DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-079

[redacted]
CDR/O-5 (Retired)

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 October 20, 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 Reserve Commander (CDR/O-5), who was honorably retired on May 22, 2017, asked the Board to correct his record by reimbursing him for the following:

- Back military pay and allowances (Basic Allowance for House (BAH) and Basic Allowance for Subsistence (BAS))
- Letter of Credit Repair
- Reimbursement for early withdrawals of his Thrift Savings Plan (TSP) funds
- Reimbursement for corresponding tax penalties that resulted from the early TSP withdrawals.

Through counsel, the applicant alleged that he was misdiagnosed for a Line of Duty (LOD) injury that he incurred on March 22, 2014. According to the applicant, this misdiagnosis caused him to have to seek treatment using his civilian medical insurance, in addition to requiring him to withdraw money from his TSP.

A complete review of the applicant's arguments can be found following the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 25, 1982, and served on active duty until December 24, 1987.

On December 25, 1987, the applicant transferred to the Coast Guard Reserve. On June 26, 1997, the applicant became a Junior Officer (O-1) and continued to promote to Commander (O-5), where he remained until his medical retirement on May 21, 2017.

In September 1986, while on active duty, the applicant incurred his first documented LOD injury when he was struck by a drunk driver while returning home from mooring a Patrol Boat. The applicant was treated for neck and lower back injuries that resulted in bulging discs. He was treated with 14 months of physical therapy.

On March 5, 1999, the applicant was working as a civilian Fire Fighter/Emergency Medical Technician (EMT) for his local county government. While responding to a fire, the applicant was injured in the line of duty and placed on Temporary Total Disability by the county government. The applicant's injuries eventually required major surgery on February 14, 2000.

In October 2002, while serving on Title 10 active-duty orders, the applicant incurred his second documented LOD injury. While conducting helicopter hoisting, the applicant was unable to properly detach from his hoisting cable when the lowering cable became twisted, causing the applicant to be dragged along the ground, bouncing three to four times before he was finally able to detach from the helo-hoist apparatus. This injury aggravated his first LOD injury causing the applicant to by treated with Epidural Steroid Injections (ESI) and physical therapy until he underwent intervertebral fusion surgery to his L1-S1 vertebrae on March 24, 2009, and his C3-C7 vertebrae on September 2, 2010.

On July 3, 2013, during his Periodic Health Assessment (PHA) the Physician's Assistant (PA) documented that the applicant had "no limiting conditions, approved for deployment." The PA also noted in the applicant's medical history "L-Spine and C-Spine Fusions."

On October 4, 2013, the applicant accepted active-duty orders starting on October 15, 2013, and ending on June 30, 2014.

On March 22, 2014, while on active duty, the applicant incurred his third documented LOD injury when he slipped and fell on some ice outside of the gym. After his fall, at approximately 11:00 p.m., the applicant was treated by military EMTs and diagnosed with bruised ribs.

On March 23, 2014, at around 2:00 a.m., the pain became too unbearable, and the applicant sought treatment at the emergency room. The applicant received x-rays and the ER doctor diagnosed the applicant with "Clinical Rib Fractures."[1] The doctor prescribed the applicant Valium

[1] The applicant stated he was diagnosed with bruised ribs after his first x-ray, but multiple pages from the applicant's emergency room medical records from March 23, 2014, show a written diagnosis of "Clinical Rib Fracture" at the top righthand of the document.

and Vicodin for the pain. The applicant signed the medical discharge paperwork stating that the diagnosis was "Clinical Rib Fractures."

On April 9, 2014, while taking pain medication administered by his assigned unit, the applicant arrived for and participated in Joint Logistics Over-the-Shore (JLOTS)[2] over a three-week period.

On April 9, 2014, the applicant was seen again by a different emergency room where he was again diagnosed with bruised ribs and prescribed physical therapy.

On April 15, 2014, the applicant's Medical Care Manager (MCM) approved a second x-ray. After reviewing the new x-rays, the treating physician diagnosed the applicant with five posterior displaced right rib fractures and an enlarged hematoma.

On May 1, 2014, the applicant's MCM issued a Physician's Report wherein he estimated that the applicant would need 8 to 12 weeks of recovery time, and 12 weeks before he would be fit for full duty. The MCM also stated that the applicant could perform duties in a limited capacity, with desk work only. Finally, the MCM stated that he had determined that the applicant's condition was not permanent as his ribs were expected to heal, and so the applicant would not be referred to a Medical Evaluation Board (MEB).

On May 19, 2014, the applicant's civilian doctor issued a Physician's Report wherein he stated the applicant had displaced right 6-10 rib fractures with intercostal neuralgia. The physician also stated that the applicant's prognosis was good and that he would require 2 to 6 months of recovery before being fit for full duty. Like the military MCM, the civilian physician stated that the applicant could perform duties in a limited capacity and ordered "no physical training, no lifting greater than 5 to 10 pounds. In addition, the physician determined that the applicant's condition was not permanent.

On June 2, 2014, the applicant was issued active-duty orders that placed him on Medical Hold from May 27, 2014, through January 15, 2015.

On September 8, 2014, the applicant's military MCM issued a Physician's Report wherein he stated that the applicant's prognosis was still "good." He estimated that the applicant's recovery time before being fully fit for duty would be four months. The MCM ordered "no sports or PT."

On November 14, 2014, the applicant's MCM noted that the applicant needed "referrals for final set of rib radiographs and intercostal nerve blocks from Dr. [redacted]."

On December 15, 2015, the applicant's MCM documented x-rays from November 28, 2014, revealing "slow healing of right posterior ribs 5-9" and that the applicant was due to see another specialist for final intercostal nerve block. "He goes off orders and moves to Florida January 15, 2015."

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[2] JLOTS consist of loading and unloading of ships without fixed port facilities, in friendly or nondefended territory, and, in time of war, during phases of theater development in which there is no opposition by the enemy.

On January 6, 2015, the applicant met once again with his military MCM and complained of pain that he considered to be a 6 out 10 and "persistent right-side rib pain." The treating physician's January 6, 2015, note also documented a December 17, 2014, surgical intervention and intercostal nerve block, which had brought temporary relief, but that the applicant stated that his pain had worsened "over the past weekend."

On January 21, 2015, the applicant reported to his Coast Guard servicing clinic for a follow-up appointment. The applicant reported that his "ribs were feeling much better and no longer 'clicking' when he's laying down sleeping. Pt. feels that they are finally healing and hopes that his move to Florida in the future will aid in helping his aches and pains go away." The applicant was then deemed Fit for Full Duty with no restrictions, released from medical hold orders, and transferred back to active Reserve status.

From February 5 to 7, 2015, the applicant accepted and served on Reserve Active Duty for Operational Support (ADOS) – AC orders and was sent for a three-day site visit. On page 3 of these orders the applicant's eligibility was discussed. Specifically, page 3 stated "Eligibility/Readiness Requirements have been verified and met on these prescribed dates…PHA: 9/11/2014. If eligibility requirements have not been met, list dates of scheduled appointments below. [N/A]."

