

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-072

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on January 19, 2007, upon receipt of the completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 8, 2008, 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 asked the Board to correct his record to show that he was advanced from YN2/E-5 to YN1/E-6 on September 1, 2006. He further asked the Board to remove from his record two CG-3307s ("Page 7s") dated October 12, 2005, and November 27, 2006, which documented his placement on weight probation.

The applicant stated that in the summer of 2005, he suffered an unexplained weight gain even though he exercised four or five times per week and did not overeat. In October 2005, he was found to be about 50 pounds overweight during a semiannual weigh-in at his command and was placed on weight probation. Contrary to the Coast Guard's weight and fitness regulations in COMDTINST M1020.8F, he alleged, no blood tests were performed to determine whether an underlying medical condition was causing his obesity.

The applicant alleged that he quickly enrolled in an Army Lean Program. However, because of medications he was taking for post-traumatic stress disorder (PTSD), his doctor, CAPT R, told him that the weight-loss program "would be detrimental to my recovery and filled out a CG-5050 (Command Medical Referral Form) requesting an abeyance [of the weight probation] be granted." In December 2005, the Operational Medicine and Medical Readiness Office at the Coast Guard Personnel Command (CGPC) denied the waiver request and ordered him to undergo a body fat analysis.

The applicant alleged that in response to CGPC's order, his command performed the body fat analysis but did so improperly by measuring his waist with the tape measure on top of his clothes and then subtracting an inch from the total. As a result of the incorrect measurement, CGPC ordered that he be discharged. However, after a new measurement was taken, he was placed on weight probation. The starting date for his probationary period was set at October 12, 2005, and the end date was April 28, 2006.

The applicant stated that after placing him on probation, his command did not assign him a health coordinator for two months. Although he hired a personal trainer and continued to see a dietician and counselor at the Lean Program, he was unable to reduce his body fat significantly. In April 2006, when it became clear that he would not reach the weight goal by the end of his probation, Dr. R ordered a medical board to be convened to determine his fitness for continued service. Then another doctor, Dr. V, finally ordered blood tests to determine whether there was an underlying medical problem causing his inability to lose weight. On July 28, 2006, more blood tests were ordered because the first set had indicated the existence of an abnormality.

On August 7, 2006, Dr. R told him that he had hypothyroidism, which made it extremely difficult for him to lose weight. Dr. R began treating him with the minimum dosage of 0.07 mg of Levetirothyroine because the EKG equipment was broken so they could not determine whether he could tolerate a higher dose. After the EKG was performed on August 25, 2006, he was prescribed 0.1 mg of Levetirothyroine.

On August 31, 2006, a third class petty officer at his command measured his body fat at 27%, so his command decided not to report the matter to CGPC because they thought that with the help of the Levetirothyroine he would attain 25%—the maximum permitted—fairly quickly. However, on September 15, 2006, a chief warrant officer performed his body fat measurements and found him to be at 30%, even though he had lost 30 pounds since October 12, 2005. Therefore, Dr. R completed a new CG-5050 waiver request, reporting that the applicant's undiagnosed thyroid condition and other medications had prevented him from losing sufficient weight since October 12, 2005, to meet the fitness standards.

Regarding his advancement, the applicant stated that he had taken the service-wide examination (SWE) in November 2005 and was number 38 on the advancement list. Although the cut-off for guaranteed advancement was initially 36, it was later lowered below 38, so he did not take the SWE in the spring or fall of 2006. On August 25, 2006, he learned that he was scheduled to advance on September 1, 2006, but that his command was going to withhold the advancement "until it [could] be shown that [his] thyroid condition was the cause of [his] not being in weight compliance." If Dr. R's waiver request had been approved, his command would have been able to advance him, but on November 27, 2006, CGPC denied the waiver, finding that his "medical condition is stabilized with the use of medications and that he can safely lose weight to comply with Coast Guard weight standards." However, because he was unable to lose enough weight or body fat to meet the fitness standards by December 16, 2006, he was not advanced off the list before it expired. Therefore, to advance, he must take the SWE again.

The applicant argued that the withholding of his advancement was unfair because the Coast Guard had failed to conduct the blood tests required in October 2005 and so failed to

timely detect and treat his hypothyroidism. He stated that his health and weight loss records clearly prove that if his condition had been timely diagnosed and treated, he would have been in compliance with the Coast Guard's fitness standards in time to be advanced on September 1, 2006. Therefore, he asked the Board to advance him to YN1 as of September 1, 2006.

