

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-129

██████████ ██████████ ██████████
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 May 27, 2020, 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 May 12, 2023, 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 Reserve Commander (CDR/O-5), who was honorably retired on June 26, 2015, asked the Board to correct her record by reimbursing her for back military pay and allowances (Basic Allowance for Housing (BAH) and Basic Allowance for Subsistence (BAS)) starting on March 15, 2013, and ending on June 26, 2015, the date she was medically retired.

The applicant received a Line of Duty (LOD) injury to her shoulder while serving on active duty orders extending from October 1, 2011, through September 30, 2012, and so she was placed on medical hold orders for six months as of October 1, 2012. She alleged that in March 2013 she was involuntarily released from active duty in violation of paragraph 6.6.3.2. of Department of Defense Instruction (DoDI) 1241.20. She argued that under that regulation, members who incur an injury while serving on active duty for 31 days or more shall, with their consent, be continued on active duty following the expiration of the orders until the member is determined to be fit for duty or the member is separated or retired as a result of a Disability Evaluation System determination. Despite this Instruction, the applicant alleged, she was told in March 2013 that she was not authorized to remain on active duty while being treated for her injury and she was released back into the Reserve and issued a Notice of Eligibility (NOE) for continued medical care. Furthermore, the applicant argued that in accordance with BCMR decision 2014-104, she is

entitled to two years of backdated active duty orders for the period she was being processed through the Physical Disability Evaluation System (PDES).

The applicant explained that after she completed her first surgery on January 24, 2013, and convalescent leave, she felt compelled to return to work and asked her surgeon to provide her with a letter allowing her to return to work while she completed the remainder of her treatment.¹ The applicant explained that her physician agreed and placed her in a Fit for Limited Duty (FLD) status. The applicant alleged that immediately upon her return to work, she was told to start the paperwork process to leave active duty and return to inactive duty in the Reserve. According to the applicant, she told her Commander (CO) and her Coast Guard medical doctor that she was Not Fit for Full Duty (NFFD) and did not want to leave active duty until her surgeon and physician felt she had healed. The applicant alleged that she told her CO that she still needed to complete physical therapy and that she might need additional surgeries. Despite this information, the applicant claimed, she was not authorized to remain on active duty even though her injuries had not healed and a final determination of her status had not been completed.

The applicant stated that after her release from active duty, she continued to follow her surgeon's orders and her physical therapy routines, but the pain and resulting headaches made it very difficult to work, requiring her and her daughter to live off of her savings while she continued treatment.

On August 13, 2013, the applicant underwent her second surgery in an attempt to fix the damage to her left shoulder. The applicant alleged that after this second surgery, her surgeon determined that an additional surgery would not be advantageous and therefore referred her to the Medical Board. The applicant stated that she believes that the protections set out in various laws and regulations are in place to protect Reserve members when they are injured on active duty. The applicant alleged that she was not afforded the opportunity to remain on active duty while being treated. The applicant claimed that she was fortunate to have savings to pay her bills while she underwent treatment for her injuries. The applicant alleged that she should, in accordance with BCMR decision 2014-104, be authorized two years of backdated active duty orders from March 2013 until she was medically retired in June 2015.²

¹ The applicant's medical doctor does not have the authority to allow the applicant to remain on active duty. The applicant's physician could only provide the applicant with a specific duty status, such as Fit For Full Duty (FFFD), Fit for Limited Duty (FLD), or Not Fit for Duty (NFD). The authority to order service members to active duty lies with the Coast Guard Personnel Service Center (PSC).

² BCMR Decision 2014-104 involved a service member who had been diagnosed with degenerative disc and joint disease that resulted in a surgery to his shoulder and foot and caused several herniated discs with severe back pain. The service member was erroneously given a FFFD status in 2012 and released from active duty, when in fact, he had disqualifying conditions that were diagnosed as early as 2008. A subsequent physical in 2012, where the service member was referred to an orthopedist, ultimately revealed that the applicant was not qualified for service/retention and had not been for some time. This case is distinguishable from the applicant's request for relief because the applicant was not given an erroneous fitness/duty status, nor has she alleged that she was given an erroneous status, but was found FLD at her request. The applicant was not found FFFD and allowed to return to work when she in fact had disqualifying conditions that rendered her NFFD. The applicant was placed on Medical Hold Orders for initial treatment in accordance with applicable Coast Guard policies until the applicant was given the FLD status. When it was determined that the applicant would not return to a FFFD status, she was appropriately and timely referred to a medical board and medically retired.

