

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-003



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 June 26, 2019, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 8, 2022, 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 Seaman Recruit (SN/E-1) who was medically retired on October 20, 2017, asked the Board to correct his military record by removing him from the Permanent Disability Retirement List (PDRL) and upgrading his reenlistment code from RE-2 (ineligible because retired) to RE-1 (eligible to reenlist).

The applicant alleged that he was unjustly placed on the PDRL instead of the Temporary Disability Retired List (TDRL). According to the applicant, had he been put on the TDRL, it would have made reenlisting easier. In addition, the applicant alleged that the Coast Guard erred by placing him on the PDRL because he was not given the opportunity to heal. The applicant explained that since his medical separation, he has been cleared by his general doctor and the neurologist who diagnosed him.

To support his application, the applicant submitted the following documents:

- A July 30, 2019, letter on behalf of the applicant from the applicant's Primary Care Physician (PCP) stating that the applicant no longer had paralysis of his right peroneal nerve and foot drop based on his evaluation. The PCP further stated that the applicant can reenlist in the military.

- An August 20, 2019, letter from his neurologist stating that the applicant's Complex Regional Pain Syndrome I of right lower limb (G90.521), Chronic Pain (G89.4), Myalgia (M79.1), Fibromyalgia (M79.7), Neuralgia and Neuritis: Unspecified (M79.2), Insomnia: Unspecified (G47.00), Pain in right ankle and joints of right foot (M25.571), and Encounter for other preprocedural examination (Z01.818) had resolved "completely" and the applicant was able to function within normal limits.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 3, 2016, reporting to basic training that same day.

On May 19, 2016, the applicant injured his leg during a training exercise at Basic Recruit Training (BRT). The applicant's injury led to a lack of sensory input in his lower leg, including a loss of range of motion of both his ankle and foot. As a result of this injury, the applicant was unable to complete basic training and was placed on limited duty, non-training capacity.

Between May and September 2016, the applicant was referred to and evaluated by several doctors including a neurologist and physical therapist, in addition to undergoing several surgical consultations.

On September 7, 2016, a Medical Evaluation Board (MEB) diagnosed the applicant with "Complex Regional Pain Syndrome of the right lower limb ICD 10-(G90.5). The Narrative Summary of the Initial Medical Evaluation Board, noted the following:

The applicant was healthy until approximately May 19, 2016, which was week 3 of his basic training. During this time, the applicant's right knee "gave out" while holding a mattress overhead, with acute onset right lateral knee pain. The knee pain was out of proportion to the injury and persisted, despite extensive evaluations and therapy. An MRI of the right knee was unremarkable, and an evaluation by the orthopedic expert agreed with a diagnosis of right knee sprain. The applicant was given a therapeutic regimen including rest and physical therapy. On May 31, 2016, the applicant reported sudden onset of right lower leg swelling, pain, pallor, weakness, and paresthesia in addition to the knee pain. The knee pain and swelling of the right lower leg resolved by July 2, 2016, but his pain, pallor, weakness, and paresthesia persisted without improvement despite treatments. A physical exam on May 31, 2016, was initially significant for unilateral 1+ non-pitting edema and mottled, cold skin of the distal right lower leg, minimal active range of motion, decreased strength and diminished sensation below the knee. Strength was 1/5 in feet dorsi/plantarflexion. Decreased cap refill was noted. Deep tendon reflexes of right leg were intact bilateral with ankle and patellar 2+, toes down going. Repeated lumbar sympathetic nerve blocks administered by the neurologist have temporarily improved skin color and temperature, but it does not last for more than an hour. Ultimately, it was the opinion of the board that the diagnosis of Complex Regional Pain Syndrome¹ of the right lower leg