SUMMARY OF THE RECORD

On February 22, 1999, the applicant enlisted in the Coast Guard. His weight upon entry is not in the records before the Board. However, a Page 7 prepared for his record on March 31, 2000, states that he weighed 230 pounds and his percentage body fat was 19%. The Page 7 noted that, at age 25 and standing 6'2" tall, the applicant's maximum allowable weight was 230 pounds. Medical records prepared pursuant to the applicant's treatment for PTSD, obesity, thyroid function, and various colds, flus, etc., show the following measurements:

<u>Date</u>	<u>Weight in pounds</u> ¹	<u>Body Fat %</u> ²	<u>TSH Level</u> ³
March 2000	230		
February 2003	225		
January 2004	259		1.13
February 2004	257		
October 2004	244		3.86
March 2005	248		
April 2005	242	25	
May 2005	267		
June 2005	265		
July 2005	255		
October 2005	271	30	
November 2005	279	29	
December 2005	273	26.7	
January 2006	278	29.4	
February 2006	274	28.6	
March 2006	279	29.9	
April 2006	276	30.2	
May 2006	287	30.6	
July 2006	278	29.9	5.159
August 2006	272	29.7	5.613
September 2006	267	29.7	1.509
October 2006	259	28.6	
November 2006	249	27.1	
December 2006			1.516
January 2007	< 240		
March 2007	242	25	
April 2007	239		

¹ These are just some of the weight measurements in the applicant's record. The measurements vary significantly from week to week. Many of the weight measurements in his record were taken in his uniform and shoes or boots.

² Enclosure 5 to COMDTINST M1020.8E provides that a man's body fat percentage is determined by subtracting the circumference of his neck from the circumference of his abdomen at the navel, measuring his height to the nearest half-inch, and checking a chart. (In COMDTINST M1020.8F, these instructions appear in Enclosure 4.)

³ The level of thyroid stimulating hormone (TSH) in the blood is an indicator of thyroid function. In January 2004, the applicant's test results stated that the normal range of TSH was 0.465 to 4.680 uIU/ml. Beginning in October 2004, the test results stated that the normal range of TSH was 0.35 to 5.10 uIU/ml.

In February 2004, the applicant was referred to a diet and exercise program after weighing in at 257 pounds. A blood test indicated that his TSH level was within normal limits.

In October 2004, the applicant sought treatment for depression, noting that a friend had committed suicide and that he had been hospitalized in 2001 due to a suicidal gesture. He was prescribed Ambien and Celexa, an antidepressant. A blood test indicated that his TSH level was within normal limits.

On January 13, 2005, a doctor noted that the applicant had also been prescribed Wellbutrin. Medical records dated from March through June 2005 indicate that a psychiatrist was prescribing Ambien, Wellbutrin, and a medication spelled variously in his records as beneflexin, beneflexin, or benaflexin for the applicant's depression.⁴

On April 1, 2005, the applicant acknowledged a Page 7 stating that he weighed 242 pounds and his percentage body fat was 25%. The Page 7 noted that, at age 30 and with a height of 6'2", the applicant's maximum allowable weight was 242 pounds. The Page 7 encouraged him to "complete a wellness profile and aggressively pursue your basic fitness plan."

On June 30, 2005, the applicant expressed concern about his weight gain. He was referred to the Army's Lean Program.

On July 21, 2005, a medical record noted that the applicant was taking Ambien, Wellbutrin, Effexor,⁵ and Remeron for his psychiatric symptoms. He continued to take Effexor through January 2007.

On September 29, 2005, Dr. R noted that the applicant would discontinue Remeron because he had experienced excessive fatigue and begin taking Nortriptyline.

On October 12, 2005, the applicant's physician, Dr. R, signed a Command Medical Referral Form, in which he noted that during the unit's semiannual weigh-in, the applicant weighed 271 pounds, which, Dr. R wrote, was 29 pounds over the maximum permitted for a man of the applicant's age, height, and wrist measurement. His body fat was measured at 30%. Dr. R stated that the applicant's PTSD was an underlying medical condition that had contributed to his weight gain but was now "aggressively being treated" and that it was safe and feasible for him to lose the excess weight although his PTSD medication was known to increase a person's appetite. He noted that the applicant was already enrolled in the Lean Program.

