DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-103

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FINAL DECISION ON RECONSIDERATION

This is a proceeding 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 April 18, 2008, upon determining that the applicant's request for reconsideration met the requirements of 33 C.F.R. § 52.67(a), 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 January 22, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND: BCMR DOCKET NO. 2006-054

In BCMR Docket No. 2006-054, the applicant, who had been discharged on September 27, 2005, after 19 years and 2 months of active duty, because of "weight control failure," alleged that his administrative discharge was erroneous and unfair and asked the Board either to vacate his discharge and reinstate him on active duty with back pay and allowances or to award him constructive service credit for active duty from September 28, 2005, through July 27, 2006—the date he would have been able to retire with 20 years of active duty—and to award him all back pay, allowances, and retirement pay. The Board denied relief for the reasons stated in the Final Decision for BCMR Docket No. 2006-054, which is attached hereto,[1] and only new information submitted since the issuance of that decision will be summarized below.

SUMMARY OF APPLICANT'S REQUEST FOR RECONSIDERATION

In his request for reconsideration, the applicant argued that his administrative discharge was erroneous and unfair because (a) he should have been processed for a physical disability separation under the Coast Guard's physical disability evaluation system (PDES) because he had been diagnosed with a compulsive overeating disorder since 1995 and had also suffered from

[1] The Final Decision and case file for BCMR Docket No. 2006-054 are incorporated as part of the record for this case, BCMR Docket No. 2008-103.

anxiety and depression; and (b) his weight probationary period should have been held in abeyance because, contrary to Finding 8 in the Final Decision for Docket No. 2006-054, Dr. B had advised him not to exercise. He argued that although he was represented by counsel in his original case, the Chair should grant reconsideration because his prior counsel clearly mishandled the case and failed to obtain readily available, significant evidence from Dr. B. In support of his disability claim, the applicant submitted publications about depression, anxiety, and compulsive overeating disorder and the following documents from his medical records:

- October 24, 1995—A medical note shows a diagnosis of "obesity [with] compulsive overeating" and a statement that it was medically safe for the applicant to lose his excess body fat. The doctor recommended Level III treatment. On a questionnaire completed by the applicant, he admitted to eating when he was not hungry and between meals, but he answered "No" to the following questions: "Do you go on eating binges for no apparent reason?"; "Do you look forward with pleasure and anticipation to the moments when you can eat alone?"; "Do you plan these secret binges ahead of time?"; and "Do you eat sensibly before others and make up for it alone?"

- October 9, 1997—A letter advises the applicant to report to a rehabilitative clinic on January 26, 1998, to attend a weight management program. A certificate indicates that he completed this Level III treatment on March 5, 1998. A letter dated February 27, 1998, dictates his "continuing care plan."

- February 28, 2000—A medical note shows that the applicant complained of chest pain. The doctor noted that he appeared mildly depressed, was diagnosed with anxiety, and was prescribed the drug Paxil.

- July 18, 2000—A Report of Medical History indicates that the applicant reported feeling depressed and anxious because of family and work problems. A social worker's letter dated July 31, 2000, indicates that he was receiving counseling in stress-management techniques for stress related to his "new supervisory position" and his mother's cancer.

- March 26, 2007—The report of psychiatric examination performed by a doctor for the Department of Veterans Affairs (DVA) notes the applicant's complaints of depression, crying spells, insomnia, lack of energy, anxiety attacks, and nervousness and states that, more likely than not, he meets the criteria for recurrent, moderate major depression[2] and an "eating disorder not otherwise specified"[3] and that both are "service-connected."

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[2] Under Chapter 5.B.10. of the Medical Manual, a diagnosis of "major depression disorder" may be disqualifying for retention and trigger PDES processing. Major depression disorder is also a ratable disability under the Veterans Affairs Schedule for Rating Disabilities (VASRD) at 33 C.F.R. § 4.130.

[3] Other than anorexia nervosa and bulimia nervosa, eating disorders are not deemed physical disabilities eligible for disability ratings by either the Coast Guard or the DVA. *See* Medical Manual, Chap. 5.B.18.d.; 33 C.F.R. § 4.130. "Eating Disorder Not Otherwise Specified" includes rumination (chewing but not swallowing food); eating disorders that do not quite meet the strict criteria for anorexia and bulimia; and "binge-eating disorder." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000), pp. 594-95. "Compulsive overeating disorder" is not listed as an eating disorder in the DSM.