SUMMARY OF THE RECORD

The applicant entered into active duty on May 5, 1988, as an Ensign. On May 18, 1995, the applicant transferred to the Coast Guard Reserve, where she served in both the Individual Ready Reserve and Selected Reserve and continued to promote to Commander (O-5).

From October 1, 2011, through September 20, 2012, the applicant was serving on Reserve Active Duty orders pursuant to 10 U.S.C. § 12301(d).

On January 3, 2012, while on leave/liberty the applicant was injured after the ATV she was driving hit a hole in the ground and threw her over the front of the vehicle. This injury was determined to have been incurred in the LOD and was not the result of misconduct.

On October 1, 2012, the applicant was placed on Medical Hold Orders due to her continued need for medical treatment. The orders were set to expire on March 15, 2013.

On January 24, 2013, as a result of the injuries the applicant had sustained on January 3, 2012, she underwent surgery on her left shoulder.

On March 15, 2013, the applicant's Medical Hold orders ended and she was released from active duty.

On March 16, 2013, the applicant signed and initialed a CG-3307 form called a Reserve Incapacitation Benefits form ("RIB-1"), wherein she was counseled regarding the authorization of incapacitation benefits in the form of a Notice of Eligibility (NOE) for authorized medical care and treatment.³ Within this counseling page, the applicant was informed that if she refused to sign the NOE, she would not receive continued medical care/treatment or compensation. The text of the RIB-1 form appears as below. The applicant wrote her initials on the line in front of each of the informational entries and, at the end, when given the option of accepting or declining medical care for her injuries, she initialed the acceptance.

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. An 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 an NOE. There are two types of medically-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 the 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 the 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 § 12301 (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.

3/16/13: Counseled this date regarding authorization of reserve incapacitation benefits in the form of a Notice of Eligibility (NOE) for authorized medical care and treatment.

_____ I understand I am authorized medical care for an injury/illness (ICD9 codes 836.2 and 810.0) incurred in the line of duty while performing active duty (ADOS) from 01 October 2011 to 30 September 2012.

_____ I understand that I may be eligible for Incapacitation Pay IAW Chapter 6 of the Reserve Policy Manual.

_____ I understand that I may request a TONO for travel and transportation expenses associated with this NOE.

_____ I have been advised of the requirement to submit an updated physician's report form from my designated medical provider every 30 days to PSC-rpm via my command. I understand that failure to do so may result in the termination of my incapacitation benefits.

_____ I have been advised that my medical care/treatment will be coordinated through my servicing clinic.

_____ I understand that my NOE will not be approved, and is not in effect, until this signed acknowledgement is received by PSC-rpm-3.

Elect one option below:

_____ I accept receipt of subject NOE and understand the requirements and provisions as set forth.

_____ I decline receipt of subject NOE and understand that by declining, I will not receive medical care/treatment or compensation.

On March 18, 2013, the applicant was issued an NOE Authorization. The NOE formally notified the applicant that she was in a Fit for Limited Duty (FLD) status as a result of injuries denoted as ICD9 code(s) 836.2 and 810.0 incurred in the line of duty while performing active duty as directed by the applicant's orders from October 1, 2011, through September 30, 2012. The applicant was informed that she was entitled to care appropriate for the injury until it cannot be materially improved by further hospitalization or treatment or until separated via the PDES. Under this authorization, the applicant was eligible to request Reserve incapacitation pay for lost wages and income. According to the Coast Guard, there is no record showing that the applicant filed a request for incapacitation pay.

On August 13, 2013, the applicant underwent a second surgery on her shoulder. According to the applicant, following this surgery, her surgeon told her that any additional surgeries would not be advantageous.⁴

On September 13, 2013, the applicant's Coast Guard doctor referred her to a Medical Evaluation Board (MEB).

⁴ The applicant did not submit any medical documentation with her application.