On February 27, 2015, the applicant obtained an MRI from a local spine institute. The MRI report provided the following:

> There is preservation of vertebral body height throughout the thoracic spine. No compression fracture is identified. There is moderate degenerative disc disease scattered throughout the thoracic spine with diffuse disc desiccation and dis space narrowing. Multiple chronic-appearing Schmorl node formations are noted – scattered throughout the mid and inferior thoracic spine.
>
> There is a posterior right central disc protrusion noted at the T7-T8 level, best appreciated on sagittal T2 image and axial T2 image #17. Ventral thecal sac indentation is noted with mild central canal stenosis. No cord indentation is noted.
>
> No additional disc protrusion is noted throughout the thoracic spine. Thoracic cord appears normal in signal characteristics and morphology.
>
> There is a small posterocentral disc bulge noted at the T3-T-4 level, best appreciated on sagittal T2 image #6. No prominent central canal stenosis is noted.
>
> There is a small left lateral recess disc bulge noted at the T4-T5 level, best appreciated on sagittal T2 image #4. No prominent central canal stenosis is noted.
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> IMPRESSION:
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> > 1. There is mild to moderate degenerative disc disease scattered throughout the mid and inferior thoracic spine with diffuse disc desiccation and disc space narrowing. No spondylolisthesis or compression fracture is noted.
> >
> > 2. Posterior right central disc protrusion noted at the T7-T8 level with mild central canal stenosis. No cord indentation.
> >
> > 3. Small posterocentral disc bulge noted at the T3-T4 level without central canal stenosis.

> 4. At the T4-T5 level, there is a small left lateral recess disc bulge noted with central canal stenosis.

On March 3, 2015, the applicant was issued and once again accepted Reserve ADOS – RC orders and reported to Reserve Personnel Management on March 24, 2015, for two days of General Duty. Page 3 of these orders stated, "Eligibility/Readiness Requirements have been verified and met on these prescribed dates…PHA: 9/11/2014. If eligibility requirements have not been met, list dates of scheduled appointments below. [N/A]."

On March 10, 2015, the applicant was again issued, and he accepted, Reserve Active-Duty for Training AT Short Term orders.

On April 12, 2015, the applicant reported to his assigned Port Security Unit (PSU), for thirteen days of active duty for annual training. The applicant's orders were terminated on April 24, 2015. Page 3 of these orders stated, "Eligibility/Readiness Requirements have been verified and met on these prescribed dates…PHA: 9/11/2014. If eligibility requirements have not been met, list dates of scheduled appointments below. [N/A]."

From April 28 to May 8, 2015, the applicant was again issued, and he accepted, Reserve Active Duty for Training – AT Short Term Orders. The purpose of the orders was Theater Security Decision Making Reserve Officer Course. Page 3 of these orders state, "Eligibility/Readiness Requirements have been verified and met on these prescribed dates…PHA: 9/11/2014. If eligibility requirements have not been met, list dates of scheduled appointments below. [N/A]."

On July 15, 2015, a physician from the United States Public Health Service (USPHS) sent an email to the applicant's MCM indicating that he had met with the applicant in order to complete a duty status chit and a Physician's Report. The doctor stated that he did not have the applicant's complete medical file—it would be sent in the mail—so he did not have "all of the details, but from the information we have, I want to pass along an update." The doctor further stated,

> In summary, CDR [redacted] has had a variety of chronic issues which have limited his ability to perform his job. With the rib fractures he sustained last year he has had chronic pain, and he also has chronic neck pain and lower back despite the neck surgery and 2 back surgeries. He also complains of arm pain and paresthesias. With the disqualifying conditions inability to perform AOLs and not being fit for world-wide deployment, my recommendation to him was to follow up with the [redacted] clinic for a Medical Board.

On July 15, 2015, the applicant was found "Not Fit for Duty (NFD)" pursuant to a Reserve Periodic Health Assessment (PHA) examination conducted by the USPHS physician. After consultation, the treating physician recommended that a Medical Evaluation Board (MEB) be initiated.

On July 17, 2015, the applicant's Command prepared a Final Injury Report, finding specifically that the applicant's March 22, 2014, injuries were incurred while in the line of duty. Importantly, the report stated:

- Member was unable to return to fully return to civilian job due to continued neck and back pain.

- The injuries incurred while on duty in 2014, specifically the multiple broken ribs, back and neck damage, have not been resolved and have exacerbated previous conditions already documented in the member's medical record.

On July 27, 2015, the spine institute physician wrote a report for the Coast Guard stating that due to the injuries the applicant had sustained, the applicant should be considered totally and permanently disabled. The doctor also noted that the applicant was going to require long-term care and his condition, more likely than not, would deteriorate over time.

On October 19, 2015, the applicant was issued a Notice of Eligibility (NOE)[3] Authorization in response to a request he submitted on October 15, 2015. The NOE formally notified the applicant that he was Not Fit For Duty (NFD) status as a result of ICD9 code(s) 338.2; 807.0; 722.2; and 772.3 incurred in the line of duty while performing active duty as directed by the applicant's orders from October 15, 2013, through June 20, 2014; and that he was approved for medical benefits from October 1, 2015, until December 31, 2015. Under this authorization, the applicant was eligible to request Reserve incapacitation pay for lost wages and income from October 1, 2015, through December 31, 2015. According to the Coast Guard, there is no record showing that the applicant filed a request for incapacitation pay.

On December 18, 2015, the applicant was issued Medical Hold orders, which were renewed through his Physical Disability Evaluation System Process (PDES) and retirement date.

On a January 5, 2016, Medical Board Report, the applicant's prognosis was noted to be poor. The report also stated that the applicant was unlikely to ever be fit for military service or worldwide assignment.

On February 29, 2016, the applicant acknowledged and signed a "Evaluee's Statement Regarding the Finding of the Medical Board Report." Within this statement the applicant was notified that he had been diagnosed with 1) Lumbar Post Laminectomy Syndrome; 2) Cervical Spinal Stenosis; 3) Ankylosis Lumbar Spine; and 4) Lumbar Myofascial Pain. The Statement also found that the applicant was found not to "[S]atisfy Medical Retention Standards, Refer to Commander, Personnel Command (CGPC-adm)."

Between February 9, 2016, and February 11, 2016, the applicant underwent a Discectomy of the C3-C4, and a laminectomy and discectomy of the C3-T1, and a fusion of the C2-T2.