On November 2, 2005, the applicant acknowledged a Page 7 dated October 12, 2005, stating that his probationary period was to be held in abeyance pending his return to a fit for full duty status, when it would be restarted "with the length of the probationary period based on your current weight when found fit for full duty or when the abeyance is lifted." The Page 7 noted

⁴ An internet search of these spellings and various pharmaceutical websites produced no results for a psychiatric prescription drug by this name or any similar name. It may be that the doctor meant venlafaxine, the generic name for Effexor.

⁵ The generic name for Effexor is venlafaxine.

that if he failed to comply with the fitness standards by the end of his probationary period, he would be separated.

On November 4, 2005, the applicant's command asked CGPC to approve the abeyance of his weight probation. On November 18, 2005, CGPC informed the command that because the applicant's excess weight exceeded the amount he could lose safely within 36 weeks, Coast Guard regulations required that he be discharged from active duty. CGPC also noted that the applicant's medical condition did not prevent him from losing weight safely. On December 22, 2005, however, CGPC informed the command that the applicant was not subject to discharge because his body fat had been measured improperly during the October 12, 2005, weigh-in. CGPC stated that on December 6, 2005, the applicant's body fat had been correctly measured and he was eligible for weight probation.

On January 10, 2006, the applicant acknowledged a Page 7 prepared for his record on December 28, 2005. The Page 7 stated that the measurements taken on October 12, 2005, had been inaccurate and yielded conflicting results. Because remeasurement on December 6, 2005, showed that the applicant was 45 pounds overweight and had 32% body fat, he was eligible for weight probation. The Page 7 stated that his probationary period had begun on October 12, 2005, and that he needed to lose 45 pounds or decrease to no more than 25% body fat by April 26, 2006, to avoid separation.

On January 23, 2006, Dr. V, a clinical psychologist for the Army's Lean Healthy Lifestyle Program, reported to Dr. R that the applicant had not lost weight although he was attending all his appointments and achieving his nutritional and exercise goals. He also wrote that "there is no indication of any medical barriers to further weight and body fat loss, but [the applicant] is due for further diagnostic testing of metabolic function over his next few sessions."

On February 15, 2006, CGPC denied a request from the applicant's command to extend his probationary period because, although his medication might increase his appetite, it would not cause weight gain independent of his food intake. CGPC stated that a medical review of the applicant's record had concluded that he suffered from no underlying conditions that would prevent him from losing the required amount of weight through a proper diet and exercise. CGPC noted that if the applicant failed to meet the fitness standards by the end of his probationary period on April 26, 2006, he would be subject to discharge.

On March 8, 2006, Dr. V reported to Dr. R that the applicant thought his failure to lose weight was a side-effect of his PTSD medications. On March 22, 2006, Dr. R noted that the applicant was going to be evaluated by a medical evaluation board.

The applicant's command failed to prepare a Page 7 documenting the end of his weight probationary period on April 26, 2006. Although the applicant had not met the fitness standards, he was not discharged.

On July 5, 2006, Dr. V noted that the applicant had lost 9 pounds since his prior monthly weigh-in and so weighed 278 pounds. The applicant had begun a strength-training program five

days per week. Dr. V ordered blood tests since tests performed by the Coast Guard were “not acknowledged” by the Coast Guard clinic.

On July 27, 2006, a blood test of the applicant’s thyroid function showed that his TSH level was high at 5.159, whereas the normal range was stated to be between 0.35 and 5.10. On August 1, 2006, the test was repeated and the result showed that his TSH level was 5.613.

On August 17, 2006, Dr. V noted that the applicant weighed 272 pounds and had lost 6 pounds since his prior weigh-in, but that his body fat percentage had not changed significantly. Dr. V noted that the applicant had been diagnosed with hypothyroidism and so started taking synthroid medication.

On August 22, 2006, Dr. R signed a Command Medical Referral Form stating that the applicant’s hypothyroidism constituted an underlying medical condition causing his weight gain; that he had been under treatment since early August; and that it was safe for the applicant to diet and exercise.

Also on August 22, 2006, the Commandant issued ALCGENL 114/06, which announced the names of personnel who were eligible for advancement as of September 1, 2006. The applicant’s name was on the list for advancement to YN1.

On August 28, 2006, the Personnel Services Center informed the applicant’s command that his advancement was being withheld under Article 5.C.25.c.1.f. of the Personnel Manual, but that if he regained eligibility prior to the expiration of the advancement list on December 16, 2006, he could be advanced.