On March 9, 2015, the applicant appeared before a Coast Guard Formal Physical Evaluation Board, which determined that the applicant could no longer perform the duties of her grade, rank or rate and recommended that she be medically retired with a 40% disability rating.

On May 6, 2015, the applicant received an email from a Coast Guard HS1 which put her on notice that she may be eligible for relief under BCMR decision 2014-104.

On June 26, 2015, the applicant was medically retired from the Coast Guard.

VIEWS OF THE COAST GUARD

On December 29, 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 afforded to the Coast Guard, nor has she shown that her signature on the RIB-1 NOE counseling form was anything other than her consent to leave active duty. According to the JAG, Article 6.A.6.b. of the Reserve Policy Manual, COMDTINST M1001.28A, permits a reservist “who would otherwise be continued on active duty at the expiration of the orders because of an injury, illness, or disease incurred or aggravated in the line of duty, **but who elects to leave active duty** (e.g., to resume civilian employment or education) shall be entitled to medical and dental care...” (emphasis added).

The JAG argued that the consensual aspect of that policy is also reflected in other authorities such as the Reserve Component Incapacitation System Management, DoDI 1242.2, and Article 1.B.11.f.1. of the Military Separations Manual, COMDTINST M1000.4. The JAG claimed that the Coast Guard Reserve Incapacitation Benefits form, or RIB-1, is the standard form used by the Coast Guard to indicate that a member desires to be released from active duty. The JAG argued that apart from the applicant’s allegation, she has provided no evidence that her release from active duty at the time she signed the RIB-1 was anything but consensual. Furthermore, the JAG explained that the applicant’s affiliation with the Coast Guard continued until her medical separation on June 26, 2015. During that time, the JAG stated, the applicant continued to have access to Coast Guard administration, assigned counsel, and a formal medical hearing. The JAG argued that all of these opportunities underscore the consensual nature of her election to leave active duty. Accordingly, the JAG claimed that the applicant’s release from active duty was not an error.

The JAG argued that the Board’s 2014-104 decision is not applicable to the applicant’s case because here the applicant made a voluntary and intelligent acknowledgement of her NOE status when she signed and initialed the RIB-1. According to the JAG, this is markedly different from the facts contained in 2014-104, where the applicant was released from active duty based on an erroneous separation from Extended Active Duty (EAD) physical examination. In 2014-104, the Board found, by a preponderance of the evidence, that the applicant was erroneously found FFFD,⁵ when he in fact had disqualifying conditions for retention. The JAG argued that in the

⁵ Coast Guard regulations use both FFD and FFFD to denote that a service member is Fit for Full Duty.

instance case, the applicant for unknown reasons elected to be released from active duty and was granted an NOE with incapacitation pay benefits, in addition to authorized medical expenses reimbursement.

The JAG argued that the Board should grant alternate relief and that in accordance with the applicant's NOE, she should be reimbursed for any expenses she incurred that were reimbursable under the NOE.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 31, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. The Chair received the applicant's response on January 28, 2021.

The applicant alleged that upon returning to her office in 2013, she was told that she was being released from active duty. According to the applicant, she had not yet begun her physical therapy and was still in a considerable amount of pain. In addition, she stated that her surgeon informed her that she may need an additional surgery. The surgeon also wanted to give the applicant's shoulder time to heal and complete physical therapy. The applicant alleged that she communicated these things to her supervisor but was told she would have to do that after being discharged from active duty.

The applicant claimed that she did not want to be released from active duty and believed it was inappropriate given that she was injured while on active duty. According to the applicant, in an effort to remain on active duty, she met with local LCDR P, who told her that she had no choice and that she would not be retained on active duty while she completed her physical therapy treatments and subsequent surgery. The applicant claimed that after receiving this news from her chain of command, she contacted the Headquarters Reserve office, which informed her that it was up to her Command whether they wanted to keep her on active duty or not while she went through her follow up treatments and surgeries. The applicant alleged that she was told that she had no other recourse and that she would be discharged from active duty.

