entered his vehicle with the infant and a woman. The applicant was then observed driving his vehicle to a nearby beach. Once at the beach, he unloaded items from his vehicle and carried them over his shoulders to the beach.

On August 1, 2016, the applicant filed a request through his congressional representative to be placed on Home Awaiting Order Status until the completion of the Coast Guard's PDES process.

On August 2, 2016, CGIS conducted surveillance of the applicant. On that day, the surveillance team noted that the applicant exited his residence without the assistance of a cane. He rolled his trash bin from the side of the road to his garage. About fifteen minutes later, the applicant again exited his residence without the assistance of a cane. He walked to his mailbox, retrieved his mail, and walked back to his residence using the staircase. About an hour later, the applicant again exited his residence without the assistance of a cane. He walked to his vehicle, retrieved what looked like an umbrella, and walked back to his residence. He then returned to his vehicle, removed a baby stroller from the trunk, and unfolded it to a functioning position. He walked back to his residence. Shortly thereafter, the applicant and a woman exited his residence. The applicant was carrying an infant baby. The woman pushed the stroller and the applicant carried the baby to an outdoor swimming pool about 0.1 miles from the applicant's residence.

On August 8, 2016, CGIS conducted surveillance of the applicant. On that day, the surveillance team observed the applicant exiting his vehicle while dressed in Coast Guard Operational Dress Uniform. He had a wrist band on his right wrist and was holding a cane with his right hand. He then walked into the Health Services Division on Base with a slight limp while using the cane to assist him. The stated reason for his visit was: "PTSD symptoms (stress anxiety) causing migraine (chronic migraines previously diagnosed)." The applicant was placed on SIQ leave for 1 day. He then exited the Health Services Division and walked with his cane to his vehicle.

On August 10, 2016, the applicant went to the Health Services Division on Base. The stated reason for his visit was: "My PTSD illness has been extremely aggravated today while on the base. My PTSD has been worsening with symptoms of high stress and anxiety." The applicant was placed on SIQ leave for 7 days.

On August 12, 2016, the Physical Review Council concurred with the findings and recommended disposition of the FPEB. It determined that there were no omissions in the record and that the FPEB findings were not clearly erroneous.

On August 15, 2016, the applicant went to the Health Services Division on Base. The stated reason for his visit was: "Possible broken toe/pain in foot and back causing migraine." The applicant was placed on limited duty for 7 days and SIQ leave for 1 day.

Also on August 15, 2016, CGIS conducted surveillance of the applicant. On that day, the surveillance team noted that the applicant was walking on Base using a cane. His right wrist also had a band on it. Later that day, the applicant was observed exiting his residence while carrying a baby. He was not utilizing a cane or wristband. He and a woman walked approximately 1.3 kilometers in their neighborhood.

On August 16, 2016, the applicant went to the Health Services Division on Base. The stated reason for his visit was: "PTSD symptoms were aggravated earlier and were extremely intensified when I entered the bases (sic) gates. I am now experiencing immense stress and anxiety." The applicant was placed on SIQ leave for 1 day.

On August 17, 2016, CGIS conducted surveillance of the applicant. On that day, the surveillance team noted that the applicant was walking on Base using a cane with his right hand and a wristband around his right wrist. Later that morning, the applicant was observed walking into his residence while wearing a green colored flight suit.

On August 22, 2016, CGIS conducted surveillance of the applicant. On that day, the surveillance team noted that the applicant walked into a VA facility while using a cane. The distance between his vehicle and the facility was approximately one-thousand feet. The applicant also used a cane to walk back to his car.

On August 26, 2016, CGIS conducted surveillance of the applicant. On that day, the surveillance team noted that the applicant was standing inside of his garage. The applicant was not using a cane and did not have a wristband around his right wrist. The applicant was observed lifting miscellaneous items. For instance, he was observed carrying a metal moving-dolly with both hands. The surveillance team noted that he moved the dolly with "physical ease." He was also observed walking from his vehicle to his garage without physical difficulty. He did not use a cane or wristband.

On September 8, 2016, the applicant was interviewed by CGIS regarding an allegation of Malingering. The applicant signed a Rights Warning Procedure/Waiver Certificate in which he acknowledged the following: 1) I do not have to answer any question or say anything; 2) Anything I say or do can be used as evidence against me in a criminal trial; 3) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both; and 4) I am now willing to discuss the offense(s) under investigation, with or without a lawyer present. I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waver below.

The applicant's interview was documented in a CGIS Action Supplement Report. The applicant stated that when he originally reported to the Base, his medical appointments would suffice for his work day due to his medical situation. When he was at work, he was placed on desk duty. Then he received new supervisors, and they implemented changes to his work schedule which included a full work day after his medical appointments. He stated that this was in direct violation of his doctor's advice. After conferring with an attorney, the applicant contacted his congressman regarding his situation. He further stated that when he attempted to report to Base and follow his supervisor's instructions, he would end up going to Medical and they would send him home due to chronic migraines and PTSD aggravation.

The applicant discussed his PTSD diagnosis at length. He stated that being on Base aggravated his PTSD symptoms and that PTSD aggravation was the most pressing issue for him. He stated that a lot of the traumatic events that he was dealing with were related to cutters and helicopters. For instance, one time he was leaving the VA and a Coast Guard helicopter flew overhead. He felt that he had to return to the VA to talk to someone and calm him down. Other things that triggered his PTSD include flight suits, the Operational Dress Uniform, cutters or small boats, smells, sounds, and visuals. The CGIS agent asked the applicant to expand on the significant events that stood out to him. He stated that significant events that have stood out to him included all of the deaths. First, he stated that he was involved in an incident in which a Senior Chief was killed. He stated that at the time of his death, most of the people were in Operational Dress Uniform. Second, the applicant stated that he was part of a flight crew that was shot at while in pursuit of a panga. He stated that the panga was dumping contraband while shooting at the flight crew. However, the pilots recognized the gunfire and were able to take necessary actions to avoid it. Third, he stated that he was hospitalized for PTSD in 2014 after he was injured during a rescue where an individual had a heart attack and hit his head. He stated that the deck of the sailboat was bloody and the helicopter crew nearly crashed. He stated that when he left the Base, he felt relieved of his PTSD symptoms.