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[3] A Notice of Eligibility (NOE) for authorized medical/dental treatment is issued to a reservist following service on active duty or inactive duty to document eligibility for medical/dental care as a result of an injury, illness, or disease incurred or aggravated in the LOD. A NOE allows access to medical/dental treatment without placing the member in an active-duty status. Depending on the severity of the injury, a reservist may be eligible for incapacitation pay or placement on active duty. *See generally,* Reserve Policy Manual, COMDTINST M1001.28B, Chap. 6. Active-duty orders may be appropriate when a reservist in a qualifying duty status suffers an injury or illness of such severity that the condition cannot be adequately treated with a NOE. There are two types of medical-related, active-duty statuses that a reserve member can be assigned. They vary based on the length of the underlying assignment during which the member incurred or aggravated injury or illness in the line of duty. If injury is incurred while on orders of 30 days or less, the reservist may be placed on active duty for health care (ADHC) orders pursuant to 10 USC § 12322. If injury is incurred while on orders of 31 days or more, the member may be placed on medical hold (MedHold) orders pursuant to 10 USC § 1230 l (h). A reservist in either of these statuses may be entitled to medical and dental treatment at the government's expense in accordance with 10 USC § 1074a and§ 1074 respectively.

On May 21, 2017, the applicant was medically retired with a disability rating of 90%.

On March 21, 2018, the applicant underwent major surgery on his T-6 through T-10 ribs. Titanium strips were used to reconnect the ribs stemming from initial rib injury from his third LOD injuries.

APPLICANT'S ALLEGATIONS

The applicant alleged that while on duty, he slipped and fell on some ice, incurring his third LOD injury. After the fall, the applicant stated that he was treated by local military EMTs and was diagnosed with bruised ribs. The applicant further stated that later that evening the pain became so unbearable that he sought treatment at his local military emergency room (ER), where he received x-rays and was once again diagnosed with bruised ribs.[4] The ER doctor prescribed the applicant Valium and Vicodin to treat the pain. The applicant alleged that upon the diagnosis of bruised ribs, he raised concerns to the doctor about the "moving and clicking" his ribs were making, but his concerns were ignored.

The applicant stated that while he was on temporary duty, he relocated to another base where he performed Joint Logistics Over-the-Shore (JLOTS)[5]. During the three weeks of JLOTS exercises, the applicant stated, he was being administered pain medications by his local unit. The applicant alleged that during his April 9, 2014, clinic visit, after being diagnosed with bruised ribs again, the applicant requested a second x-ray before he started his physical therapy, but his request was denied. According to the applicant, he was suffering from such excruciating and debilitating pain, which felt much worse than a bruise, he felt confident that he had suffered more serious injuries. Eventually, the applicant stated, a second x-ray was ordered and confirmed that his ribs were in fact broken and not bruised, but his proper diagnosis was delayed by 24 days because his doctors would not heed his concerns.

The applicant alleged that after being placed on Active Duty for Health Care (AD-HC) orders, not only did he complain of his ongoing pain and suffering associated with the injuries to his ribs, neck, and back, but he also made multiple requests for an MRI, but his requests were repeatedly denied.

The applicant further alleged that between May 2014 and January 2015, he suffered from chronic pain and was given no less than four treatments of ESIs to manage his pain. The applicant claimed that during this time he suffered from numbness and pain in his neck, back, ribs and arms. According to the applicant, his military MCM continually denied him additional medical evaluations, specifically the MRI he had requested multiple times. As noted in the Summary of the Record, the applicant alleged that on January 6, 2015, he complained of persistent right-side rib pain that he measured as a 6 out of 10. During this same visit, the applicant claimed the doctor noted that he had undergone a surgical intervention and intercostal nerve block, but the temporary

[4] Although the applicant alleges that he was told he had bruised ribs, his medical records from the emergency room state a diagnoses of "Clinical Rib Fracture."

[5] JLOTS consist of loading and unloading of ships without fixed port facilities, in friendly or nondefended territory, and, in time of war, during phases of theater development in which there is no opposition by the enemy.

relief provided had lessened "over the past weekend." Despite allegedly reporting the chronic pain, the applicant stated that on January 21, 2015, his military MCM released him "w/o limitations" and found him Fit For Full Duty.

The applicant stated that after his multiple requests for an MRI were denied, he used his civilian health insurance to obtain one from a local spine institute. The applicant noted that it was this MRI that revealed he had damaged cervical hardware, multiple herniated discs, and rib fractures.

The applicant alleged that in May of 2015, he attempted to resume his civilian employment with the Coast Guard, but he was unable to do so due to the pain, and he left his position after five business days.[6] After leaving his civilian job, the applicant claimed, he returned to the spinal institute for additional treatment. The applicant stated that this treatment was also paid for by his civilian health insurance. After his visit with the spinal institute, the applicant stated, he signed a CG-4407 and applied for Reserve Incapacitation Benefits.[7]

The applicant alleged that in October 2015, after multiple requests for relief and for the Coast Guard to acknowledge the error that the applicant should never have been found fully fit for duty, he was issued a Notice of Eligibility (NOE) for medical care. The applicant further alleged that from January 16, 2015, through December 14, 2015, he only received Reserve component pay. According to the applicant, this unequal pay resulted in him being forced to deplete his personal life savings and withdraw a substantial portion of his Thrift Savings Plan (TSP) in order to survive this period of unemployment. The applicant claimed that TSP regulations did not allow for a loan, so he was forced to withdraw funds which resulted in an early withdrawal penalty in addition to tax consequences.

The applicant stated that between December 15, 2015, through May 21, 2017, he received pay through AD-HC orders.

The applicant argued that his February 9 through 11, 2016, surgeries were only medically necessary because of the 12-month delay in treatment. The applicant alleged that the delayed procedures resulted in partially paralyzed arms and multiple post-surgery respiratory cardiac arrests for which he spent an additional six days in the Intensive Care Unit (ICU).

The applicant argued that the medical opinion of the spinal institute's physician showed that his healthcare orders from May 2014 through January 2015 were for the purpose of properly evaluating his spinal issues, but that the Coast Guard failed to do so and did not initiate the appropriate Initial Medical Board (IMB). To support his argument, the applicant relied on the fact that the Coast Guard ultimately returned him to active duty for PDES processing and awarded him a 90% disability rating. Prior to his PDES processing, the applicant alleged, the Coast Guard repeatedly failed to provide him with reasonable medical care and PDES processing from March 22, 2014 (the date of his third LOD injury), to December 15, 2015.

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[6] The applicant was not clear about what he meant by having left his job. The Board is unsure if he meant he resigned his position or if he took additional leave to pursue additional treatment.
[7] There is no record that the applicant applied for Incapacitation pay.

According to the applicant, at a minimum, in January 2015, when his AD-HC orders ended, the Coast Guard should have recognized that his condition was slowly declining.[8] However, the applicant stated that he had already received a healthcare order and the Coast Guard was on notice of service aggravating medical conditions related to a very compromised back and spine, which had previously been surgically repaired. The applicant argued that pursuant to 10 U.S.C. §1074(a)(1), members in the armed forces are entitled to adequate medical care. The applicant argued that the misdiagnosis of his broken ribs, despite his complaining of "moving and clicking" ribs, shows he did not receive the care afforded to service members under 10 U.S.C. §1074(a)(1). In addition, the applicant claimed that instead of receiving additional medical care for his service-related injuries, he was unjustly released from active duty on January 15, 2015. The applicant stated that it is unclear if any of the requirements of Article 2.A.1.d.3. of the Coast Guard Medical Manual, COMDTINST M6000.1F (2014), were followed.[9] The applicant also alleged that Article 3.C. of the same manual was not followed because the applicant's evaluation did not contain the necessary information provided in Article 3.C.