In support of his claim about Dr. B's medical advice to stop exercising, the applicant submitted the following letter from Dr. B dated May 7, 2007:

> [The applicant] was seen by me on 6-10-05 at which time he had been on a diet with caloric restriction, physical activity, and an appetite suppressant and had successfully gotten down from 271 lbs. to 257 lbs. He presented on 5-31-05 with some vague parasthesias [numbness] in the left hand, aching in the left interscapular area, and base of the neck while doing an elliptical exercise machine workout. Therefore, we held his appetite suppressant immediately and we did indeed advise him not to exercise until we did a complete cardiac work-up. Stress cardiolite test was scheduled for 6-23-05. The subsequent stress cardiolite test 6-23-05 showed no evidence for classic ischemic change. There was, however, a left ventricular ejection fraction of only 36% and therefore, a cardiac ultrasound was scheduled. A subsequent echocardiogram was performed 7-13-05 which showed mild hypokinesis of the intraventricular septum, otherwise normal, no flow abnormalities detected.
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> [The applicant's] assertion that he was directed to stop exercising prior to completion of this cardiac stress testing is correct. He was indeed instructed to do this for his own safety until we could make further recommendations based on the test results.
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> The cardiologist, subsequently, saw the patient on 7-22-05 and based on the 2D echocardiogram felt that his ejection fraction was calculated at 53%, which is considered to be normal and that the previously noted ejection fraction that was computer calculated by the Department of Radiology may have been a computer error. It was felt at that time there was a normal cardiac examination and the patient may resume his full activity without restriction.
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> In regards to whether the patient was advised to refrain from exercise until testing was completed, it is my policy that when patients present with chest discomfort suspicious for coronary artery disease that they not participate in strenuous activity until stress testing can be completed. In this case, I specifically remember advising the patient of same, but apparently failed to dictate it into my progress notes.

The applicant alleged that he properly ceased exercising based on Dr. B's advice during his weight probationary period and that, therefore, his probationary period should have been suspended for 52 days, from May 31 through July 22, 2005. The applicant noted that he was placed on weight probation on April 13, 2005, and needed to comply with the Coast Guard's standards by achieving 25% body fat or a weight of 189 pounds by December 25, 2005. However, at the mid-way point, his command decided he was not making progress and initiated his discharge on August 10, 2005.[4] He argued that if his command had properly suspended his probationary period for 52 days, "his mid-way point would have arisen only after the [Coast Guard] actually discharged [him]." He alleged that given his rate of weight loss and body fat on August 10, 2005, "there is no reason to conclude that he would not have achieved his weight and body fat limitations by February 3, 2006," which would have been the end date of his probation had it been suspended for 52 days. The applicant argued that he would not have been discharged had his command properly suspended his probation. In addition, he alleged, the fact "that [he] had on at least seven previous occasion met his weight and body fat standards through weight control

[4] Article 2.F.6. of COMDTINST M1020.8E 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."

probation is clear evidence that he likely would have done so by February 3, 2006." The applicant concluded that given his inability to exercise during 52 days of his probationary period and his medical diagnoses, the Coast Guard's decision to discharge him just ten months before his approved retirement date "shocks the conscience."

DECISION OF THE CHAIR TO GRANT RECONSIDERATION

The Chair advised the applicant that, in accordance with the Board's regulations under 33 C.F.R. § 52.67, she granted reconsideration on the basis of Dr. B's letter because it responded directly to the Board's Finding 8, which noted the following in pertinent:

> … [O]n August 12, 2005, after the CO received the applicant's medical records and his request for retention dated August 7, 2005 (wherein the applicant alleged that his probation should have been suspended due to his medical complaints and testing), the CO wrote that "since being formally put on the program, [the applicant] has put forth a myriad of medical complaints. All complaints were quickly and thoroughly assessed by qualified medical professionals who consistently concluded there were no grounds to cease weight loss activities. … [The applicant] is and has always been fit for full duty and fitness exercise." The Board finds that although the applicant apparently stopped exercising and dieting during his probationary period, there is insufficient evidence in the record to prove that he did so based on his doctor's advice. If Dr. B or the cardiologist actually instructed the applicant to stop dieting and exercising, the applicant should be able to produce written confirmation of this fact. The medical notes are too vague about what advice was given and what decisions the applicant made on his own to overcome the presumption that the CO's statement that the applicant was fit for duty and weight loss activities throughout the probationary period is correct. [Citation omitted.] The Board finds that the applicant has not proved by a preponderance of the evidence that his command erred in failing to suspend his probationary period under Article 3.A.2. of COMDTINST M1020.8E.