Regarding the applicant's use of the cane, he stated that he used the cane mostly because of his lower back problems. He also stated that his right ankle had a ruptured ligament from one of his latest rescues. He stated that he "can't really stand still, maybe for only 10 seconds." At times, his right leg gave out while walking. He stated that the cane took some of the pressure off of his right leg and helped to catch him if he fell. He further stated that even if he used his cane or someone was helping him, he got tired and fatigued very quickly. However, he stated that the physical therapists and surgeons told him to try to walk without the cane as much as possible. He stated that when he does try to walk without a cane, he will only do so if someone is with him to grab onto. He stated that if he is by himself, he has the cane because "it's too risky without it."

The applicant explained that discussing medical issues makes him want to leave and get to a safe place, like his house. He stated that he feels safe at his house because he is extremely vulnerable and cannot defend himself.

The applicant was asked whether his physical symptoms exist while he is at home. The applicant stated that his physical symptoms were the same at home as they were while on Base. However, his physical symptoms associated with PTSD, like heart pounding, tension, and increased migraines, were exacerbated while on Base. Otherwise, he stated, there is nothing different that he could do on Base compared to off Base. He stated that he is never really out of pain.

The applicant was then confronted with information gained from surveillance activities conducted by CGIS agents. Regarding his physical abilities off Base, he stated that the physical therapists and orthopedic surgeons wanted him to walk without a wheelchair and cane as much as possible. He stated that at home, he was more comfortable with the layout and the landscape. He stated that if he was seen walking around his neighborhood without a cane, there was someone with him for assistance. He stated that the furthest he had walked without his cane was at the VA hospital. However, he stated that he was willing to suffer a little bit of pain in order to walk around



his neighborhood with his newborn baby. When confronted with information regarding him carrying and loading items into his vehicle, he stated that he did not recall items he loaded or unloaded into his vehicle. He did not recall loading or unloading anything that had very much weight.

The applicant was asked whether he increased the severity of his symptoms while on Base. He responded, "I see, oh I understand what you're saying. So you're basically accusing me of over exaggerating my physical limitations while on base, but then at home it's something different." He explained that he doesn't have the same options at work as he does at home. So, he will avoid the physical activity at work to make sure he doesn't aggravate some of his injuries. However, when he's at home, he feels he is better prepared to tend to his physical symptoms. He stated, "Well, you observed me lifting a trash can, carrying the baby, going for a swim, going to the beach and moving things, which are conflicting with what my diagnoses are but the diagnoses are what they are. There are times and days that are better than others, physically and mentally."

The applicant acknowledged how his actions on and off Base could be perceived. However, he stated that he is not doing anything sinister and he hoped his command would understand. He stated that at that point, he wanted to do whatever he could to appease his command. He stated that he did not want anything to prolong or hinder him from separating from the Coast Guard. He stated that he is frustrated because he needed surgeries but had not been able to get them for two years.

On September 16, 2016, the applicant's supervisor was interviewed by CGIS. He stated that the applicant was required to work desk duty 1 to 4 hours a day but that he had only adhered to that schedule a few times. He described the applicant as appearing to be in pain while on duty. He had not seen the applicant on Base without using a cane. When the CGIS agent asked him whether he believed the condition that the applicant displayed while on the Base, he stated, "physically no, but mentally [I] can't tell if [the applicant] is truthful or not."

On September 20, 2016, Dr. H was interviewed by CGIS. He stated that he was a flight surgeon who had recently taken over the applicant's medical file. He stated that the applicant had suffered seizures due to medications he was taking. However, once he had stopped taking the medication, the seizures had stopped. He also stated that the applicant does have documented medical abnormalities based on test results. He expressed concern that the applicant displayed Conversion Disorder.<sup>2</sup> He stated that he had reached out to the applicant's medical specialists and was informed that there were no planned surgeries.

On October 5, 2016, LCDR C was interviewed by a CGIS agent. LCDR C was a pilot at the Air Station where the applicant had served as a rescue swimmer. When asked about a 2012 incident involving gunshots being fired from a panga, she stated that her flight crew was involved in the assistance of a panga sighting. She recalled seeing muzzle flashes and stated that the panga appeared to be firing gunshots at the other boat nearby. She stated that the panga did not appear to be firing at the Coast Guard Helicopter and no evasive maneuvering action was taken by the flight crew. She stated, "neither pilot felt the crew was in danger."

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<sup>2</sup> "Conversion disorder" may be diagnosed when a patient complains of symptoms that cannot be explained by a medical, neurological, or mental health condition. DSM V.

On October 12, 2016, the applicant's orthopedic surgeon documented the applicant's ankle pain. He stated that the applicant continued to complain of right ankle pain and instability despite multiple regimens of physical therapy. He further stated that surgery would be the only option in order to help restore stability to his right ankle and to help prevent further joint deterioration and arthritis from developing into the right ankle.

On November 3, 2016, the applicant was assigned defense counsel.

On November 16, 2016, the applicant received two Administrative Remarks forms CG-3307 ("Page 7"). The first Page 7 notified him that he was ineligible to reenlist. The second Page 7 notified him that he had been found to have committed misconduct.

On November 30, 2016, the applicant submitted a statement in response to his denial of reenlistment. In his statement, he objected to the finding that he was ineligible to reenlist. He alleged that he was entitled to remain in the Service until final action had been taken in his PDES case. He further objected to the finding that he had committed misconduct. He argued that the CGIS investigation was based on unsupported allegations. For example, he maintained that his statements regarding a shooting during a mission should not have been construed as intending to deceive at any time. He enclosed an affidavit by the co-pilot of the helicopter. He stated that this affidavit demonstrates that two people perceived the same incident in two entirely plausible ways. He requested that he be permitted to extend his active duty until such time as his PDES case received final action.