Citing Article 3.F.12. of the Coast Guard Medical Manual, the applicant argued that nerve pain may be disqualifying for retention when the symptoms are severe, persistent, and not responsive to treatment. In addition, under Article 3.F.15.n.2. of the same manual, the applicant argued that nerve inflammation must be more than moderate with permanent functional impairment. Relying on DoD Instruction 1332.39, which the Coast Guard can rely upon for guidance, the applicant argued, "demonstrable pain on spinal motion associated with positive radiographic findings" is sufficient to award a minimum disability rating and a finding that one is "unfit for duty."

The applicant argued that when he was found FFD and released from active duty on January 21, 2015, he was forced to seek medical treatment on his own. The applicant stated that he was fortunate that his civilian insurance through his civilian job at the Coast Guard covered his necessary care and the MRI he should have received while on active duty. The applicant alleged he did everything he could to get the medical care that he needed and to provide for himself financially. The applicant further alleged that the only pay he did receive was a year of drill pay. The applicant argued that he should have been kept on active-duty orders pending a proper medical evaluation at all times following his March 22, 2014, LOD injury. The applicant alleged that an adequate medical evaluation would have revealed the full extent of his injuries, which should have resulted in him being found unfit for continued military service.

The applicant alleged that he would have suffered less had his broken ribs and aggravated existing conditions been properly identified and treated. In addition, the applicant claimed that had he been properly diagnosed, he would not have incurred out-of-pocket expenses, travel costs

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[8] The applicant cites to BCMR decision 2004-053 and 2005-093 to support his arguments.

[9] Article 2.A.1.d.3. of the Coast Guard Medical Manual, COMDTINST M6000.1F (2014) states, "Medical Evaluations. A completed PHA and Report of Medical Assessment, Form DD-2697, shall be used in four scenarios described below. CG members in these four scenarios are authorized to complete their evaluations at CG clinics. CG Medical Officers shall clearly annotate in Block 20 of the Report of Medical Assessment, Form DD2697 whether the member meets retention standards in accordance with Chapter 3 Paragraph F of this Manual…The four scenarios in which the PHA and Report of Medical Assessment, Form DD-2697 shall be used in conjunction are: (a) Reserve members who are being released from active duty orders (greater than 30 days) a new PHA must be completed within 10 days from being released from active duty orders…"

related to his treatment, worsening pain and suffering, and the financial costs associated with having to make early withdrawals. The applicant stated that had he been properly diagnosed, he would have received his medical retirement much sooner. The applicant alleged that his treating physician should have found him unfit for duty in January 2015 but failed to conduct adequate medical examinations, and should have known to submit an adequate Medical Evaluation Board package in January 2015. The applicant claimed that his treating physician's error delayed his MEB processing from being convened until June 2016 and delayed his medical retirement until May 21, 2017.

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

- Results of an MRI Scan of the applicant's Thoracic Spine taken on February 27, 2015. The Spine Institute's physician made the following findings:
- A July 15, 2015, USCG Monthly Physician's Report, where a Coast Guard medical physician stated the applicant needed a Medical Evaluation Board (MEB). The reason for the MEB referral was the applicant's chronic pain, rib fractures, and spinal injuries. The Coast Guard physician stated the applicant was not FFD, and could not perform his civilian job.
- A July 27, 2015, letter of reference from the applicant's civilian orthopedic doctor. The doctor stated that he had been treating the applicant for over ten years and that the applicant had been diagnosed with progressive degenerative disease of the spine, including ankylosing of the spine. The doctor further stated that as of the date of the letter, it had been determined that the applicant was unable to return to work due to severe physical limitations. According to the doctor, the applicant had extensive imaging studies documenting his condition and its severity. The doctor alleged that at that point, the applicant's condition is permanent and unlikely to resolve, and would require continued pain management and frequent invasive procedures to control his pain.
- An October 15, 2015, statement from the applicant's Thrift Savings Plan (TSP) noting the applicant's withdrawal of 34K dollars from his TSP account.
- An October 18, 2016, statement from the applicant's TSP noting his withdrawal of approximately 24K dollars from his TSP account.
- An October 25, 2018, statement from the applicant's TSP noting his withdrawal of approximately 38K dollars from his TSP account.

The applicant also provided the following Coast Guard polices:

Article 3.C.14. of the Coast Guard Medical Manual.[10] In relevant part:

> 14. Spine and Other Musculoskeletal (Item 36 of the Report of Medical Examination, Form DD-2808). Carefully examine for evidence of intervertebral disc syndrome, myositis, and traumatic lesions of the low back (lumbosacral and sacroiliac strains). If there is any indication of congenital deformity, arthritis, spondylolisthesis, or significant degree of curvature, obtain orthopedic consultation and x-rays.

[10] Chapter 3.C. of the Medical Manual provides the physical standards for enlistment in the Coast Guard. The standards for retention appear in Chapter 3.F.

a. Examination. With the examinee stripped and standing, note the general configuration of the back, the symmetry of the shoulders, iliac crests and hips, and any abnormal curvature. Palpate the spinous processes and the erector spinae muscle masses for tenderness. Determine absence of pelvic tilt by palpating the iliac crests. Have examinee flex and extend spine and bend to each side, noting ease with which this is done and the presence or absence of pain on motion. Test rotary motion by gripping the pelvis on both sides and having the examinee twist to each side as far as possible fully extend the knee, note complaints of pain (this corresponds to a 90-degree straight leg raising test in supine position).

b. Reflexes. With the examinee sitting on the examining table, test patellar and ankle reflexes.

c. Strength. With the examinee supine, test dorsiflexor muscle power of the foot and toes, with particular attention to power of the extensor hallucis longus. Weakness may indicate nerve root pressure on SI. Flex hip fully on abdomen and knee flexed and determine presence or absence of pain on extremes of rotation of each hip with hip flexed to 90 degrees. Frequently, in lumbosacral sprains of chronic nature, pain is experienced on these motions. Place the heel on the knee of the opposite extremity and let the flexed knee fall toward the table. Pain or limitation indicates either hip joint and/or lumbosacral abnormality.

d. Extension. While prone, have the examinee arch the back and test strength in extension by noting the degree to which this is possible.

e. Abnormal findings. If pain is experienced on back motions in association with these maneuvers or if there is asymmetry or abnormal configuration, back x-rays, including pelvis, should be obtained. These should include antero-posterior, lateral, and oblique views.

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Neurologic (Item 39 of the Report of Medical Examination, Form DD-2808). Conduct a careful neurological examination being attentive to the following:

a. Gait. The individual shall: walk a straight line at a brisk pace with eyes open, stop, and turn around. Look for spastic, ataxic, incoordination, or limping gait, absence of normal associated movements, deviation to one side or the other, the presence of abnormal involuntary movement, undue difference in performance with the eyes open and closed.