The applicant alleged that there is no documentation that shows she requested to be taken off active duty, and she did not request to be taken off of active duty. The applicant stated that the NOE form she signed on March 16, 2015, was explained to her as the document that would entitle her to receive medical care for her injury after her discharge. The applicant explained that she was told that the Coast Guard would pay for her medical care if she signed the NOE form and that if she refused to sign it, her future medical expenses would not be covered. The applicant argued that the NOE form she signed does not state that she elected to be taken off of active duty as implied in the Coast Guard's advisory opinion. The form she signed consists only of the requirements that needed to be met in order for her to continue getting medical care for her injury through the Coast Guard. The applicant stated that she abided by the terms of the NOE form and continued her treatments as outlined in the NOE.

The applicant explained that even though the Coast Guard's advisory opinion claimed that she did not apply for incapacitation pay, she did apply for benefits but was unable to work due to

significant pain. The applicant alleged that she contacted Coast Guard Headquarters by telephone to discuss how to apply for incapacitation pay immediately after she was released from active duty, but she was told that since she was listed as FLD and could not demonstrate a loss of civilian pay, she did not qualify for incapacitation pay. According to the applicant, she had been on active duty orders for four consecutive years and did not have a civilian job to return to. The applicant alleged that because of her injury, she was unable to pursue new employment. The applicant explained that in January 2018, she spoke to the Branch Chief of PSC, who told her the same information—that because she was FLD and could not demonstrate a loss of civilian pay, she did not qualify for incapacitation pay. However, the PSC Branch Chief did inform the applicant that she could apply for lost income from drill pay. The applicant explained that she applied for incapacitation pay for the lost income from drills, which she received in March 2018.

The applicant asked the Board to correct her record by extending her active duty orders from her initial release from active duty in March 2013 to her medical retirement in June 2015 and reimbursing her for all backpay and allowances she was entitled to.

To support her application, the applicant submitted two letters from former coworkers who stated that the applicant did not want to leave active duty. In addition, she provided an email chain from the Coast Guard Pay and Personnel Center documented the incapacitation pay benefits the applicant was entitled to. The applicant received more than thirty thousand dollars in incapacitation pay over a two-year period.

APPLICABLE LAW AND POLICY

Title 37 U.S.C. § 204(h)(1) provides that a member of a Reserve component of a uniformed service who is physically able to perform his military duties, is entitled, upon request, to a portion of the monthly pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for each month for which the member demonstrates a loss of earned income from nonmilitary employment or self-employment as a result of an injury, illness, or disease incurred or aggravated –

(A) in line of duty while performing active duty;

Title 10 U.S.C. § 12301(d) states, “At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member.”

Coast Guard Regulations

Article 5.D. of the Reserve Policy Manual, COMDTINST M1001.28B, provides the necessary guidance on duty status for Reserve members. It states the following 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).

Chapter 6 of the Reserve Policy Manual (RPM), COMDTINST M1001.28A (July 2006), provides the following guidance on the Reserve incapacitation system:

Chapter 6.A.6. states the following:

a. A reservist on active duty under a call or order to active duty specifying a period of 31 days or more, who incurs or aggravates an injury, illness, or disease in the line of duty *shall*, with the member's consent, be continued on active duty upon the expiration of call or order to active duty until the member is determined **FFFD** or the member is separated or retired as a result of a PDES determination. Commands shall notify Personnel Command (CGPC-rpm) and the servicing ISC (pf) when a reservist is continued on active duty upon the expiration of call or order to active duty due to incapacitation, and shall notify them again when the reservist is determined FFFD and released from active duty or is separated or retired as a result of a PDES determination. **Also see Section 6.A.6.c below.**

...

Article 6.B.3. Notice of Eligibility (NOE) for Authorized Medical Care.

a. A Notice of Eligibility (NOE) for authorized medical treatment is issued to a reservist following service on active duty to document eligibility for medical care as a result of an injury, illness, or disease incurred or aggravated in the line of duty. An NOE recipient shall not be transferred from a SELRES assignment while his or her incapacitation is unresolved, unless the member specifically requests transfer for another reason unrelated to the incapacitation, as authorized. The command shall either schedule the reservist for IDT in a limited duty status (ADT, ADOT, or mobilization must be deferred until the member is fit for full duty) or reschedule drills for future dates when the member will be fit for full duty.