Also on November 30, 2016, LCDR C provided an affidavit under penalty of perjury. She stated that she was the co-pilot of a Coast Guard helicopter involved in a law enforcement mission. She stated that the applicant was a member of her crew on this mission. During the mission, they were in pursuit of a panga with two persons on board who were throwing objects overboard. This is consistent with the jettisoning of contraband narcotics. While providing oversight of the panga, the crew saw muzzle flashes, but were unable to determine from which vessel the flashes originated. Based on LCDR C's education, training, and experience, she knew that those flashes indicated that shots were being fired. She stated that while she did not know which other members of the crew observed the gunfire, she communicated her observations to the rest of the crewmembers.

On December 5, 2016, the applicant's CO recommended that he be separated from the Coast Guard by reason of the commission of a serious offense. He further recommended that the applicant receive a general discharge. The CO stated that the CGIS investigation discovered that the applicant did not suffer from the disabilities that he was presenting at work. In response to the applicant's claim that the discrepancies in his abilities during and outside of work were due to his attempts at physical therapy, the CO stated that the Report of Investigation demonstrated that the applicant's abilities outside of work were so far beyond the scope of his abilities at work that they could not possibly be related to physical therapy. The CGIS investigation also discovered that the applicant had lied at his FPEB and was dishonest with CGIS when being interviewed. Specifically, the CO noted that the applicant made false statements to the FPEB that he was shot at multiple times during an operation. The CO further noted that this allegation was refuted by the copilot of the operation, LCDR C. The CO concluded by stating that the applicant did not meet the eligibility requirements under the Commandant's Second Chance Program.

On March 15, 2017, the applicant was notified that his CO had initiated action to involuntarily separate him from the Coast Guard. His CO indicated that the basis for his discharge was the Commission of a Serious Offense. He wrote the following regarding the applicant's conduct:

For more than one year, from about February 2014 to about September 2015, you attempted to secure physical disability benefits from the Coast Guard to which you were not entitled, by knowingly making false representations to your command, to Coast Guard medical officers, and to physical disability boards, about the nature and severity of your medical state and your fitness for duty. Your attempt to secure physical disability benefits to which you were not entitled is a violation of Article 80 of the UCMJ.

During your medical evaluations, you falsely told Coast Guard medical officers that you were shot at while serving as an AST during a Coast Guard flight off the coast of [redacted] in or around 2012. That statement was false because neither you, nor the crew on that flight, were shot at and you knew your statement was false at the time you made it.

Additionally, on or about 20 April 2016, in a Physical Disability Evaluation Board hearing, with the intent to deceive the Board, you wrongfully and unlawfully made, under lawful affirmation, false statements concerning your physical abilities such as: you do not walk without assistance of a cane; crutches or a wheelchair, that you were unable to drive yourself due to disability, that you cannot bend down etc., which were totally false and was then known by you to be so false. Your false official statements to Coast Guard medical officers and to the Physical Disability Evaluation Board were violations of Article 107 of the UCMJ.

Finally, from 2014 through 2016, on many occasions for the purpose of avoiding duty at facilities engineering onboard Base [redacted], you feigned illness by reporting to the clinic at Base [redacted] that you were unable to work or to perform your duties for diverse reasons, including, but not limited to: headaches and a hurt toe. Your malingering was a violation of Article 115 of the UCMJ.

His CO notified him of his rights including the right to consult with a lawyer, the right to appear before an administrative separation board, and the right to waive his right to an administrative separation board on condition that he receive a specific characterization of service. The applicant was also notified of other rights that were unique to him:

As the Respondent in this administrative separation case you also have certain unique rights because of three factors: (1) Your enlistment expired on 27 Dec 2016, but was involuntarily extended in accordance with UCMJ Articles 2 and 3, and RCM 202 because action was taken against you with a view towards court-martial; (2) I made my disposition decision regarding potential charges against you under the UCMJ and decided not to take disciplinary action, which means that you may no longer be held on active duty over your objection; and (3) Pursuant to Article 1.B. 1.e of reference (a), you are being concurrently processed for separation due to a potential disability (PDES case) at the same time (as of this notice) that you are being processed for administrative separation due to misconduct.

Because your enlistment has expired, the Coast Guard cannot continue to conduct administrative proceedings, either for you or against you, unless you voluntarily agree to extend your enlistment. If you extend your enlistment to exercise your rights to be heard by an administrative separation board, then pursuant to 1.B.11.j. of reference (a) [Military Separations, COMDTINST M1000.4 (series)], you must execute a voluntary extension for at least one year to allow the proceeding to be completed, including final action at the Coast Guard Personnel Service Center.

Because your administrative separation board may result in an administrative separation for misconduct due to potentially false statements you made during your PDES proceeding, Coast Guard

policy requires your PDES case to be suspended. See I.B.1.e of reference (a). If you are retained in the Coast Guard by the administrative separation proceeding, then, pursuant to Article I.B.1.f of reference (a), your PDES case will continue.

You must choose one of the following options when you complete your Exercise of Rights memo:

(1) You may execute a voluntary extension for at least one year to allow your administrative separation case to be completed, including final action. If you choose this option, I will direct the Servicing Personnel Office to assist you to execute the extension. Physical disability proceedings will continue if you are retained by the administrative separation proceeding. Or,

(2) You may demand to be released from the Coast Guard due to the expiration of your enlistment. If you chose this option, you will be issued either an honorable or general discharge based on your military record in your most recent enlistment, pursuant to Article I.B.2 of reference (a). Because you have a pending PDES case, if you choose this option, you must sign a CG-3307 entry, as described in Article I.B.11.f.(1).c) of reference (a), acknowledging that you fully understand the rights and potential benefits you may forfeit as a result of your demand.

That same day, the applicant acknowledged that he received his CO's notice to initiate involuntary separation. He also acknowledged that he read and understood the information contained in the CO's memorandum. He indicated that he wanted to consult with a military lawyer and provide a written statement.