(1) Stand erect, feet together, arms extended in front. Look for unsteadiness and swaying, deviation of one or both of the arms from the assumed position, tremors, or other involuntary movements.

(2) Touch the nose with the right and then the left index finger, with the eyes closed and both arms extended laterally to a horizontal position. Look for muscle atrophy or pseudohypertrophy, muscular weakness, limitation of joint movement, and spine stiffness.

b. Pupils. Look for irregularity, inequality, diminished or absent contraction to light or lack of accommodation.

c. Deep Sense (Romberg). Negative, slightly positive, or pronouncedly positive.

d. Deep Reflexes: Patellar, Biceps, etc. Record as absent (o), diminished (-), normal (+), hyperactive (++), and exaggerated (+++).

e. Sensory Disturbances. Examine sensation by lightly pricking each side of the forehead, bridge of the nose, chin, across the volar surface of each wrist, and dorsum of each foot. Look for inequality of sensation right and left. If these sensations are abnormal, vibration sense should be tested at ankles and wrists with a tuning fork. With eyes closed, the examinee shall move each heel down the other

leg from knee to ankle. Test sense of movement of great toes and thumb. Look for diminution or loss of vibration and plantar reflexes. When indicated, perform appropriate laboratory tests and x-ray examinations.

f. Motor Disturbances. Evidence of muscle weakness, paresis, or any other abnormality.

g. Muscular Development. Evidence of atrophy, compensatory hypertrophies, or any other abnormality.

h. Tremors. State whether fine or coarse, intentional or resting, and name parts affected.

VIEWS OF THE COAST GUARD

On August 19, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he 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).

The JAG argued that the applicant has not provided sufficient evidence to overcome the presumption of regularity or that his military Primary Care Manager (PCM) erred when he found the applicant fit for duty on January 21, 2015. The JAG claimed that the applicant provided incomplete medical records to support his allegations that he made multiple appointments with his military PCM and was thwarted in his efforts to obtain radiological imagery. The JAG argued that medical records show that the applicant's military PCM was tracking the applicant's progress and was ordering radiological assessments as needed. According to the JAG, these reports show a steady lessening of the applicant's symptoms. Under the presumption of regularity, the JAG argued that the applicant's PCM made a reasonable "duty status diagnosis" based on his medical expertise, knowledge of patient history, which included radiological reports, and the applicant's own remarks on January 21, 2015. The JAG stated that the February 27, 2015, radiological report describes the applicant's condition as "mild to moderate." The JAG argued that there is no evidence that the applicant shared this report with his medical providers at his new duty location. According to the JAG, the July 27, 2015, records provided by the applicant from his pain management physician and the September 24, 2015, from his neuropsychiatrist both occurred after the applicant was found not fit for duty by military providers on July 15, 2015. The JAG also noted that neither of the physicians are military practitioners. As such, the JAG argued that they are not applying the medical standard of review associated with military duty status determinations.

The JAG argued that as evidenced by the applicant's continuation of Inactive Duty Training (IDT) and acceptance of multiple ADOS orders, the FFD determination worked no injustice upon the applicant. The JAG claimed the applicant has produced no military health records for the period of January 21, 2015, through July 15, 2015, to indicate a continuation or worsening of his condition. The JAG argued that under Articles 6.A. and 6.B.10. of the Coast Guard Reserve Policy Manual, COMDTINST M1001.28B., the applicant had a duty to report a change in his medical readiness or status, but did not do so despite participating in multiple IDT drills. The JAG further argued that under Article 3.I.2. and 5.O. of the same manual, the applicant was prohibited from undertaking ADOSs and IDT drills if he was not in a FFD status. However, the JAG claimed the applicant accepted and completed ADOS order commencing on February 5, 2015, and March 3, 2015, in addition to ADT order commencing on March 10, 2015, and April 28, 2015. The JAG argued that the Coast Guard is left to speculate about what could have happened to the applicant between May 2015, and July 2015 that could have worsened or aggravated his

condition. The JAG claimed there is no mention of a triggering incident or trauma was mentioned by his air station's clinic on the SF600 entry or the duty status report that found him NFD. Regardless, the JAG argued that the clinic's decision to initiate the PDES process for the applicant does not mean that the earlier diagnosis was erroneous or unjust, but rather, informed by additional information.

The JAG stated that the applicant's Medical Hold Orders should have continued until his follow-up appointment on January 21, 2015. The JAG argued that on May 27, 2014, the applicant was placed on active-duty Medical Hold Orders until January 15, 2015, but was not found fit for duty until January 21, 2015. The JAG argued that in accordance with Article 6.D.2. of the Coast Guard Reserve Policy Manual, COMDTINST M1001.28B, the applicant's Medical Hold Orders should have been extended until he was found FFD, which was January 21, 2015, rather than expiring on January 16, 2015. As such, the JAG stated that backpay and allowances are appropriate for additional days of active duty.

In addition to the extension of the applicant's Medical Hold Orders, the JAG also argued that the applicant's NOE should be amended to reflect the date he was determined to be NFD, which was July 15, 2015, as opposed to the October 1, 2015, date given on the initial NOE. The JAG stated that under the NOE authorization, the applicant was eligible to request reserve incapacitation pay for lost wages and income, though there is no record that he attempted to do. Regardless, the JAG argued that the applicant was found NFD due to the injury he sustained on March 22, 2014, which was subsequently found to be in the line of duty, July 16, 2015, would have been the proper date for the applicant's NOE commencement. The JAG stated that amending the commencement date of the NOE, may allow for the reimbursement of incurred medical expenses, as well as a renewed opportunity to request reserve incapacitation pay.

Finally, the JAG argued that the Coast Guard does not possess the appropriate funding authorities to "reimburse" a Coast Guard member for TSP funds withdrawn. The JAG also argued that the Coast Guard cannot act as agent between the applicant and Internal Revenue Service for the recovery of TSP related tax penalties. However, the JAG stated that if the Board determines that backpay is appropriate in this case, the TSP system does permit directing of said backpay towards his previously established TSP account, if the member so elects. The JAG argued that the Thrift Savings Board, in coordination with the IRS, is the appropriate authority to handle the applicant's early withdrawal taxes and penalties.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 21, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The Chair received the applicant's response on December 6, 2021.

The applicant alleged that the notes of the Coast Guard's own Primary Care Manager (PCM) stated that the applicant's pain was so severe that it required intercostal nerve blocks twice, in November and December 2014, from the applicant's civilian doctor. The applicant claimed that such nerve blocks are for injections in the muscle below each rib cage.

The applicant further alleged that when he obtained his MRI, a month after the FFD finding, his injuries were clearly defined by the spinal institute treating him. The applicant further argued that his injury was in March 2014, and still necessitated intervention for severe pain three weeks before release from active duty. The applicant alleged that his military PCM's erroneous FFD finding ignores the necessity of the applicant's civilian doctor's pain intervention. According to the applicant, the Coast Guard failed to follow its own procedures and provide for a PHA whereupon a more independent medical review would have occurred.