¹ Complex Regional Pain Syndrome is defined by the National Institute of Neurological Disorders and Stroke, as "[a] broad term describing excess and prolonged pain and inflammation that follows an injury to an arm or leg. CRPS has acute (recent, short-term) and chronic (lasting greater than six months) forms. CRPS used to be known as reflex sympathetic dystrophy (RSD) and causalgia. People with CRPS have changing combinations of spontaneous pain or excess pain that is much greater than normal following something as mild as a touch. Other symptoms include changes in skin color, temperature, and/or swelling on the arm or leg below the site of injury. Although CRPS improves over time, eventually going away in most people, the rare severe or prolonged cases are profoundly disabling. Most CRPS

is correct, and that the applicant is unable to perform duties or normal activities due to the significant right lower extremity weakness and pain, and must rely on crutches for ambulation. The prognosis for the applicant was described as “guarded,” and that the applicant was unlikely to return to fit for full duty.

On May 18, 2017, the Coast Guard Informal Physical Evaluation Board (IPEB) issued its “Finding and Recommended Disposition Report,” wherein it found that the applicant’s right-side complete paralysis of the command peroneal nerve (Reginal Pain Syndrome) was not due to willful neglect, was incurred while entitled to receive basic pay, and was the proximate result of performance of active duty. The report also found that the applicant was unfit for continued duty by reason of physical disability, and that his medical condition was disqualifying because it continued to prevent him from performing the duties required of a service member of his rank or primary rating. The IPEB ultimately found that the applicant should be placed on the Permanent Disability Retired List with a 40% disability rating. The IPEB report stated that the applicant was advised by an attorney regarding acceptance of the IPEB findings and its recommended disposition. The applicant subsequently accepted the IPEB’s tentative findings and recommended disposition and waived his rights to a formal hearing. The applicant signed this document on June 19, 2017.

On October 20, 2017, the applicant was retired with a 40% disability rating. He received a reenlistment code of RE-2, which means that he is unable to reenlist due to retirement. The applicant’s DD-214 provides a separation code of “SFJ” which means “disability: permanent (mandatory retirement),” and a narrative reason of “disability, permanent.”

VIEWS OF THE COAST GUARD

On April 8, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by PSC.

The JAG argued that the applicant’s placement on the PDRL was neither erroneous nor unjust. The JAG stated that although the applicant has submitted medical opinions with a post-service of his disabling condition, he has failed to provide any evidence that established it was unjust or an error when the Coast Guard IPEB to conclude in 2017, that the applicant’s condition was permanent. Citing Article 2.C. of the Physical Disability Evaluation Manual, COMDTINST M1850.2D, the JAG argued that a disability will be categorized as “permanent” when it can be reasonably determined that the disability will not improve to the extent that the evaluatee will ever return to duty, and accepted medical principles indicate the defect has stabilized to the degree necessary to assess the permanent degree of severity or percentage rating. According to the JAG, a review of the applicant’s medical records leading up to his 2017 retirement confirms that the applicant’s condition was stabilized, and no improvement or change had been notated since the initial injury. The JAG cited the following statements from the applicant’s medical records:

- Onset of symptoms since May 31, 2016. No change or improvement since onset.
- Patients [*sic*] condition is expected to be permanent or to last longer than 6 months.
- No noticeable improvement overall.

illnesses are caused by improper function of the peripheral C-fiber nerve fibers that carry pain messages to the brain. Their excess firing also triggers inflammation designed to promote healing and rest after injury.”

- Patient is unable to actively move his right ankle at all!
- No change in CRPS symptoms.
- Here for follow up today, reports no change.
- No change since last physical exam.
- Patient reports no change in symptoms: no strength or sensation below the right knee.

The JAG further argued that at the time of the applicant's retirement it suggested that the applicant's condition was unlikely to improve or change. The JAG explained that the initial MEB determined that the applicant was "unlikely to return to [a] fit for full duty [status]." In addition, the JAG stated that the IPEB made specific findings about the applicant's physical disability, fitness for continued duty, the disqualifying nature of the applicant's diagnosis, and found that the applicant should be placed on the PDRL. The JAG argued that in recommending that the applicant be placed on the PDRL, the IPEB was required to find that the applicant's condition was permanent. Absent evidence to the contrary, the JAG argued that there is a presumption that the IPEB followed Coast Guard policy, and that they placed the applicant on the PDRL believing his condition was permanent and stable. In addition, the JAG argued that the applicant's assignment of error is misplaced because he did not contest the IPEB findings at the time of his retirement. The applicant accepted the IPEB findings and chose not to explore the additional administrative remedies available to him or contest his placement on the PDRL. As such, the JAG argued that the applicant has failed to establish that the Coast Guard erred.