On March 20, 2017, the applicant submitted a Memorandum with the subject "Exercise of Rights—Involuntary Separation." In the memorandum, the applicant acknowledged that he had consulted with a military lawyer and understood the rights that he was about to exercise. He also acknowledged that he understood his rights concerning conditional waivers. Then, the applicant elected to waive his right to appear before an administrative board on the condition that he receive an honorable discharge. Under this election, the applicant hand-wrote the following: "In making this election, I do not waive any of my rights under the PDES or BCMR processes. I continue to object to this administrative separation action as being unlawful and void ab initio." At the bottom of the page, the applicant further wrote, "I object to administrative separation processing and request to be medically retired IAW (in accordance with) my PDES case. I do not waive any rights with regard to this administrative action."

The applicant also submitted a written statement along with the Memorandum. He requested that his CO reconsider the decision to separate him involuntarily due to misconduct. Instead, he requested to be medically retired. He explained that while serving as a rescue swimmer, he had incurred multiple injuries to his back, spine, knees, ankle, and wrist. Additionally, he stated that he suffers from epilepsy and major depressive disorder. He argued that despite his injuries, his command interfered with his treatment plan. For instance, he argued that although his psychiatrists had recommended that he be placed on Home Awaiting Orders Status, he was instead forced to come to work every day. The applicant concluded by stating, "To be clear, I do not waive any rights afforded to me in an involuntary separation, nor do I agree to be extended for any purpose other than final action of my PDES case."

On March 24, 2017, the applicant filed a complaint with the Inspector General (IG). In the complaint, he called for an investigation into his chain of command's continual efforts to deny him statutory and regulatory relief in accordance with the PDES.

On April 10, 2017, the Director of Operational Logistics (CG DOL) concurred that the CGIS report contained sufficient information to establish a basis to separate the applicant for misconduct. CG DOL determined that there was no indication that the Base had acted in bad faith, or out of retaliation, in seeking to process the applicant for separation on this basis. CG DOL recommended that CG PSC approve the applicant's request to receive an honorable discharge in exchange for a waiver of his pending administrative separation board.

On May 22, 2017, the applicant was discharged from the U.S. Coast Guard. His DD-214 shows an honorable discharge, a separation code of HKQ (misconduct), and a reenlistment code of RE-4. The narrative for the separation is "misconduct." The applicant signed his DD-214.

On September 20, 2017, the applicant received a letter from the VA. The letter was to certify that the applicant is an honorably discharged veteran and is entitled to 100% disability compensation due to service-connected disabilities. This total disability rating is considered permanent. In making its decision, the VA considered a VA General Examination dated August 29, 2016, a VA Dental Examination dated August 30, 2016, as well as several other examinations.

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

On November 12, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board grant partial relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that CGIS documented several instances of alleged malingering by the applicant. Specifically, the applicant was observed walking with the assistance of a cane while on Base, but he walked normally and with no assistance from a cane while at his residence. At the same time, PSC alleged, the applicant repeatedly reported to a Coast Guard clinic and received limited duty statuses for an inability to perform acts that he was observed completing while off Base. PSC stated that the burden of proof for a determination of misconduct is the preponderance of the evidence. Further, PSC stated that a finding of misconduct does not require NJP or court-martial.

PSC noted that by policy, when a member is alleged to have committed misconduct, all PDES proceedings are suspended. Separations for misconduct trump any potential separation for disability. In response to the applicant's allegation that the Coast Guard improperly delayed his exit from the Coast Guard, PSC argued that the existence of an alleged UCMJ violation, by itself, provides sufficient justification to extend the applicant's service while determining if a court-martial is the best means of discipline.

PSC stated that there is compelling evidence that a physical examination was not completed for the applicant as required by policy when he was discharged. PSC recommended that partial relief be granted by providing the applicant the requested documentation for a separation physical examination.

The JAG reiterated that the applicant's PDES case was properly suspended during the pendency of his criminal investigation and administrative separation. The JAG stated that the final

action regarding his PDES case had not taken place by the time CGIS initiated its criminal investigation into allegations of malingering. Accordingly, the PDES process was properly suspended and the criminal and disciplinary separation process continued to resolution. The JAG argued that Coast Guard policy clearly establishes that criminal and/or disciplinary separation proceedings supersede disability proceedings. Because the applicant's misconduct resulted in administrative separation, the applicant was never entitled to have his PDES case resumed. As such, he was not entitled to receive a medical retirement.

The JAG also reiterated that the Coast Guard properly retained the applicant beyond the end of his enlistment to investigate allegations of misconduct. On November 7, 2016, CGIS completed its final entry in the Report of Investigation. After reviewing the completed Report of Investigation, the Coast Guard determined that court-martial was not the appropriate forum at which to dispose of the matter. Instead, on December 5, 2016, the applicant was notified of the command's intent to discharge him. The applicant was further notified that because disciplinary action was no longer pending, he could not be held beyond his enlistment without his consent. The JAG argued that the one-month period was appropriate for the applicant's command to review the completed Report of Investigation, inquire about any deficiencies in the investigation, collaborate with the legal office, draft the appropriate discharge paperwork, and meet with the applicant. The JAG also argued that the fact that charges were never brought against the applicant is irrelevant: Coast Guard policy only requires that criminal prosecution is contemplated to retain a member beyond the end of enlistment.

The JAG argued that the applicant's purported "reservation of rights" to the PDES process was invalid. The JAG stated that the applicant knowingly, willingly, and voluntarily accepted administrative discharge in exchange for an honorable discharge. Had the applicant appeared before an administrative separation board, he could have received a general or other than honorable discharge. The JAG argued that by accepting an administrative discharge, the applicant knew he would no longer be eligible to participate in the PDES process. If the applicant had wanted to use his medical issues as potential mitigation, he would have had to pursue the administrative separation board process. The JAG stated that the applicant's attempt to simultaneously agree to discharge while demanding a procedural process only available to him while in the service is "untenable." The JAG argued that if the applicant believed he was entitled to a disability retirement, he should not have agreed to be administratively discharged.