b. Servicing ISC (pf)s will issue each NOE for a period not to exceed three months and may authorize reimbursement for travel incident to medical and dental care in connection with the NOE. A sample NOE is provided in Figure 6-2. Commands requesting issuance of NOEs shall provide ISC (pf)s with the same information that is outlined in Section 6.B.2.b of this chapter, as soon as possible but not later than three working days after the initial medical evaluation and prognosis is completed. Commands shall immediately notify the servicing ISC (pf) and copy Personnel Command (CGPC-rpm) for termination of the NOE when a member is found FFFD, 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.

c. Upon determination that the member will require treatment beyond the first three-month period of the NOE, commands shall notify the servicing ISC (pf) and may request extensions in one-month increments. Requests for NOE extensions shall indicate whether or not a medical board has been initiated. ISC (pf)s may not authorize extensions to allow an NOE to exceed six months.

DoDI 1241.2

This DoD Instruction applies to the Coast Guard at all times, as the JAG admitted. It implements policies, assigns responsibilities, and prescribes procedures to authorize medical and dental care for members of the Reserve components who incur or aggravate an injury, illness, or disease in the line of duty and provide pay and allowances to those members while being treated for or recovering from a Service-connected injury, illness, or disease, or who demonstrate a loss of earned income as a result of an injury, illness, or disease incurred or aggravated in the line of duty.

Paragraph 6 of the Instruction, “Procedures,” provides the procedures for processing reservists who have been injured in the line of duty while on either active or inactive duty.

Paragraph 6.1. concerns the right to health care and states, “6.1.1. A member who incurs or aggravates an injury, illness, or disease in the line of duty is entitled to medical and/or dental treatment as authorized under 10 U.S.C. 1074 or 1074a (reference (b)) in an approved medical treatment facility as provided under Section 1074 of reference (b) until terminated under subparagraph 6.3.3., below.”

Paragraph 6.2. concerns the right to pay and allowances and states, “6.2.1. A member of the Reserve component 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, and DoD 7000.14-R, Volume 7A (references (c) and (d)). The amount of pay and allowance authorized for the member is determined in accordance with table 57-3 of reference (d).”

Paragraph 6.3.2.2. states, “In making the determination whether pay and allowances should continue beyond the initial 6 months in the case of a member described in subparagraph 6.2.1.2.1., above, the Secretary concerned shall consider if the member has resumed his or her civilian occupation, undertaken a new position in the same occupation, or taken a position in a new occupation. These factors are to help guide the Secretary in determining if it is in the interest of fairness and equity to continue benefits under 37 U.S.C. 204(h) (reference (c)).”

Paragraph 6.6.3. of the Instruction concerns the rights of reservists who are injured while serving on active duty for a period of more than 30 days. It includes the following provisions:

6.6.3.2. A Reserve component member on active duty under a call or order to active duty specifying a period of 31 days or more, who incurs or aggravates an injury, illness, or disease in the line of duty shall, with the member's consent, be continued on active duty upon the expiration of call or order to active duty until the member is determined fit for duty or the member is separated or retired as a result of a Disability Evaluation System determination.

6.6.3.3. A member on a call or order to active duty specifying a period of 31 days or more, who would otherwise be continued on active duty at the expiration of the orders because of an injury,

illness, or disease incurred or aggravated in the line of duty, but who elects to leave active duty, shall be entitled to medical and dental care for the Service-connected medical or dental condition at an authorized medical treatment facility in accordance with Section 1074a of reference (b) upon release from active duty until benefits are terminated under subparagraph 6.3.3., above. The member shall also be entitled to pay and allowances under 37 U.S.C. 204(g) or 204(h) (reference (c)) upon release from active duty until benefits are terminated under subparagraph 6.3.3., above.

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 her 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 preponderance of the evidence shows that the applicant discovered the alleged error in her record on May 6, 2015, when she received an email from an HS1 informing her that she may have been entitled to benefits she did not receive. Therefore, 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).