The JAG stated that although the applicant's health has apparently greatly improved, this change in circumstances does not mean that the Coast Guard's decision to permanently retire him was unjust. The JAG argued that the applicant was injured 13 days into his Coast Guard career and was evaluated during the following seventeen months by multiple medical care providers. After his condition failed to resolve, the applicant was referred to the PDES, where he was represented by counsel, evaluated by both an MEB and IPEB, and voluntarily accepted the IPEB recommendation for permanent relief disability retirement. The JAG stated that after spending a year and a half on active-duty service, the applicant was medically retired and will receive 40% of his E-1 pay, in addition to medical and collateral benefits, for the rest of his life.

Finally, the JAG argued that the applicant was correctly given an RE-2 reenlistment code as a result of his medical retirement, which is the standard RE-2 code for medical retirement. According to the JAG, the applicant's DD-214 accurately reflects the applicant's medical discharge reenlistment code of RE-2, and that the applicant's improved health does not change that fact, nor does it mean an error was committed. As such, the JAG stated the applicant's request should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 9, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. An extension was granted to respond, but as of the date of this decision no response was received.

APPLICABLE LAW AND POLICY

Article 2.C. of the Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, provides the relevant guidance on the requirements for establishing whether or not a physical ailment will be considered permanent or nonpermanent. Article 2.C.2. states the following in relevant part:

Fit For Duty (FFD) and Not Fit for Duty (NFFD). The following policies relate to fitness for duty.

a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank, or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank, or rating. In addition, before separation or permanent retirement may be ordered:

- (1) there must be findings that the disability
 - (a) is of a permanent nature and stable; and
 - (b) was not the result of intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence. ...

Article 2.C.3. of the PDES Manual states that an IPEB must make findings concerning, *inter alia*, whether the member is fit for duty or not fit for duty because of a physical disability, what disability rating should be assigned for each unfitting condition, and “whether each disability ‘is permanent’ or, on the basis of accepted medical principles, ‘may be permanent.’”

Article 2.C.10. of the PDES Manual states the following:

Is Permanent or May be Permanent. These rules will be applied to the question of permanency of disability.

a. A disability will be categorized “permanent” when it can be reasonably determined that the disability will not improve to the extent that the evaluatee will ever return to duty, and:

1. accepted medical principles indicate the defect has stabilized to the degree necessary to assess the permanent degree of severity or percentage rating. [or]
2. the compensable percentage rating can reasonably be expected to remain unchanged for the statutory 5-year period that the evaluatee can be compensated while on the TDRL. [or]
3. the compensable percentage rating is 80% or more with reasonable expectation that it will not fall under 80% during the 5-year period.

...

c. A disability will be characterized "may be permanent" if, based upon accepted medical principles, the defect has not stabilized to the degree necessary to assess the permanent degree of severity (percentage rating). This disposition is used only when permanent retirement is inappropriate under the criteria of article 2.C.10.a.

d. Informal or Formal Physical Evaluation Boards evaluating TDRL cases for final disposition at the expiration of the five year period during which an evaluatee's name may be carried on the TDRL, shall rate any disability which still exists as "permanent," and recommend a disability rating based on the degree of the evaluatee's impairment at the time of the evaluation (see 10 U.S.C. §1210(b)).