On September 13, 2006, Dr. V noted that the applicant weighed 267 pounds and had lost 5 pounds since his last weigh-in. However, his body fat percentage had not changed significantly. A blood test taken in September 21, 2006, showed that his TSH level had fallen to 1.509, well within normal limits.

On October 13, 2006, Dr. V reported that the applicant weighed 259 pounds, his body fat had decreased, and “he showed an increase in lean body composition.” On November 19, 2006, Dr. R reported that the applicant had continued exercising and weighed 249 pounds.

On November 27, 2006, CGPC informed the applicant’s command that their November 9, 2006, request for an abeyance for the applicant’s weight probation was denied because medication had stabilized his thyroid function. CGPC instructed the command to place the applicant on weight probation as of October 27, 2006, because he was 19 pounds overweight and had 28% body fat.

On November 27, 2006, the applicant signed a Page 7 acknowledging his new weight probationary period from October 27, 2006, to March 9, 2007. The Page 7 indicated that he weighed 253 pounds and had 28% body fat and needed to lose 19 pounds or drop to 25% body fat or he would be subject to discharge.

On November 27, 2006, the applicant sent an email message to Dr. R asking him to provide a letter stating that no thyroid test was performed in October 2005 and that if his hypothyroidism had been discovered in October 2005, he would likely have been treated and would have been in compliance with the fitness standards by September 1, 2006, so that he could have advanced to YN1. On November 28, 2007, Dr. R sent the applicant an email in which he stated the following:

I reviewed your chart. You were screened for exceeding your MAW in Jan 04 and that prompted a dietician referral (the thyroid screen was normal). We evaluated you this past year for obesity and continued you in the Lean Program. The screening overlooked the possibility of Thyroid Disease (despite the family history). The thyroid screening was completed some time after the oversight. Your thyroid function was diminished and was a clear reason (coupled with several of your medications for PTSD) for weight gain and inability to shed the weight. The correction of the hypothyroidism culminated in an unprecedented recent weight loss.

I agree that the oversight affected your status. The diagnosis of hypothyroidism would have negated your entry into the weight program.

On December 4, 2006, a Physical Evaluation Board recommended that the applicant be retained on active duty. The recommendation was approved on March 7, 2007.

On December 13, 2006, the applicant's TSH level was measured at 1.516.

On January 3, 2007, Dr. R reported that the applicant weighed less than 240 pounds.

On March 1, 2007, the applicant's CO entered a Page 7 in his record stating that he had met Coast Guard fitness standards during the probationary period by achieving 25% body fat.

On March 21, 2007, an endocrinologist reported that the applicant weighed 242 pounds and had a BMI of 31. She noted that his TSH was 3.86 (within normal limits) in October 2004 but 5.16 in August 2006. Since beginning synthroid medication, his TSH had dropped to 1.5 and his weight had initially dropped but then "plateaued at about 10 lbs. above goal." She noted that his maternal grandmother and great grandmother had had hypothyroidism, and that his hypothyroidism was likely the cause of his past weight gain since he was losing weight with the synthroid medication. She also noted, however, that his PTSD medications, Effexor and Nortriptyline, "are known to cause weight gain mediated by both increased appetite and mechanisms independent of food intake that are not well understood." She recommended that his mental health provider consider changing from Effexor to an alternative such as Prozac "that might have less possibility of weight gain as a side-effect."

On March 28, 2007, Dr. R noted that the endocrinologist had reported that the applicant's medications, Nortriptyline and Effexor, may have caused his weight gain "independent of appetite and caloric intake."

VIEWS OF THE COAST GUARD

On October 4, 2007, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board grant partial relief by correcting the applicant's record to show that his weight

probation was held in abeyance on August 22, 2006; that he advanced to YN1 on September 1, 2006; and that he is entitled to back pay and allowances. In recommending this relief, he adopted the findings and analysis provided in a memorandum on the case by CGPC.

CGPC stated that in early November 2005, the applicant's command held his weight probationary period in abeyance without proper authority. CGPC rescinded the improper abeyance on November 18, 2005, because his doctor reported that he was able to lose weight safely despite his medical conditions and medications, and ordered the applicant's separation because his measurements indicated that he was not eligible for weight probation. However, on December 22, 2005, based on new body fat measurements, the applicant was granted a 28-week probationary period.