The applicant argued that Coast Guard's conclusion that his performance of Inactive Duty Trainings can be interpreted as him being FFD runs counter to the obviously debilitating nature of his injuries, which were captured in x-rays from October 17, 2021. The applicant further argued that the military PCM's own medical notes and the eventual return to orders for disability processing overcome any presumption of FFD. The applicant stated that when his PCM released him from active duty in January 2015, he was not FFD, despite the presumption that he was FFD at the time and in the months thereafter. The applicant alleged that his lumbar injuries and lumbar disc disabilities existed for years and were severely aggravated by his March 2014 injury. The applicant argued that it must be considered an admission that he received orders for disability processing within months of his release. The applicant also noted that he previously requested that the Coast Guard provide a medical expert to refute his claims, but they did not.

The applicant also alleged that he did report to his Command that he was still suffering from injuries but received orders anyway. The applicant stated that the toll this has taken on his well-being, family, and his ability to provide for them is indescribable and incalculable. The applicant further stated that he was out of work, in severe pain, and could not work at his civilian job, so when the Coast Guard offered him orders, he accepted them. According to the applicant, his acceptance of orders and performance of active and inactive duty in 2015 in no way proves that he was FFD at the time. The applicant claimed that the February 27, 2015, MRI showed that the significant hardware in his spine needed to be repaired. He alleged that when he was recommended for an MEB on July 15, 2015, it was the first time he was evaluated by a Coast Guard physician at a PHA, but he should have been examined by one before his release from MEDHOLD.

The applicant alleged that on October 28, 2014, even after pain intervention shots, medical notes reflect that he was still suffering from "right-side low back pain at approximately the level of his 11th and 12th ribs, with some flank pain, and some radiation into his low abdomen on the right…and with specific pain along the rib borders of the 10th, 11th, and 12th on the right side more anteriorly." The applicant claimed that his delay in treatment aggravated his fibromyalgia, bilateral upper and lower extremity neuropathy, radiculopathy and depression.

APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 1074a(a)(1) states in pertinent part that "[e]ach member of a uniformed service who incurs or aggravates an injury, illness, or disease in the line of duty while performing … (B) inactive-duty training" and not as a result of gross negligence or misconduct is entitled to

> (1) the medical and dental care appropriate for the treatment of the injury, illness, or disease of that person until the resulting disability cannot be materially improved by further hospitalization or treatment; and

(2) subsistence during hospitalization.

Under 10 U.S.C. § 1074a(e), a member injured in the line of duty in accordance with § 1074a(a) who is ordered to active duty for health care or recuperation for more than 30 days "is entitled to medical and dental care on the same basis and to the same extent as members covered by section 1074(a) of this title [which provides medical and dental care for active duty members] while the member remains on active duty."

Title 10 U.S.C. § 12322 states, "A member of a uniformed service described in paragraph (1)(B) or (2)(B) of section 1074a(a) of this title may be ordered to active duty, and a member of a uniformed service described in paragraph (1)(A) or (2)(A) of such section may be continued on active duty, for a period of more than 30 days while the member is being treated for (or recovering from) an injury, illness, or disease incurred or aggravated in the line of duty as described in any of such paragraphs."

Title 37 U.S.C. § 204(g) states, "A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated… (B) in line of duty while performing inactive-duty training" but "the total pay and allowances shall be reduced by the amount of [non-military] income. In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered."

Reserve Regulations

Article 5.D. of the Reserve Policy Manual, COMDTINST M1001.28B, provides the necessary guidance on duty status for reserve members. In relevant part:

> Article 5.D.4. Duty Status. A reservist is considered to be in a duty status during any period of active duty or inactive duty; while traveling directly to or from the place that duty is performed; while remaining overnight immediately before the commencement of duty, or remaining overnight between successive periods of inactive duty at or in the vicinity of the site of inactive duty.
>
> a. In accordance with reference (p), Coast Guard Medical Manual, COMDTINST M6000.1 (series), a Coast Guard Medical Officer shall use one of the following duty statuses and shall provide written notification of the same to the member after examination.
>
> (1) Fit for Full Duty (FFD). Status of a member who is able to perform all of the essential duties of the member's office, grade, rank or rate. This includes the physical ability to perform worldwide assignment. The exception to this is if a member is Human Immunodeficiency Virus (HIV) positive; refer to Coast Guard Human Immunodeficiency Virus (HIV) Program, COMDTINST 6230.9 (series) for details.
>
> (2) Fit for Limited Duty (FLD). Interim status of a member who is temporarily unable to perform all of the duties of the member's office, grade, rank, or rating. A member placed in this temporary status will have duty limitations specified, such as: no prolonged standing, lifting, climbing; or unfit for sea or flying duty.

> (3) Not Fit for Duty (NFD). Status of a member who is determined to be unable to perform the essential duties of the member's office, grade, rank, or rating. If needed, specific instructions should be given (i.e. confined to rack, sick in quarters or sick at home).
>
> b. When a reservist is NFD and seeing a civilian medical provider or DoD medical provider, only a Coast Guard medical officer shall render a member FFD after reviewing the civilian or DoD medical notes. Occasionally, the Coast Guard medical officer may request to see the Coast Guard member for an exam.
>
> c. The command shall either schedule the reservist in a limited duty status for IDT or reschedule drills for future dates when member is FFD. ADT, ADOT, or mobilization must be deferred until the member is FFD.

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

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

Under Chapter 6.A.3. of the RPM, a reservist injured in the line of duty is entitled to medical and/or dental treatment for the injury as authorized by 10 U.S.C. § 1074a until the member is fit for military duty or the member has been separated under the Physical Disability Evaluation System.

Chapter 6.A.4. states the following:

> a. A reservist who incurs or aggravates an injury, illness, or disease in the line of duty is entitled to pay and allowances, and travel and transportation incident to medical and/or dental care, in accordance with 37 U.S.C. 204 and 206. The amount of incapacitation pay and allowance authorized is determined in accordance with DoD 7000.14-R, Volume 7A, DoD Financial Management Regulation, Military Pay Policy and Procedures – Active Duty and Reserve Pay, and is summarized below.
>
> b. A reservist who is unable to perform military duties due to an injury, illness, or disease incurred or aggravated in the line of duty is entitled to full pay and allowances, including all incentive and special pays to which entitled, if otherwise eligible, less any earned income as provided under 37 U.S.C. 204(g).

Chapter 6.A.6.e. authorizes ADHC orders as follows:

> Personnel Command (CGPC-rpm) may authorize a reservist to be ordered to or retained on active duty, with the consent of the member, under 10 U.S.C. 12301(h)[11] to receive authorized medical care or to be medically evaluated for a disability, and may authorize a reservist to be ordered to or continued on active

[11] Title 10 U.S.C. § 12301(h) is actually inapplicable because it authorizes only the Secretaries of "military departments" to order reservists to active duty to receive medical care, and for the purposes of Title 10, "military departments" are defined at 10 U.S.C. 101(a)(8) as follows: "The term 'military departments' means the Department of the Army, the Department of the Navy, and the Department of the Air Force." However, the Coast Guard may issue ADHC orders under 10 U.S.C. § 12322.