The JAG argued that the Coast Guard determined by a preponderance of the evidence that the applicant committed misconduct. This determination of misconduct was primarily based on four findings. First, the applicant's command found pictures of the applicant on social media that directly contradicted his appearance at work. Second, through CGIS surveillance, it was discovered that the applicant did not suffer from the disabilities that he was presenting at work. Specifically, the applicant walked with a limp and cane when on Base, and walked without a limp or cane when off Base. Third, the applicant's physicians stated that his medical conditions were primarily diagnosed as a result of his own statements about his symptoms, rather than as a result of actual physical findings. Lastly, it was determined that the applicant lied at his FPEB and was dishonest with CGIS when being interviewed.

The JAG refuted the applicant's claim that his command refused to accept his medical diagnoses and engaged in a vindictive campaign to deny him a disability retirement. The JAG argued that the applicant's command supported his participation in the PDES process until they were presented with evidence of his misconduct. The JAG stated that when presented with competent evidence confirming the applicant's misconduct, his command rightfully pursued administrative separation rather than permitting him to benefit from a disability retirement.

The JAG reiterated that the applicant was entitled to a pre-separation physical examination. According to the JAG, the applicant's last known general physical examination was more than 12 months prior to his separation. While the applicant provided evidence that he had received medical care from various providers within 12 months of his separation, the JAG is unsure whether these medical records are sufficient to establish a pre-separation physical examination. As such, the JAG recommended that the applicant return to a VA to obtain a physical examination and any follow-on care for service connected injuries. However, the JAG maintained that this error is immaterial and did not work an injustice against the applicant.

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

On November 18, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, through counsel, the applicant contested all of the JAG's allegations and argued that the only fair resolution is for him to receive a medical retirement.

The applicant argued that there was no evidence that he was guilty of any misconduct or malingering. For instance, he argued, he was advised to use a cane as infrequently as possible. He argued that the Coast Guard failed to provide any medical evidence to contradict the medical evaluations made by his doctors and the FPEB. The applicant argued that the malingering allegation was totally unsubstantiated as evidenced by the U.S. Attorney's Office refusal to prosecute despite "herculean efforts" by the CGIS agents to make a case.

The applicant argued that the CGIS Action Report, upon which the JAG relied on in its Advisory Opinion, was seriously flawed. For instance, the applicant argued that the CGIS agents took it upon themselves to judge if and how the applicant needed his cane or arm brace. Further, he argued that the investigation did not include statements from witnesses. Moreover, the applicant argued that his rights were violated. He argued that when he was interviewed by CGIS, he was not immediately read his rights. To support this claim, the applicant argued that his interview began by 8:14 am, but that he was not read his rights until 8:20 am. Additionally, the applicant argued that the rights given to him were deficient. Specifically, he argued that the CGIS agent misled him when he expressed a desire to have an attorney. He alleged that the agent stated that since no charges had been brought against him, an attorney had not been appointed. However, he argued that the Rights Warning Waiver Certificate that he signed clearly stated, "if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."

The applicant argued that the JAG violated his rights by its excessive use of redactions in the Advisory Opinion. He argued that the Advisory Opinion redacts names with no consideration of the legal requirements set forth by the Freedom of Information Act or Privacy Act. He argued

that such redactions make any attempt to contact persons who are able to verify information virtually impossible.

The applicant argued that the Coast Guard improperly suspended his PDES case. The applicant conceded that the PDES process can be suspended during the course of disciplinary proceedings, but he argued that the facts of his case do not support such action. He argued that the Coast Guard failed to prove that he committed misconduct by a preponderance of evidence. He further argued that the CGIS agents did not even attempt to obtain direct evidence from doctors to support an accusation of malingering. Instead, he argued that the CGIS agents substituted their own idea of malingering for that of qualified medical personnel.

The applicant argued that the Coast Guard completely disregarded his reservation of rights to be medically retired. On his separation paperwork dated March 20, 2017, the applicant noted: "In making this election I do not waive my rights under PDES.... I object to administrative separation process and request to be medically required IAW [in accordance with] with my PDES case." The applicant argued that the Coast Guard's acceptance of his separation paperwork was an endorsement of the condition that he be medically retired.

### APPLICABLE LAW AND POLICY

Article 107 of the Manual for Courts-Martial defines the offense of False Official Statements as follows:

*a. Text of statute.*

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

*b. Elements.*

- (1) That the accused signed a certain official document or made a certain official statement;
- (2) That the document or statement was false in certain particulars;
- (3) That the accused knew it to be false at the time of signing it or making it; and
- (4) That the false document or statement was made with the intent to deceive.

*c. Explanation.*

- (1) Official documents and statements. Official documents and official statements include all documents and statements made in the line of duty.
- (2) Status of victim of the deception. The rank of any person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement or document from the accused. The government may be the victim of this offense.
- (3) Intent to deceive. The false representation must be made with the intent to deceive. It is not necessary that the false statement be material to the issue inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive, while immateriality may tend to show an absence of this intent.
- (4) Material gain. The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing on the element of intent to deceive.
- (5) Knowledge that the document or statement was false. The false representation must be one which the accused actually knew was false. Actual knowledge may be proved by circumstantial evidence. An honest, although erroneous, belief that a statement made is true, is a defense.

*d. Lesser included offenses.* See paragraph 3 of this part and Appendix 12A.



e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

Article 115 of the Manual for Courts-Martial defines the offense of Malingering as follows:

a. *Text of statute.*

Any person subject to this chapter who for the purpose of avoiding work, duty, or service—

- (1) feigns illness, physical disablement, mental lapse or derangement; or
- (2) intentionally inflicts self-injury; shall be punished as a court-martial may direct.

b. *Elements.*

- (1) That the accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service;
- (2) That the accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself or herself; and
- (3) That the accused's purpose or intent in doing so was to avoid the work, duty, or service. [Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]
- (4) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. *Explanation.*

(1) *Nature of offense.* The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

...

e. *Maximum punishment.*

(1) *Feigning illness, physical disablement, mental lapse, or derangement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

Chapter 1.B.17.b. of the Military Separations Manual discusses reasons to discharge for misconduct in relevant part:

(3) Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

(a) Members may be separated based on commission of a serious military or civilian offense when:

- (1) The specific circumstances of the offense warrant separation; and
- (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

Rule 202 of the Manual for Courts-Martial discusses persons who are subject to the jurisdiction of courts-martial in relevant part:

...