CGPC denied that COMDTINST M1020.8F or any other regulation requires the Service to conduct any particular kind of medical test when a member is found not to comply with the fitness standards. Instead, the member's physician determines what tests to conduct based upon the member's medical history and responses to questions. In the applicant's case, Dr. R apparently did not find screening for thyroid function to be warranted in October 2005. CGPC noted that the applicant's TSH level had been well normal limits in October 2004.

CGPC stated that on February 15, 2006, the applicant's command requested suspension of his probation, but CGPC denied the request because although the applicant's medication might increase his appetite, it would not cause weight gain *per se* and there were "no other underlying medical conditions that would prohibit [him] from losing the required weight." However, in August 2006, testing did reveal an underlying medical condition that might have contributed to his excess weight: hypothyroidism.

CGPC stated that on November 21, 2006, CGPC again denied a request from the applicant's command that his weight probation be held in abeyance because blood tests conducted on September 21, 2006, had shown that his thyroid function had been normalized with medication. Therefore, on November 27, 2006, the applicant was again placed on weight probation and was required to lose 19 pounds or drop to no more than 25% body fat by March 9, 2007. CGPC stated that the applicant met the standards by achieving 25% body fat on March 1, 2007.

In support of these allegations, CGPC submitted a copy of an email from the Office of Military Personnel (OMP), which reviews abeyance requests. OMP stated that hypothyroidism is known to cause weight gain and so if a command submits evidence supporting a diagnosis of hypothyroidism and the member's hormone levels have not yet been stabilized, a medical abeyance will be authorized. OMP indicated that abeyances of three months or less are normally granted for hypothyroidism. OMP stated that in the applicant's case an abeyance was not granted when his command requested it in November 2006 because, although he had been diagnosed with hypothyroidism, his TSH level had already been stabilized and he was losing weight, so an abeyance was deemed unnecessary.

CGPC noted that the applicant's command erred by failing to discharge him when he did not meet the fitness standards at the end of his probationary period in April 2006. However, CGPC stated that if the applicant's command had promptly requested an abeyance on August 22,

2006, after his hypothyroidism was first diagnosed, the abeyance would likely have been granted and would have terminated on October 26, 2006. The abeyance would have allowed him to be advanced on September 1, 2006. Therefore, CGPC recommended that the Board correct the applicant's record to show that he was granted an abeyance on August 22, 2006, and advanced to YN1 on September 1, 2006.

CGPC stated that the applicant has not proved that the Coast Guard erred by failing to test his thyroid function in 2005 or that he suffered from hypothyroidism in 2005. CGPC stated that the documentation of the applicant's weight probationary periods in 2005 and 2006 should not be removed from his record. CGPC argued that although there is evidence that some measurements were taken improperly in October 2005, they did not prejudice the applicant since he was ultimately provided the probation he was entitled to and even given a second probationary period although he should have been discharged at the end of the first.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 8, 2007, the applicant responded to the views of the Coast Guard. The applicant agreed with the recommendation that he be advanced to YN1 as of September 1, 2006, but argued that he is also entitled to removal of the documentation of his weight probationary periods beginning in October 2005 and November 2006.

The applicant argued that the Coast Guard's opinion ignores the fact that his antidepressant medications contributed to his obesity. He stated that he began taking such medications in late 2004 and early 2005 to treat his PTSD. The applicant alleged that when he first began taking such medications he weighed about 230 pounds but then immediately began gaining weight.

The applicant alleged that the Coast Guard failed to review his medical records before denying the requested abeyance in November 2005. The applicant alleged that his command did not discharge him in April 2006 after he failed to meet the weight standards during his probationary period because an informal Physical Evaluation Board had granted him a six-month extension. After his hypothyroidism was diagnosed and treated, however, he was declared fit for full duty and had to meet the fitness standards by March 2007 or be subject to discharge. Therefore, he stopped taking his PTSD medications in February 2007, met the fitness standards by March 2007, and weighed just 220 pounds and had only 20% body fat by the time of his unit's October 2007 semiannual weigh-in. The applicant alleged that he has been unfairly forced to choose between taking his PTSD medications and meeting Coast Guard fitness standards.

APPLICABLE FITNESS REGULATIONS

COMDTINST M1020.8E provided the "Weight/Physical Fitness Standards for Coast Guard Military Personnel" from September 15, 2004, through April 26, 2006. COMDTINST M1020.8F provided the standards beginning as of April 27, 2006. Any substantive differences between the two manuals are noted herein.