> duty while the member is being treated for, or recovering from, an injury, illness, or disease incurred or aggravated in the line of duty while performing inactive duty or active duty for a period of 30 days or less as authorized by 10 U.S.C. 12322 (ADHC). Such authorization shall normally be provided only after consultation with Commandant (CG-1311), and only for members expected to remain not fit for military duties for more than 30 days, when it is in the interest of fairness and equity to provide certain healthcare or dependent benefits.

Chapter 6.B.9. and 10. provide the responsibilities of both the reservist and his/her medical officer as it pertains to a member's medical readiness. It states:

> 6.B.9. Coast Guard Medical Officer. A Coast Guard medical officer shall provide the member's command and District RFRS staff with updated prognosis and duty status information at least once each month, until the member is found FFD, or the injury, illness, or disease cannot be materially improved by further hospitalization or treatment and the member has been separated or retired as the result of a PDES determination in accordance with reference (p), Coast Guard Medical Manual, COMDTINST M6000.1 (series) and reference (aa), Physical Disability Evaluation System, COMDTINST M1850.2 (series). The health record custodian, District RFRS staff and Commander (CG PSC-RPM) must be copied on all notifications involving incapacitation of reservists.
>
> 6.B.10. Reservist. Each reservist is responsible for notifying their chain of command of changes in their medical or dental readiness regardless if the change did not occur while in a duty status or whether or not the injury or illness is considered by the member to be severe enough to warrant medical attention, and:
>
> a. Shall ensure they are fully medically ready in accordance with reference (p), Coast Guard Medical Manual, COMDTINST M6000.1 (series);
>
> b. Shall update their annual screening questionnaire whenever there is a change in their readiness status in accordance with Section E of this Chapter.

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.[12]

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 he should have been kept on active-duty orders pending a proper medical evaluation at all times following his March 22, 2014, LOD injury. When

[12] *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).

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.[13] 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."[14]

5. The record shows the following pertinent timeline:

- The applicant was both a Reserve officer and a federal employee of the Coast Guard.
- From October 15, 2013, to June 30, 2014, the applicant was serving on long-term active-duty orders when he fell and broke his ribs in the line of duty on March 22, 2014. Following an x-ray, the applicant was accurately diagnosed with broken ribs the same night.
- From May 27, 2014, to January 15, 2015, the applicant remained on active duty on a medical hold for his ribs to heal. Both civilian and military physicians predicted that he would recover.
- On January 21, 2015, the applicant's doctor noted that the applicant stated that his "ribs were feeling much better and no longer 'clicking' when he's laying down sleeping. Pt. feels that they are finally healing and hopes that his move to Florida in the future will aid in helping his aches and pains go away." The doctor found him fit for duty, and the medical hold orders ended.
- From February to June 2015, the applicant returned to performing inactive duty as a reservist and also accepted and performed five short-term active-duty orders.
- On July 15, 2015, at a physical examination for a Reserve Periodic Health Assessment, the physician recommended that the applicant be evaluated by a Medical Board to determine his fitness for continued military service.
- From October 1 through December 31, 2015, an NOE was issued which entitled the applicant to continuing medical coverage for his injury and to incapacitation pay. According to the Coast Guard, the applicant did not apply for incapacitation pay.
- From December 18, 2015, until the date of his retirement, May 21, 2017, the applicant remained on active duty on a medical hold while he was being processed under the PDES and retired with a 90% disability rating.

6. The applicant argued that his healthcare orders from May 2014 through January 2015 were for the purpose of properly evaluating his spinal issues, but the Coast Guard failed to do so and did not initiate the appropriate Initial Medical Board (IMB). To support his argument, the applicant relied on the fact that the Coast Guard ultimately returned him to active duty on a medical hold for PDES processing and awarded him a 90% disability rating. Prior to his PDES processing, the applicant alleged, the Coast Guard repeatedly failed to provide him with reasonable

[13] 33 C.F.R. § 52.24(b).
[14] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

medical care and PDES processing from March 22, 2014 (the date of his third LOD injury), to December 15, 2015. For the following reasons, the Board disagrees:

a. On May 1, 2014, the applicant's MCM issued a Physician's Report wherein he estimated that the applicant would need 8-12 weeks of recovery time, and 12 weeks before he would be fit for full duty. In addition, the MCM believed the applicant's prognosis was good. The MCM also stated that the applicant could perform duties in a limited capacity—desk work only—and that because the applicant's condition was not considered permanent, and he would not be referred to a Medical Evaluation Board (MEB). The record also shows that the applicant's civilian physician made similar findings about the applicant's prognosis on May 19, 2014, just three weeks after the military MCM made these findings. As such, the record shows that sending the applicant to an MEB immediately upon his third LOD injury would have been premature because both independent medical professionals expected his ribs to heal and found that the applicant's prognosis was good and "non-permanent." Article 3.F.1.c. of the Coast Guard Medical Manual, COMDTINST M6000.1F, states, "[R]eservists in any status not found 'fit for duty' six months after incurring/aggravating an injury or illness, or reservists who are unlikely to be found 'fit for duty' within six months after incurring/aggravating an injury or illness shall be referred to a Medical Evaluation Board." This policy is instructive as it shows that a service member is not automatically referred to an MEB simply because he incurs broken bones or aggravates a previous injury. Instead, the policy requires that the service member first be given an opportunity to recover and heal. Only after six months and only if the service member is unlikely to be found "fit for duty" is a member referred to an MEB. Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when it did not refer him to an MEB immediately upon his third LOD injury.

b. According to the applicant, no later than January 2015, the Coast Guard should have recognized that his condition may have been slowly declining. However, as stated previously, the record shows that the applicant was being given the necessary time to heal and recover from his injuries, before making the difficult decision to permanently end his military career. His medical records show that his doctors, both civilian and military, believed the applicant's prognosis was good, and "non-permanent." The applicant contends that the Coast Guard should have known that his condition was worsening but that is not shown in the record. In fact, on January 21, 2015, when his medical hold was ending, the applicant told his MCM that his ribs were feeling much better, were no longer clicking, and that they are finally healing. Therefore, he was found fit for duty, and he returned to duty. The Coast Guard even began issuing him short-term active-duty orders, which he accepted.

c. Article 6.B.10. of the Reserve Policy Manual states,

> Each reservist is responsible for notifying their chain of command of changes in their medical or dental readiness regardless if the change did not occur while in a duty status or whether or not the injury or illness is considered by the member to be severe enough to warrant medical attention, and:

> a. Shall ensure they are fully medically ready in accordance with reference (p), Coast Guard Medical Manual, COMDTINST M6000.1 (series);
>
> b. Shall update their annual screening questionnaire whenever there is a change in their readiness status in accordance with Section E of this Chapter.