(B) *Termination of jurisdiction over active duty personnel.* As indicated above, the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction.

(i) *Effect of completion of term of service.* Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction. An original term of enlistment may be adjusted for a variety of reasons, such as making up time lost for unauthorized absence. Even after such adjustments are considered, court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention. As indicated in subsection (c) of this rule, servicemembers may be retained past their scheduled time of separation, over protest, by action with a view to trial while they are still subject to the code. Thus, if action with a view to trial is initiated before discharge or the effective terminal date of self-executing orders, a person may be retained beyond the date that the period of service would otherwise have expired or the terminal date of such orders.

...

(C) *Attachment of jurisdiction over the person.*

(1) *In general.* Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial. When jurisdiction attaches over a servicemember on active duty, the servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the code during the entire period.

Chapter 1.B.1.e. of the Military Separations Manual discusses concurrent disability evaluation and disciplinary action:

(1) Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander (CG PSC-PSD-mr) is processing a member for disability while simultaneously Commander (CG PSC-EPM-1) is evaluating him or her for an involuntary administrative separation for misconduct or disciplinary proceedings which could result in a punitive discharge or an unsuspended punitive discharge is pending, Commander (CG PSC-PSD-mr) suspends the disability evaluation and Commander (CG PSC-EPM-1) considers the disciplinary action. If the action taken does not include punitive or administrative discharge for misconduct, Commander (CG PSC-EPM-1) sends or returns the case to Commander (CG PSC-PSD-mr) for processing. If the action includes either a punitive or administrative discharge for misconduct, the medical board report shall be filed in the terminated member's medical personnel data record (MED PDR).

(2) Notwithstanding subparagraph 1.B.1.e.(1) of this Manual, disability evaluation in a member's case may proceed if Commander (CG PSC) or the Commandant (CG-00) so direct. In such a case, the Commandant decides the ultimate disposition.

Chapter 2.C. of Physical Disability Evaluation System Manual discusses the policies related to the general administration and guidelines for the PDES in relevant part:

11. Cases Involving Disability Evaluation and Disciplinary Action Concurrently.

a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINST M1000.6 (series). If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by Commander, Coast Guard Personnel Command.

b. If the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official medical record.

Chapter 2.E. of the Enlisted Personnel Administrative Boards Manual discusses how an enlisted member can either exercise or waive the right to appear before an administrative board:

2.E.1. Deadline – Five Days.

- a. The respondent shall be permitted five calendar days from the day he or she is given notice of intent to take administrative action to consult with a civilian lawyer, if he or she so elects, and to exercise the rights described in this article.
- b. If the respondent elects to consult with a military lawyer, then he/she shall be permitted five calendar days from the date of consultation to exercise his or her rights under this article.

See Article 2.D.2. of this Manual regarding the respondent's right to consult with a lawyer.

2.E.2. Failure to Act Before the Deadline.

A respondent who fails to exercise the rights described in this article before the deadline waives and forfeits his or her right to appear before a board. The convening authority shall:

- a. Document the respondent's waiver on an administrative board supplemental page, a sample of which is shown at Appendix 2-3.

Downloading Supplemental Pages. The convening authority may locally prepare a memo or other form that includes the same information as Appendix 2-3. Templates (both Word and fillable Adobe versions) of the supplemental page may also be downloaded for use from the PSC-psd website: <http://www.dcms.uscg.mil/PSD/fs/Admin-Sep-Boards/>.

- b. Proceed as if the respondent has affirmatively waived his or her right to appear before a board.

2.E.3. Form of Respondent's Exercise of Rights.

The respondent shall complete an Exercise of Rights memorandum and submit it to the convening authority.

See Appendix 2-4 for a sample Exercise of Rights memo for an administrative separation board.

Downloading Respondent's Exercise of Rights. The Exercise of Rights memo may be prepared locally by or for the respondent. Templates of the memos (both Word and fillable Adobe versions) for each type of board controlled by this Manual may also be downloaded for use from the PSC-psd website: <http://www.dcms.uscg.mil/PSD/fs/Admin-Sep-Boards/>.

The respondent may exercise his or her rights to do any of the following.

- a. Submit a written statement.
- b. Request a hearing before an administrative board.
- c. Unconditionally waive a hearing.
- d. Conditionally waive a hearing as follows:

(1) Type of Discharge and Characterization of Service. The respondent may submit a board waiver conditioned on receiving a specified, or more favorable,

type of discharge and characterization of service. The conditional board waiver shall be submitted to PSC-epm-1/PSC-rpm-1 (as applicable) through the convening authority and the first flag officer in the respondent's chain of command.

On September 3, 2014, the Department of Defense issued a Memorandum titled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder." The Memorandum stated: "Liberal consideration will be given to petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions."

### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>3</sup>
3. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).
4. The applicant alleged that his administrative separation for misconduct is erroneous and unjust because he should have received a medical retirement. 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 the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>4</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>5</sup>
5. The applicant argued that he should not have been administratively discharged because he did not commit any misconduct. The applicant's CO stated that the basis for his administrative discharge was the commission of a serious offense. The CO cited two specific offenses: 1) False Official Statements; and 2) Malingering.<sup>6</sup> According to the Military Separations Manual, a member can be administratively separated for "commission of a serious offense" when the specific circumstances of the offense warrant separation and when the maximum penalty for the offense in the Manual for Courts-Martial includes a punitive discharge. Because both of the

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<sup>3</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>6</sup> The applicant's CO also cited the offense of Attempt under Article 80. However, the CO did not specify what offense the applicant attempted to commit.

offenses cited by the applicant's CO carry a maximum penalty that include a punitive discharge, the Coast Guard only needed to demonstrate that the applicant committed one of the offenses by a preponderance of the evidence. Since the applicant specifically contested the accusation of Malingering, the Board will first address this offense. For purposes of this case, Malingering is defined as any person who feigns illness or physical disablement for the purpose of avoiding work, duty, or service.