Article 2.D.1. states that all military personnel will be weighed each October and April, but COs may screen members against standards anytime they deem it necessary. Article 2.C.1.

states that all personnel will present to their supervisors a basic fitness plan including, “at a minimum, ... vigorous cardio-respiratory endurance training three times a week for thirty minutes each time and vigorous strength training one to three times per week.” Article 2.D.3. states that all members “exceeding both MAW and body fat will complete a detailed personal fitness plan.” Article 2.D.4. states that members who are found to be overweight or “overfat” will not be advanced, transferred to a new unit, assigned to training, or paid bonus installations until they are in compliance with regulations.

Article 2.E.1. states that members not in compliance with MAW and body fat standards “shall be referred to a medical officer or local physician, who shall make a recommendation to the command as to the member’s health, whether or not weight and/or body fat loss would be detrimental to the member’s health, and the member’s ability to participate in each component of the monthly fitness assessment.” Article 2.E.2. states that if weight and body fat loss would be detrimental to the member’s health, the command shall initiate a medical board for possible separation proceedings under the Physical Disability Evaluation System.

Article 2.E.3. states that a member diagnosed with an “underlying medical condition that limits or prohibits his/her participation in a specific portion of the fitness assessment will be excused from only that portion of the fitness assessment, but must continue to participate in weekly fitness enhancing activities outlined in his/her detailed fitness plan. The physician will document his or her finding in the member’s health record.”

Article 2.E.4. states that a “member found to have an underlying medical condition that would make fitness activities detrimental to his/her health is still responsible for meeting MAW standards within the timeline specified by the probationary period.” (In COMDTINST M1020.8F, this provision is included in Article 2.E.3.)

Article 2.F.1. states that unless granted an exemption, “overweight members who also exceed their maximum body fat percentage shall be placed on probation, during which they must lose their excess weight or body fat. The probationary period cannot equal or exceed thirty-six weeks, however.” Article 2.F.2. states that healthy weight loss “should be at a rate of 0.5 to 1.0 pound per week.” Article 2.F.3. states that the probation period “shall equal the amount of time it would take the member to lose all excess weight at an average of one pound per week or one percent body fat per month, whichever is greater.” Article 2.F.4. states that “[m]embers whose probationary period has been determined to be equal to or greater than 36 weeks both by weight calculations and by body fat calculations ... shall be processed for separation. If the situation exists in which one of the two calculations results in a period in excess of 36 weeks, and one less than 36 weeks, the member shall be assigned a probationary period based upon the calculated period which is less than 36 weeks.”

Article 2.F.5. states that a probationary weight loss period “shall not commence until *after* a medical examination. Therefore, the medical exam must be completed as expeditiously as possible, usually within three to four weeks of the discovery that MAW standards have been exceeded. However, written notification and acknowledgment that the member exceeds the maximum standards shall be completed regardless of any delay.” The probationary period must be acknowledged in a member’s record on a Page 7.

Article 2.F.3. states that if a doctor determines that a member's medication or medical condition prevents him from losing weight or body fat at the required rate, the CO may request permission from Headquarters "to hold the probationary period in abeyance for a specified period of time. By so doing, the Service can avoid the unintended consequence of penalizing a member (e.g., withholding an advancement or payment of a bonus) who, through no fault of his or her own, is battling a medical condition that makes weight loss challenging or impossible. Once the abeyance period has passed (i.e., once the patient's condition has stabilized), the probationary period will resume with the length of the probationary period based on the member's current weight."

Article 2.F.4. states that a probationary period "shall equal the amount of time it would take the member to lose all excess weight at an average of one pound per week or one percent body fat per month, whichever is greater." Article 2.F.5. states that a probationary period shall not equal or exceed 36 weeks. ... Members whose probationary period has been determined to be equal to or greater than 36 weeks both by weight calculations and by body fat calculations, except those granted an exemption per Chapter 3, shall be processed for separation."

Article 2.F.6. states that "[d]uring probation, members should demonstrate reasonable and consistent progress toward attaining their MAW (i.e., lose approximately half of the required weight or half the excess percentage of body fat by the midpoint of the probationary period). Failure to demonstrate such reasonable and consistent progress may provide sufficient grounds for commanding officers to [initiate discharge] before the probationary period expires."

Article 2.F.11. states that "MAW standards **must** be met in order for a member to be removed from the weight program and retained in the Coast Guard." Article 2.F.12. states that at the end of a probationary period, "a commanding officer may use discretion to add up to an additional four (4) weeks if he or she determines the case warrants special consideration."