3. The applicant alleged that pursuant to Coast Guard regulations and DoDI 1241.2, she should have been kept on active-duty orders following her January 3, 2012, LOD injury. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁶ 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."⁷

4. Both federal statutes and military policy make distinctions between (a) reservists who incur injuries in the line of duty (LOD) while serving on inactive duty (drills) or short periods of active duty and (b) reservists who incur LOD injuries while serving on active duty orders of more than 30 days' duration. Unless called to active duty voluntarily, the former are entitled to military health care for their LOD injuries and incapacitation pay to make up for civilian or military (drill pay) income lost as a result of those injuries,⁸ and these benefits are made available to the reservist through a Notice of Eligibility, or NOE. The latter—reservists with LOD injuries incurred

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ 37 U.S.C. § 204(h); Article 6.2.1. of DoDI 1241.2.

while on active duty for a period of more than 30 days—are entitled to remain on active duty until they are fit for full duty (FFD), are medically separated under the Physical Disability Evaluation System, or voluntarily elect to leave active duty.⁹ Here, as explained below, there is no question that the applicant was a Reserve officer serving on one-year active duty orders when she incurred her LOD injury on January 3, 2012.

5. The record shows that the applicant was issued a Standard Travel Order on September 30, 2011, wherein she was ordered to active duty for a period of one year from October 1, 2011, through September 30, 2012. According to the applicant, it was her fourth consecutive year serving on active duty orders, and the Coast Guard did not deny it. But on January 3, 2012, the applicant's left shoulder was severely injured in an ATV accident, and her injury was determined to have been incurred in the LOD. The applicant's orders were set to expire on September 30, 2012, but on October 1, 2012, the applicant was issued orders that placed her on a Medical Hold under 10 U.S.C. § 12301(h) so that she could continue to receive medical treatment for her shoulder injury. On January 24, 2013, the applicant underwent surgery on her shoulder to repair damage caused by her January 3, 2012, LOD injury and then began convalescing. The Medical Hold Orders were set to expire on March 15, 2013. Sometime in early March 2013,¹⁰ the applicant asked to be allowed to do deskwork and her physician found her to be fit for limited duty (FLD)¹¹ so she could return to her unit to do deskwork. The applicant alleged that upon returning to work and against her wishes, she was promptly told that she was being released from active duty and returned to Reserve duty.

6. Article 6.A.6.a. of COMDTINST M1001.28A states:

a. A reservist on active duty under a call or order to active duty specifying a period of 31 days or more, who incurs or aggravates an injury, illness, or disease in the line of duty *shall*, with the member's consent, be continued on active duty upon the expiration of call or order to active duty until the member is determined **FFFD** or the member is separated or retired as a result of a PDES determination. Commands shall notify Personnel Command (CGPC-rpm) and the servicing ISC (pf) when a reservist is continued on active duty upon the expiration of call or order to active duty due to incapacitation, and shall notify them again when the reservist is determined FFFD and released from active duty or is separated or retired as a result of a PDES determination. Also see Section 6.A.6.c below.

Article 6.6.3.2. of DoDI states:

A Reserve component member on active duty under a call or order to active duty specifying a period of 31 days or more, who incurs or aggravates an injury, illness, or disease in the line of duty *shall, with the member's consent*, be continued on active duty upon the expiration of call or order to active duty until the member is determined fit for duty or the member is separated or retired as a result of a Disability Evaluation System determination.

Accordingly, pursuant to joint military policy and Coast Guard regulations, the applicant's retention on active duty was not permissive but mandatory as long as the Coast Guard had the

⁹ 10 U.S.C. § 12301(h); Article 6.A.6. of the Reserve Policy Manual, COMDTINST M1001.28A; Article 6.6.3.2. of DoDI 1241.2.

¹⁰ No medical records were provided, so the exact date the applicant was found FLD is unknown.

¹¹ The applicant stated that her FLD was initiated at her request.

applicant's consent to remain on active duty, which the Coast Guard had. Therefore, under the above-quoted policies, the Coast Guard was required to retain the applicant on active duty until she was found FFFD or found NFD and separated as a result of a PDES determination unless she consented to being released from active duty.

7. The Coast Guard argued that removing the applicant from active duty was not erroneous or unjust because the applicant elected to leave active duty under Article 6.6.3.3. of DoDI 1241.2 and Article 6.A.6.b. of COMDTINST 1001.28A, when she signed and initialed her RIB-1 form informing her about the NOE. According to the JAG, "CG-3307 Reserve Incapacitation Benefits (RIB-1) is the standard form used by the Coast Guard to indicate that a member desires to be released from active duty." However, nothing in the RIB-1 form states or even suggests that a servicemember's initials and signature represent an election or consent to be released from active duty. The only option presented on the form is for the servicemember to indicate whether she wants to accept or decline the NOE to receive military health care after she is released from active duty.