#### **a. Malingering**

While the applicant was waiting for the FPEB's determination to be reconsidered, he requested to be on Home Awaiting Orders Status. Instead, the applicant was required to report to Base daily in uniform. Once on Base, the applicant frequently went to Medical and was approved for SIQ leave. In one instance, on July 29, 2016, the applicant went to Medical for "PTSD Symptoms/Anxiety, Stress, and early stages of a migraine." That same day, the CGIS surveillance team observed the applicant going to the beach with his girlfriend and child. In a second incident, on August 15, 2016, the applicant went to medical for a "possible broken toe/pain in foot and back causing migraine." The applicant was placed on limited duty for 7 days and SIQ leave for 1 day. That same day, the CGIS surveillance team observed the applicant exiting his residence while carrying his child. He was not using a cane or wearing his wristband. Then the CGIS agents observed the applicant and his girlfriend walk approximately 1.3 kilometers in their neighborhood.

In both of these instances, the maladies complained of by the applicant are inconsistent with his behavior demonstrated later that same day. In the first instance, if the applicant was in fact suffering from PTSD, anxiety, stress, and the early stages of a migraine, it is highly unlikely that he would have been able to go to the beach with his family. He had previously stated that when having these symptoms, he felt vulnerable and wanted to be home, where he felt safe. He had also claimed that he tried to avoid places that might aggravate his symptoms. Going to the beach when he was experiencing PTSD, anxiety, and stress contradicts his claims. Additionally, at his FPEB hearing, the applicant stated that when he had migraines, he was incapacitated and unable to do anything. Going to the beach with a girlfriend and young child is inconsistent with being incapacitated or knowing that one might soon feel incapacitated. In the second instance, if the applicant had in fact a possible broken toe and was experiencing back and foot pain, it is highly unlikely that he would have been able to carry a baby and go for a walk in his neighborhood without a cane. This is exacerbated by the fact that the applicant consistently maintained that he could not walk long distances without a cane for fear of falling and had to use a wheelchair if the car was parked far from the entrance of his doctor's office. If the applicant was experiencing more pain than usual in his lower extremities as he alleged, carrying a baby and going for a long walk would have been almost impossible.

The applicant argued that in accusing him of Malingering, the Coast Guard failed to contradict his medical evaluations and the FPEB's findings that the applicant was unfit for duty. However, the issue before the Board is not whether the applicant sustained injuries during his service that rendered him unfit for duty. The issue is whether the Coast Guard erred in deciding that the applicant had feigned illness for the purpose of avoiding work. Whether the applicant completely feigned illness(es) or just greatly exaggerated his symptoms is immaterial. The essence of Malingering is the design to avoid work which would normally be expected of one in the Coast

Guard.<sup>7</sup> The record shows that in July 2016, the applicant was expected to report to Base and perform desk duty. However, as demonstrated by his congressional request, he did not want to report to Base for work. The record supports a finding that on at least two occasions, he feigned illness in order to be placed on SIQ leave.

#### **b. False Official Statements**

For purposes of this case, False Official Statements is defined as any person who, with the intent to deceive, makes any false official statements while knowing it to be false. At the hearing for the FPEB on March 16, 2016, the applicant made several statements regarding his physical disabilities. According to the Physical Disability Evaluation System Manual, an FPEB is “a fact-finding body which holds an administrative hearing to evaluate a member’s fitness for duty and to make recommendations consistent with the findings.” As such, the FPEB played an important role in determining the applicant’s fitness for duty. Any knowingly false statements made by the applicant to the FPEB could reasonably be found to be made with the intent to deceive the Coast Guard about his medical condition and to support his request for a medical retirement.

The applicant made several statements to the FPEB that were in direct contradiction to his behavior observed by the CGIS. First, he stated that his injuries to his cervical spine prevented him from driving. On several occasions, CGIS observed the applicant driving his vehicle. Second, the applicant stated that he used a wheelchair when he had to go long distances. For instance, he stated that he used a wheelchair to see some of his doctors whose offices were located far from the parking lot. When asked by the FPEB what would happen if he were to walk a long distance, he stated that his lower extremities would give out due to muscle weakness or nerve pain. On several occasions, CGIS observed the applicant not only walking long distances, but walking without the assistance of a cane. On two of those occasions, CGIS observed the applicant walking while carrying his baby. While CGIS often only observed the applicant walking from his car to his residence, CGIS also observed the applicant walking to a local pool, walking from his car to the beach, and walking a distance of 1.3 kilometers in his neighborhood. Third, regarding his shoulders, the applicant told FPEB that he could not “really” use them. He stated that he could not extend his arms out in front of him. However, on separate occasions, the applicant was observed carrying his child, carrying beach items over his shoulder, and lifting and carrying a metal moving-dolly with both hands.

The applicant has not demonstrated that he received any surgeries or other medical intervention between March 2016 and July 2016. Without such evidence, there is nothing to explain the discrepancies in his physical abilities that he described to the FPEB and the physical abilities observed by the CGIS agents. The Board agrees with the Coast Guard that the applicant’s physical therapy is insufficient to explain the difference between his disability claims to the FPEB and his subsequently observed physical activity.

The Board finds that the applicant has not shown that the Coast Guard erred in finding that he had committed Malingering and False Official Statements by a preponderance of the evidence. Therefore, the Board finds that the Coast Guard did not commit an error when it discharged the applicant for misconduct in accordance with Article 1.B.17.b. of the Military Separations Manual.

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<sup>7</sup> Article 115, UCMJ.