Article 2.G.1. states that "[m]embers who exceed their MAW and body fat percentage to such an extent that they would be placed in a probationary period of 36 weeks or more, fail to demonstrate reasonable and consistent progress during probation, or fail to attain their MAW or body fat by the end of their probation ... shall be processed for separation."

Article 2.J. states that a Page 7 shall be prepared and entered in a member's record whenever the member exceeds his MAW or maximum body fat percentage and whenever the member has successfully or unsuccessfully completed a probationary period.

Article 3.A.1. states that a "[m]ember who incurs an injury or illness during a probationary period that may adversely affect their weight loss should be referred to a medical officer or contract physician to determine whether it is medically safe and feasible for the member to continue the weight loss program." Article 3.A.2. states that if members are found to have a medical condition that precludes weight loss and they are found not fit for full duty, their probationary periods shall be held in abeyance. Members granted an abeyance must still participate in semi-annual weigh-ins and have their current weight entered into Direct Access, but the probationary restrictions under Article 2.D.4. will not apply.

Article 4.D. states that medical officers are responsible for evaluating overweight members to determine whether there is an underlying medical cause; whether any underlying cause is treatable; and whether the member can safely participate in a weight loss program. The medical officer also refers the member to a dietician.

Article 12.B.12.a.10. of the Personnel Manual states that a member may be discharged for the convenience of the Government due to “[o]besity, provided a medical officer certifies a proximate cause of the obesity is excessive voluntary intake of food or drink, rather than organic or other similar causes apparently beyond the member’s control.”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant asked the Board to correct his record to show that he advanced to YN1 on September 1, 2006. The Coast Guard has admitted that if the applicant’s command had promptly requested an abeyance when Dr. R completed the Command Medical Referral Form on August 22, 2006, citing hypothyroidism as an underlying cause of the applicant’s obesity, the Coast Guard would likely have granted the abeyance because hypothyroidism is a known cause of weight gain and the applicant had just been diagnosed and begun treatment with synthroid medication. However, for unknown reasons, the applicant’s command waited until mid November to request the abeyance. If the abeyance had been requested and granted in August 2006, pursuant to Articles 2.F.3. and 3.A.2. of COMDTINST M1020.8F, the restrictions under Article 2.D.4. would not have applied, and the applicant would have advanced to YN1 on September 1, 2006. Article 2.F.3. expressly states that abeyances should be requested to “avoid the unintended consequence of penalizing a member (e.g., withholding an advancement ...) who, through no fault of his or her own, is battling a medical condition that makes weight loss challenging or impossible.” Therefore, the Board finds that the applicant’s command erred in failing to request an abeyance for the applicant promptly when Dr. R submitted the Command Medical Referral Form on August 22, 2006. The preponderance of the evidence indicates that if the command had timely requested the abeyance, it would have been granted, and the applicant would have advanced to YN1 on September 1, 2006. Therefore, the applicant’s record should be corrected to show that he advanced to YN1 on September 1, 2006.

3. The applicant asked the Board to remove from his record the Page 7 documenting his placement on weight probation in October 2005. He alleged that it should be removed because (a) Dr. R told him that, because of his PTSD and medications, a weight-loss program “would be detrimental to my recovery”; (b) two of his PTSD medications, Effexor and Nortriptyline, caused his weight gain and so constituted an underlying medical condition that should have resulted in an abeyance; (c) he was suffering from hypothyroidism, which the Coast Guard did not timely detect because, contrary to regulation, no thyroid function tests were performed in

October 2005; and (d) if his hypothyroidism had been diagnosed in October 2005, he would have been granted an abeyance and treated.

4. Under Article 2.J. of COMDTINST M1020.8E, a Page 7 must be prepared by a member's command "whenever a member exceeds his/her MAW or maximum body fat percentage." The regulations provide no exception to this rule, so a Page 7 should have been prepared for the applicant's record in October 2005 whether or not an underlying condition was discovered or an abeyance was granted because, at the time, he exceeded both his MAW and his maximum body fat percentage.

5. The applicant alleged that Dr. R told him that participating in a weight-loss program would be detrimental to his recovery. The record, however, contradicts this allegation, as Dr. R indicated on the Command Medical Referral Form dated October 12, 2005, that it was safe and feasible for the applicant to lose his excess weight even though his mental condition had contributed to his weight gain and his medication was known to increase a person's appetite.