Article 4.A. of the Coast Guard Physical Disability Evaluation System, COMDTINST M1850.2D, discusses the policies governing the IPEB. In relevant part:

4.A.8. IPEB Evaluation or Reevaluation of Members on the Temporary Disability List (TDRL). The IPEB shall consider each periodic physical evaluation report following examination of an evaluatee on the TDRL. The IPEB will continue on the TDRL an evaluatee whose intermediate (not final) periodic evaluation indicates that the evaluatee's disability is not permanent, is rated at 30% or greater, and the evaluatee remains not fit for duty. In a case where the periodic physical evaluation report indicates the evaluatee is fit for duty or that the evaluatee's condition is permanent or the degree of disability is less than 30%, the IPEB will make findings and recommend a disposition.

Article 8 of the Coast Guard Physical Disability Evaluation System, COMDTINST M1850.2D, discusses the policies governing the TDRL. In relevant part:

Article 8.A. Overview.

1. A member who is qualified for disability retirement under 10 U.S.C. § 1201 or §1204 will be placed on the TDRL in accordance with 10 U.S.C. §1202 or 10 U.S.C. §1205 when the disability is not permanent.
2. Placement on the TDRL does not guarantee a member permanent disability retirement. The TDRL is similar to a pending list. It provides a safeguard for the government against permanently retiring members who may later fully or partially recover from the disabling condition. Conversely, the TDRL safeguards members from being permanently retired with a condition that is not stable and could result in a higher disability rating.
3. Requirements for placement on the TDRL are the same as for permanent disability retirement, except that the disability is not stable. The disability must render the member unfit to perform the duties of his or her office, grade and rank or rating, and the disability must be rated at a minimum of 30 % or higher, unless the member has 20 years of active service for retirement purposes.
4. Temporary retirement status implies no inherent right for retention on the TDRL for the entire 5-year period provided by 10 U.S.C. §1210. Upon review of a periodic physical examination and a determination that the member's condition is of a permanent nature and stable, an IPEB or FPEB may recommend removal of the member's name from the TDRL by separation with severance pay, permanent disability retirement, or a finding of Fit for Duty, as appropriate.
5. Upon review of a periodic physical examination and a subsequent determination that the member's condition is not stable and that the member continues to be unfit for duty, an IPEB or FPEB may continue the member's name on the TDRL. Such cases will be continued with the same determination that was approved when the member's name was originally placed on the TDRL. The continuation shall become a part of the total case record. At the end of 5 years, the member is either permanently retired or FFD and returned to the Service.

The Article 3 Coast Guard Medical Manual, COMDTINST M6000.1F, provides the necessary guidance on disqualifying conditions. Article 3.F. of the Medical Manual, which lists the disqualifying conditions for being retained on active duty in the Coast Guard, states the following in pertinent part:

3.F.15.n. Neurological Disorders. Peripheral nerve conditions.

1. Neuralgia. When symptoms are severe, persistent, and not responsive to treatment.
2. Neuritis. When manifested by more than moderate, permanent functional impairments.

...

3.F.15.q. General. Any other neurological condition, regardless of etiology, when after adequate treatment, there remain residuals, such as persistent severe headaches, convulsions not controlled by medications, weakness or paralysis of important muscle groups, deformity, incoordination, pain or sensory disturbance, disturbance loss of consciousness, speech or mental defects, or personality changes of such a degree as to definitely interfere with the performance of duty.

...

3.F.19. Systematic Diseases, General Defects, and Miscellaneous Conditions.

...

c. Miscellaneous Conditions or Circumstances.

1. Chronic Fatigue Syndrome, Fibromyalgia, and Myofascial Syndrome when not controlled by medication or with reliably diagnosed depression.

...

3. The individual's health or well-being would be compromised if allowed to remain in the military service.

4. The individual's retention in the military service would prejudice the best interests of the government.

...

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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.²

3. The application was 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 he was wrongfully separated from service upon the IPEB's determination that the injury to his right knee was permanent and would prevent the applicant from being fit for full duty. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military

² *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).