As such, the applicant was required to notify his command of changes to his medical readiness. The record is void of any changes or formal notices made by the applicant to put his command on notice that he was in fact, not medically fit to perform ADOS' or IDTs from January through June 2015. The applicant seems to argue that it was the Coast Guard's responsibility to intrinsically know that he was unfit for duty, but policy makes it clear that it is the responsibility of a reservist to ensure he is "fully medically ready" and to notify his command if he is not. If the applicant believed this status was incorrect after his appointment on January 21, 2015, it was his duty to inform his command and update his individual readiness, regardless of whether he considered his injuries to be "severe enough to warrant medical attention." The record is presumptively correct, and the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard ignored his medical conditions and erroneously found him fit for duty on January 21, 2015.

d. The applicant alleged that the Coast Guard's decision to return him to active duty on health care orders in December 2015, so that he could be processed through the PDES shows that he should have been found unfit for duty sooner than he was. Article 6.A.6.e. of the Reserve Policy Manual, COMDINST M1000.28b, states, "Personnel Command (CGPC-rpm) may authorize a reservist to be ordered to or retained on active duty, with the consent of the member, under 10 U.S.C. 12301(h)[15] to receive authorized medical care or to be medically evaluated for a disability…" And Coast Guard policy grants the Personnel Service Center the power to order a member back to active duty for the purpose of being evaluated for a disability, which is what happened here. However, the applicant's medical records do not indicate PDES processing was warranted prior to the determination by a physician on July 15, 2015. The physician's email is the first time a medical provider recommended that the applicant be considered for an MEB because his condition was described as chronic and reported symptoms were potentially disqualifying.[16] Up until this point, despite the applicant's contentions to the contrary, the applicant's medical prognosis was good, and he was expected to make a full recovery. The applicant has not shown that the Coast Guard had reason to assume otherwise, especially since he did not inform his command that he believed

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[15] Title 10 U.S.C. § 12301(h) is actually inapplicable because it authorizes only the Secretaries of "military departments" to order reservists to active duty to receive medical care, and for the purposes of Title 10, "military departments" are defined at 10 U.S.C. 101(a)(8) as follows: "The term 'military departments' means the Department of the Army, the Department of the Navy, and the Department of the Air Force." However, the Coast Guard may issue ADHC orders under 10 U.S.C. § 12322.

[16] Of important note, within this email the doctor expressly states that he had not reviewed the applicant's medical file because they had not yet been received, so he did not have "all the details." The symptoms the doctor was describing were relayed to him by the applicant, but they had not yet been personally verified by the doctor. In essence, the symptoms were merely hearsay at that point. Based off the ailments described to the doctor by the applicant, the doctor recommended the applicant for a medical board, instead of waiting to review the applicant's actual medical records.

he was not "fully medically ready" to participate in his required duties. Finally, the applicant's own civilian orthopedic surgeon did not inform the Coast Guard of his belief that the applicant's severe disabilities would prevent him from being able to return to work until July 27, 2015. By that point, the applicant had already been referred to an MEB. As such, the Board finds that the applicant's contention that the Coast Guard's return of the applicant to active duty for the purpose of PDES processing proves that he should have been processed for PDES processing sooner is without merit.

e. The applicant alleged that his injuries rendered him unfit for duty and were disqualifying for retention. However, upon review of the medical files provided by the applicant, there is no record of the applicant complaining of a disqualifying condition prior to his July 15, 2015, meeting with the USPHS physician. In fact, upon his initial treatment for the fall that led to his broken ribs, medical records indicate that the applicant was not experiencing any neck or back pain; nor was there any reported numbness or parasthesia. As such, the applicant has failed to prove, by a preponderance of the evidence, that his symptoms and injuries were disqualifying prior to July 15, 2015, or that the Coast Guard erred by not processing him for PDES sooner. And although the applicant alleged that a delay in his treatment led to breathing problems that caused complications after surgery resulting in a six day stay in ICU, the record shows that the applicant was being treated for sleep apnea, in addition to his other symptoms, and the applicant has not shown that the Coast Guard delayed any treatment recommended by his physicians or that his physicians failed to accurately diagnose his condition.

7. The applicant contends that because of the Coast Guard's erroneous delay in processing him through PDES, he incurred unnecessary financial consequences. He requested reimbursement for his Thrift Savings Plan withdrawals (TSP), in addition to any tax penalties he incurred as a result of his withdrawals. However, the Board does not have the authority to grant such reimbursements. The authority of the Board is restricted to the correction of military records. The applicant's TSP withdrawals are not military records; nor are the funds tied to a military record. Likewise, the applicant's tax penalties are not within the jurisdiction or authority of this Board to correct or to reimburse. As such, this request should be denied.

8. The applicant further alleged that his credit was adversely affected by the Coast Guard's failure to timely process him through PDES. He asked the Board to issue a letter of credit repair. The record shows that the applicant was found unfit for duty on July 15, 2015, and not issued a Notice of Eligibility (NOE) to be entitled to incapacitation pay until October 1, 2015. Although he was or had been a federal employee of the Coast Guard, it is possible that he lost civilian income and/or incurred medical bills during those months. The applicant has not submitted any evidence of his alleged loss of income or medical bills, however. In addition, according to the Coast Guard, he never applied for incapacitation pay when he was entitled to do so after October 1, 2015. Therefore, the Board finds that the applicant has not proven that the Coast Guard should issue him a letter of credit repair.

9. In regard to the applicant's NOE, the record shows that despite being deemed unfit for duty and referred to a medical board on July 15, 2015, the applicant's NOE did not begin until October 1, 2015. According to the NOE notification, he applied for it on October 15, 2015, and it was issued on October 19, 2015, but backdated to October 1, 2015. As argued by the JAG, the applicant's October 1, 2015, NOE start date is erroneous and should be corrected to reflect a date of July 15, 2015, because the applicant was reported by a doctor to be not fit for duty on that date. This correction will renew the applicant's ability to apply for incapacitation pay, contingent of course upon the applicant providing the requisite documentation to the Coast Guard showing that he incurred a loss of civilian income as a result of his disability.

10. Accordingly, the applicant's request for relief should be denied, but alternative relief should be granted by correcting the start date of the applicant's NOE from October 1, 2015, to July 15, 2015, and by allowing him to seek incapacitation pay and reimbursement for covered medical expenses for the duration of the NOE.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of CDR [redacted] USCGR [redacted] for the correction of his military record is denied, but alternate relief is granted as follows:

The Coast Guard shall amend his Notice of Eligibility, issued on October 19, 2015, to reflect a start date of July 15, 2015, instead of October 1, 2015. Upon proper submission of the necessary documentation of civilian income and medical expenses, if the Coast Guard finds that during that period he was entitled to incapacitation pay or reimbursement for medical expenses for injuries incurred in the line of duty, the Coast Guard shall pay him the incapacitation pay and reimburse him for the medical expenses, as necessary, for the period of July 15, 2015, through December 31, 2015.

October 21, 2022

[redacted]

[redacted]

[redacted]