6. Although the applicant alleged that CGPC's denial of an abeyance in 2005 was unjust, he has not proved by a preponderance of the evidence that he suffered from hypothyroidism in 2005. No regulation required the Coast Guard to test the applicant's TSH level before preparing the Page 7, placing him on weight probation, or denying the abeyance. Although when the applicant informed Dr. R that he had been denied advancement, Dr. R called the failure to test the applicant's TSH level in October 2005 an "oversight," the Board notes that the applicant's TSH levels had been tested and found normal twice in 2004 when the applicant weighed above his MAW. And when the applicant's blood was again tested in July 2006, his TSH level just slightly exceeded the stated normal range. Moreover, even assuming *arguendo* that the applicant did suffer from hypothyroidism in October 2005, he would still have been placed on weight probation after his TSH level was normalized with medication.

7. Likewise, the applicant has not proved by a preponderance of the evidence that his PTSD or medications prevented him from losing weight or that it was erroneous or unjust for the Coast Guard to place him on weight probation in 2005. Dr. R noted in the Command Medical Referral Form that although the applicant's PTSD may have contributed to his weight gain and his PTSD medication was known to increase appetite, the applicant could lose his excess weight safely through diet and exercise. In denying the abeyance requested in November 2005, medical officers in CGPC also apparently determined that the applicant was physically able to lose weight despite his diagnosed PTSD and medication. Moreover, the Board notes that although the applicant attributes his compliance with the weight standards in March 2007 to his decision to stop taking Effexor and Nortriptyline in February 2007, his medical records show that he lost a great deal of weight—falling from 287 pounds in May 2006 to less than 240 pounds on January 3, 2007—while taking Effexor and Nortriptyline. Therefore, although the endocrinologist reported to Dr. R on March 21, 2007, that those medications "are known to cause weight gain mediated by both increased appetite and mechanisms independent of food intake that are not well understood," the Board finds that the applicant has not proved by a preponderance of the evidence that CGPC's denial of an abeyance in 2005 was erroneous or unjust.

8. The Board notes that under Article 2.E.2. of COMDTINST M1020.8E, if the Coast Guard had determined that the applicant could not meet the fitness standards without forgoing his PTSD medications to the detriment of his health, the Coast Guard would not have granted him a permanent abeyance of the fitness standards but would have processed him for separation under the PDES. However, the PEB found him fit for duty and recommended his retention on December 4, 2006.

9. The applicant asked the Board to remove from his record the Page 7 documenting his placement on weight probation in November 2006. He alleged that it should be removed because (a) if the Coast Guard had diagnosed his hypothyroidism in 2005, he would have been in compliance with the fitness standards by November 2006; and (b) his PTSD medications caused his weight gain and so constituted an underlying medical condition that should have resulted in an abeyance. However, as stated in Finding 6, above, the applicant has not proved that the Coast Guard was negligent in failing to test his thyroid function in the fall of 2005; and as stated in Finding 7, he has not proved that his PTSD medications should have resulted in an abeyance since he in fact lost a great deal of weight in 2006 while taking Effexor and Nortriptyline. The record shows that in November 2006, the applicant's TSH level had been reduced with medication and he was losing weight. Therefore, the denial of the abeyance requested in November 2006 was neither erroneous nor unjust.

10. If the applicant's command had timely requested an abeyance after Dr. R submitted the Command Medical Referral Form on August 22, 2006, the Coast Guard would likely have granted an abeyance until the applicant's TSH level was within the normal range so that he could lose weight through regular diet and exercise. The record shows that the applicant's TSH level was in the normal range by September 21, 2006. CGPC submitted evidence indicating that abeyances granted for hypothyroidism are normally no more than three months long. Therefore, even if the applicant had been granted an abeyance in late August 2006, he would have been placed on weight probation by late November 2006 at the latest.

11. Although the applicant has proved that he was unfairly denied advancement when his command failed to timely request an abeyance after he was diagnosed with hypothyroidism in August 2006, he has not proved that his periods of weight probation in 2005 and 2006 were imposed erroneously or unjustly. Accordingly, partial relief should be granted by advancing the applicant to YN1/E-6 as of September 1, 2006, but the documentation of his weight probationary periods should remain in his record.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his record to show that he advanced to pay grade YN1/E-6 on September 1, 2006, and shall pay him any amount he is due, such as back pay and allowances, as a result of this correction.

All other requested relief is denied.