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.³ 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.”⁴

5. The applicant alleged that he was unjustly placed on the Permanent Disability Retirement List (PDRL), rather than first being put on the TDRL. However, the record shows that from the time that the applicant incurred his injury on May 19, 2016, he was evaluated and treated by multiple physicians who were unable to improve the applicant’s condition. During an August 22, 2016, exam, the physician noted:

[s]howed resolution of right knee pain and right lower leg swelling with an unremarkable knee exam. However, the pain, diminished sensation and cap refill time, cold and mottled skin, and significantly limited active range of motion of the right lower leg below the knee persisted without improvement since the initial onset. No edema. Mottled, cold skin of the distal right lower leg, and diminished cap refill and sensation below the knee. Strength was 1/5 in right ankle and foot. Deep tendon reflexed of right leg were intact with ankle and patellar 2+, toes down going.

It is the opinion of the board that the diagnosis of Complex Regional Pain Syndrome of the right lower leg is correct, and that the patient is unable to perform duties or normal activities due to the significant right lower extremity weakness and pain, and must rely on crutches for ambulation.

The prognosis for the patient is guarded.

The record also shows that the applicant was diagnosed with Complex Regional Pain Syndrome I of right lower limb, Chronic Pain Syndrome, Myalgia, Fibromyalgia, Neuralgia, Neuritis: Unspecified, Insomnia: Unspecified, and pain in the right ankle and joints of right foot. Articles 3.F.15. and 3.F.19. of the Coast Guard Medical Manual, COMDTINST M6000.1F, list neuralgia, neuritis, and fibromyalgia as disqualifying conditions for the retention of a service member. In addition, Article 3.F.15.q. of the same manual provides the following, “Any other neurological condition, regardless of etiology, when after adequate treatment, there remain residuals, such as... weakness or paralysis of important muscle groups...incoordination, pain or sensory disturbance...” The applicant had a loss of range and motion in his right foot and ankle, numbness, Fibromyalgia, Neuralgia, and Neuritis, all of which are disqualifying conditions under Coast Guard policy. As such, the applicant’s medical records support a finding that his conditions were disqualifying for retention on active duty, and specialists’ attempts to treat and resolve his issues were unsuccessful for more than a year. Furthermore, the same Medical Manual requires that those members whose individual health or well-being would be compromised if allowed to remain in the military service be separated under Coast Guard policy. The record is presumptively correct, and the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when they found him unfit for duty and unlikely to return to a fully fit for duty status. As such, the applicant has not proven by a preponderance of the evidence that the Coast Guard committed an error or injustice in finding that the applicant’s disqualifying conditions warranted separation.

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

6. The applicant alleged that the Coast Guard's decision to medically retire him on a permanent basis, instead of placing him on the TDRL, was clearly erroneous because both his current physician and the neurologist who previously diagnosed him have both cleared him for service, stating that all of his previous medical conditions have resolved. However, the applicant has not provided any medical evidence that shows his injuries are unlikely to recur upon his reentry in the Coast Guard and return to the extensive physical training required in Basic Recruit Training. The applicant's service-connected injuries occurred shortly after he began basic training and were resistant to treatment for more than a year. The applicant underwent multiple procedures over several months, but doctors of numerous specialties were unable to cure the applicant and get him to a place where he could return to service without further harming himself or jeopardizing the Coast Guard's mission. The applicant contended that because his doctors have since found his conditions to be resolved, the Coast Guard's decision that his condition was sufficiently stable to permanently retire him was erroneous. However, the fact that the applicant's chronic pain and numbness resolved years after he stopped basic training and military service does not persuade this Board that the Coast Guard's determination that he was permanently unfit for military service because of his physical response (long-term numbness and chronic pain) to basic training was erroneous or unjust.

7. Furthermore, the record shows that the applicant was advised by an attorney regarding the IPEB's findings and recommended disposition, which included the applicant being permanently medically retired from the Coast Guard. The record also shows that after being advised of the findings and recommendations, the applicant accepted the IPEB's tentative findings and waived his right to a formal hearing. As such, the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when finding his conditions to be permanent and disqualifying, and his request for relief should be denied.

8. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.⁵ He has not proven, by a preponderance of the evidence, that his permanent disability retirement with an RE-2 reenlistment code is erroneous or unjust. Accordingly, the applicant's request should be denied.

⁵ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

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

December 8, 2022

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]