6. The applicant argued that the Coast Guard acted improperly and with malice in delaying his exit from the Coast Guard. While the applicant conceded that the Coast Guard is permitted to involuntarily extend a member while on active duty, he argued that this should only be done upon good cause. Rule 202 of the Manual for Courts-Martial states that, “servicemembers may be retained past their scheduled time of separation, over protest, by action with a view to trial while they are still subject to the code.” In *United States v. Wheeley*, the court concluded that since the accused had been taken to the staff sergeant’s office and informed of the nature of the offenses being investigated, this constituted action with a view to trial as required by the Manual for Courts-Martial.<sup>8</sup> In this case, the record shows that on September 8, 2016, the applicant was interviewed by CGIS regarding an allegation of Malingering. At the interview, the applicant read, understood, initialed and signed the Rights Warning Waiver Certificate. The action taken by CGIS clearly constituted as action with a view to trial. While the applicant was never charged at court-martial, it is clearly established law that court-martial is not required to retain a member beyond the end of enlistment.<sup>9</sup> Therefore, the Board finds that the applicant was properly retained past his end of enlistment.

7. The applicant argued that the Coast Guard improperly suspended his PDES case. However, Article 1.B.1.e. of the Military Separations Manual and Article 2.C. of the Physical Disability Evaluation System Manual both state that if a member is being processed for disability while simultaneously being evaluated for an involuntary administrative separation for misconduct, the disability evaluation is suspended. The applicant’s PDES case was properly suspended while the applicant was investigated for misconduct. Then, when the applicant was discharged for misconduct, his disability case was properly closed. Therefore, the Board finds that the Coast Guard did not commit an error when it suspended the applicant’s PDES case.

8. The applicant argued that by accepting his separation paperwork, the Coast Guard accepted the condition that he be medically retired in accordance with his PDES case. However, according to Chapter 2.E.3.d. of the Enlisted Personnel Administrative Boards Manual, the applicant only had the right to do the following regarding his separation: 1) submit a written statement; 2) request a hearing before an administrative board; 3) unconditionally waive a hearing; and 4) conditionally waive a hearing. In addition, the applicant could only condition his waiver to appear before an administrative board on receiving either a general discharge or an honorable discharge. Accordingly, the applicant submitted a written statement and waived his right to an administrative board hearing on the condition that he receive an honorable discharge. Any further conditions set forth by the applicant were impermissible. Moreover, he would not have a right to further PDES processing until and unless he went before the administrative separation board and succeeded in being retained on active duty. On the day he signed the waiver, he had no right to PDES processing that he could refuse to waive as a condition.

The applicant argued that given the unpermitted conditions he included on his waiver, the Coast Guard should have rejected his waiver of an administrative separation board. However, in this case, the alternative to a conditional waiver was not the right to appear before an administrative

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<sup>8</sup> *United States v. Wheeley*, 6 M.J. 220, 221 (C.M.A. 1979).

<sup>9</sup> *United States v. Self*, 13 M.J. 132 (C.M.A. 1982) (noting that “even if a trial by court-martial does not eventuate for one reason or another, clairvoyant positiveness has never been required.”).

separation board since the applicant had refused to extend his enlistment for those proceedings to occur. In fact, the alternative would have been that the applicant unconditionally waived his right to a hearing, and he could have received a less favorable characterization of service. First, because the applicant's enlistment had expired, the Coast Guard could not conduct an administrative separation board unless he voluntarily agreed to extend his enlistment. Second, the manual is explicit that the right to an administrative separation board is an affirmative right that must be exercised. A member who fails to exercise such right forfeits his right to appear before a board. As such, the Coast Guard's acceptance of the applicant's conditional waiver, despite the unpermitted language accompanying it, was beneficial to his characterization of service. If the applicant truly objected to administrative separation, he should have voluntarily extended his enlistment and affirmatively requested a hearing by the administrative separation board. Instead, with the advice of counsel, the applicant waived his right to a hearing on the condition that he receive an honorable discharge. The fact that he added language about refusing to waive a nonexistent right does not persuade the Board that the Coast Guard committed an error or injustice by accepting the applicant's conditional waiver of his right to an administrative discharge board.

9. The applicant argued that the Coast Guard had an independent duty to ensure that his ultimate discharge from the Coast Guard took into consideration his medical issues. However, as discussed above, the applicant's PDES case was properly closed when the applicant was administratively discharged for misconduct. Regardless, the applicant argued that his discharge for misconduct is unfair because he suffered from service-related PTSD. The policy cited by the applicant to support this allegation is misapplied. The Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder requires that the Army, Navy, and Air Force correction boards grant liberal consideration to petitions for upgrades in characterization of service or narrative reason for service. And DHS has similar policies, but they do not apply to requests for retirement. The applicant has already received the highest possible characterization of service. Additionally, he has submitted no evidence to show that his mental condition caused or contributed to his misconduct. Therefore, the Board finds that the Coast Guard did not commit an error by administratively discharging the applicant for misconduct.

10. The applicant made numerous allegations with respect to the actions and attitudes of various officers involved in his CGIS investigation, administrative separation, and BCMR application. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.<sup>10</sup>

11. The JAG recommended that this Board grant partial relief in the form of a pre-separation physical examination. According to the JAG, the applicant was entitled to a general physical examination prior to his separation because his last known physical examination was conducted more than twelve months before his separation. However, the applicant has not requested that this Board provide such relief. Further, a letter from the VA shows that the applicant received a VA General Examination on August 29, 2016, and a VA Dental Examination on August 30, 2016. Both of these occurred within twelve months of the applicant's discharge, and the appli-

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<sup>10</sup> 33 C.F.R. § 52.24(b); see *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").



cant has a 100% disability rating for service-connected disabilities from the VA and is already receiving follow-on care for his service-connected injuries.

12. Accordingly, the applicant's request for relief should be denied.

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

**ORDER**

The application of former AST2 [REDACTED], USCG, for correction of his military record is denied.

May 29, 2020