The Chair further noted that the applicant had been represented by counsel in Docket No. 2006-054 and could have and should have solicited and submitted Dr. B's letter with his original application. However, she found that "it is in the interest of justice to grant reconsideration in this case because it is possible that the Board would have made a different determination if [Dr. B's] letter had been included with [his] original application."

The Chair further advised the applicant that she was not granting reconsideration on the grounds of the applicant's diagnosed compulsive overeating disorder "because the diagnosis was known to the Board and because under Section 3.E. of COMDTINST M1020.8E[5] [the Coast Guard manual for weight standards] and Chapter 5.B.18.d. of the Medical Manual,[6] members

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[5] Article 3.E. of COMDTINST M1020.8E states that "[c]ases involving members who display tendencies toward compulsive overeating or are diagnosed with an eating disorder shall be handled in accordance with the provisions of the Medical Manual, COMDTINST M6000.1 (series)."

[6] Chapter 5.B.18.d. of the Medical Manual states that "[e]ating disorders have a potential to affect fitness for duty, but the diagnosis of an eating disorder does not automatically mean the member is unsuitable for continued service. Individuals suspected of having an eating disorder shall be referred for evaluation by an Armed Forces psychiatrist or Armed Forces clinical psychologist. Treatment may be authorized in accordance with the same criteria as other mental conditions." This regulation also states that members with anorexia nervosa and bulimia nervosa that do not respond to treatment shall be processed under the PDES, whereas members with "eating disorders not otherwise specified … [s]hall be processed in accordance with Chapter 12.B.12 … of the Personnel Manual, … if the condition significantly impacts or has the potential to significantly impact performance of duties (health, mission, and safety)."

with compulsive overeating disorders that cause them to be unfit for duty due to obesity are not processed for physical disability separations but are, like [the applicant], administratively separated for the convenience of the government under Article 12.B.12. of the Personnel Manual."[7]

APPLICANT'S RESPONSE TO THE CHAIR

The applicant responded to the Chair's letter alleging that it is not clear that he could not have been processed under the PDES due to his diagnosed compulsive overeating disorder. He argued that regardless of the regulations, "it is clear that he did have medical conditions that interfered with his ability to meet the Coast Guard weight and body fat standards," and therefore his administrative discharge for obesity was not appropriate. The applicant also argued that because of his diagnosed compulsive overeating disorder, under Chapter 5.B.1. of the Medical Manual,[8] the Coast Guard should have referred him for six months of treatment in 2005 instead of discharging him. The applicant's response to the Chair was forwarded to the Coast Guard as additional information.

VIEWS OF THE COAST GUARD

On September 2, 2008, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief.

The JAG argued that based upon the Chair's analysis granting reconsideration, "the only question presented is whether the applicant's commanding officer [CO] abused his discretion by recommending the applicant's discharge for weight control failure based [on Dr. B's] letter." The JAG argued that the CO did not abuse his discretion or commit error or injustice in initiating the applicant's discharge.

The JAG argued that "the Board should conclude the applicant has not proved by a preponderance of the evidence that applicant's command erred in failing to suspend his probation-

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[7] Article 12.B.12. of the Personnel Manual authorizes the administrative discharge of members for obesity "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."

[8] Chapter 5.B.1. of the Medical Manual states the following with respect to psychiatric conditions:

> General The following diagnostic categories conform to DSM IV-R and indicate the appropriate reference for disposition. In determining qualification for appointment, enlistment, and induction, or appropriate disposition (when the condition has been determined to be disqualifying for retention in accordance with paragraph 3-F-16), the diagnosis appears under DSM IV Axis I or Axis II. Conditions generally considered treatable and not grounds for immediate separation, mental health treatment may be authorized for members when medically necessary to relieve suffering and/or maintain fitness for unrestricted duty. The decision to provide treatment for mental health conditions will be based on a review of all factors, including the opinion of experts, probability of a successful outcome, and the presence of other physical or mental conditions.
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> a. If a successful outcome (availability for worldwide assignment) is not realized within six months of the initiation of therapy, the patient's condition must be reassessed. If the reassessment indicates that the prognosis for a successful outcome is poor, the member shall be processed for discharge pursuant to Chapter 12 of the Personnel Manual or through the Physical Disability Evaluation System.