In fact, the language on the RIB-1 form refutes the JAG's claim that the form can be used to indicate a member's consent to being released from active duty. On the form, the member is required either to accept the NOE for military health care or decline it, and to decline it, the member must initial this statement: "I decline receipt of subject NOE and understand that by declining, I will not receive medical care/treatment or compensation." Because initialing the form to decline the NOE means that the member will not receive medical care/treatment, then initialing the form to decline the NOE cannot mean that the member will remain on active duty because members on active duty receive medical care and treatment. Thus, the form presents the member with the options of leaving active duty with an NOE for medical care or leaving active duty without an NOE for medical care. The form provides no option for remaining on active duty or even for objecting to being released from active duty, and the JAG's claim that the applicant indicated her consent to being released from active duty by initialing and signing the RIB-1 form is clearly erroneous.

8. Furthermore, the applicant claimed that she was told she had no choice but to leave active duty, and other than the RIB-1 form, addressed above, the Coast Guard submitted nothing to refute this claim. Although the JAG argued that the Board should afford the Coast Guard the presumption of regularity that the applicant's consent was obtained before it released her from active duty, the Board finds substantial evidence in the record supporting the applicant's claim that she did not want to be released from active duty: the applicant was a single mother with significant injuries who had been on active duty for four years, was convalescing from surgery, and had no civilian job to return to. The applicant also presented two letters from former coworkers who stated that the applicant did not want to leave active duty. Moreover, the applicant asked her physician to find her FLD so that she could return to deskwork at her unit, and there is no reason for her to have made that request if she wanted to be released from active duty. In addition, had she refused to sign the RIB-1 form to accept the NOE, the medical and financial consequences for her would have been extreme. Knowing that she was being released from active duty, the applicant could not afford to refuse to sign and submit the RIB-1 form to get the NOE. Therefore, given that the Coast Guard failed to present any evidence to support the claim that the applicant consented or "elected" to be released from active duty in March 2013, the Board finds that the preponderance of the

evidence shows that the applicant did not consent to being released from active duty in March 2013 but was released from active duty without gaining her consent.

9. As explained above, the applicant incurred a significant LOD injury while she was serving on active duty for a year from October 2011 through September 2012. And Article 6.A.6.a. of COMDTINST M1001.28A states that “[a] reservist on active duty under a call or order to active duty specifying a period of 31 days or more, who incurs or aggravates an injury, illness, or disease in the line of duty *shall*, with the member's consent, be continued on active duty upon the expiration of call or order to active duty until the member is determined FFFD or the member is separated or retired as a result of a PDES determination.” (Emphasis added.) Because the preponderance of the evidence supports the applicant’s claim that she did not consent to being released from active duty in March 2013, the Board finds that the applicant has proven, by a preponderance of the evidence, that the Coast Guard committed an error and injustice when they released her from active duty without her consent in March 2013. Therefore, she is entitled to relief. Specifically, she is entitled to have her record corrected to show that she was not released from active duty and was instead retained on active duty on a medical hold until her PDES processing was complete on June 25, 2015. She should receive all back pay and allowances she is due as a result of this correction.

10. The record shows that in 2018, the applicant applied for and received incapacitation pay for the inactive duty drills she was unable to perform due to her January 3, 2012, LOD injury. Since the Board finds that the applicant has proven, by a preponderance of the evidence, that she was erroneously released from active duty, the incapacitation pay she received may be offset against the back pay and allowances she is due as a result of this decision.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of CDR [REDACTED] USCGR (Retired), for correction of her military record is granted. The Coast Guard shall correct her record to show that she was not released from active duty in March 2013 and was instead retained on active duty on Medical Hold orders until her medical retirement on June 26, 2015. The Coast Guard shall pay her the back pay and allowances due as a result of this correction and may offset any incapacitation pay she received for the period March 16, 2013, through June 25, 2015.

May 12, 2023

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.05.15 09:12:49 -04'00'

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.05.15 09:43:37 -04'00'

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Date: 2023.05.15 10:28:52 -04'00'