ary period under Articles 2.F.3. or 3.A.2. of COMDTINST M1020.8F."[9] The JAG stated that the intent of Article 2.F.3. is "to distinguish between physiological conditions that make weight loss difficult or impossible, and physical conditions that may restrict a member's ability to exercise but are not a physiological impediment to weight loss. Abeyance requests will generally not be granted for purely physical ailments, such as twisted ankles, pulled muscles, broken bones, etc., that make it difficult to exercise, but have no physiological impact on food intake." The JAG stated that the applicant's assertion that he should have been granted an abeyance because he was told by Dr. B not to exercise "runs contrary to Coast Guard policy as it pertains to [Article 2.F.3.]" He stated that Dr. B's May 7, 2007, letter indicates that he advised the applicant "not to participate in strenuous activity/exercise until stress testing can be completed," but does not indicate that he made any medical determination that the applicant had a medical condition that prevented him from losing weight by, for example, changing his diet and caloric intake or light exercise.

Moreover, the JAG argued, the applicant was not found unfit for duty while he was awaiting the cardiologist's determination, so he did not meet standard for an abeyance under Article 3.A.2. Therefore, he concluded that Dr. B's letter "clearly falls short of the two ways in which the applicant could have been granted an abeyance from his probationary period."

The JAG stated that "[h]aving a limitation on exercise does not automatically invoke an abeyance" and argued that with no medical determination that the applicant could not safely lose weight, his CO was "under no obligation to request an abeyance pursuant to [Article] 2.F.3." The JAG pointed out that under *Quinton v. United States*, 64 Fed. Cl. 118, 124 (2005), *et alia*, "[a]bsent strong evidence to the contrary, military officers, like other government officials, are presumed to have carried out their duties correctly, lawfully, and in good faith." The JAG also noted that in 2005 the applicant could have sought a medical determination that his probationary period should be held in abeyance, but he apparently did not do so.

The JAG stated that the applicant "was afforded every opportunity to comply with Coast Guard policy regarding weight and body fat standards. [He] has been on and off weight probation throughout his career and was well aware of the guidelines. Instead of actively pursuing his

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[9] COMDTINST M1020.8F was published in April 2006, after the applicant's discharge. COMDTINST M1020.8E was in effect in August 2005. Much of the language in the two editions is the same. Article 2.F.3. of COMDTINST M1020.8E states that if a doctor determines that a member's "medication or medical treatment or condition prevents them from losing weight or body fat at the required rate," the member's CO may request authority from CGPC to hold the probationary period in abeyance to prevent penalizing a member "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 3.A. of this manual states the following:

> 1. Members who incur 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 regimen.
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> 2. Members who are determined to be in a not-fit-for-duty status for a period of 30 days or less shall have their probationary period held in abeyance until they are restored to fit-for-full-duty status, provided they have a physician's determination that the physical condition precludes weight loss. See Enclosure (4), example 4, for the proper working of the Administrative Remarks entry. If a member will be in a not-fit-for-duty status for longer than 30 days, the provision of Paragraph 2.F.3. above will apply.

prescribed weight loss regimen, [the applicant] failed to demonstrate reasonable and consistent progress, which prompted the commanding officer's decision to initiate discharge procedures." The JAG also pointed out that under Article 2.H.2. of the COMDTINST, members who are discharged because of obesity "may request reenlistment to their former rate provided they comply with MAW or maximum percent body fat, meet appearance standards and have been out of the service no more than 24 months."

The JAG also stated that, should the Board recommend granting relief, the decision must be reviewed under 33 C.F.R. § 52.64 because the applicant has challenged "a significant issue of Coast Guard policy." The JAG concluded that the applicant's

> failure to adhere to Coast Guard policy runs contrary to Coast Guard core values and counter to good order and discipline especially from senior enlisted [personnel]. The Coast Guard can ill afford the introduction of doubt in the minds of fellow crew members regarding its true commitment to or equitable administration of the weight program. The applicant should not be afforded an administrative scheme to circumvent proscribed policy regarding the Coast Guard's weight restrictions. Moreover, the applicant would have been able to apply for reenlistment within 24 months of his discharge, but his continued non-compliance of well established Coast Guard policy regarding the weight program has precluded this opportunity.

The JAG also attached to the advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC pointed out that under Article 2.E. of COMDTINST M1020.8E, even a member who has a medical condition that makes fitness activities detrimental to his health must comply with Coast Guard weight standards within his probationary period.[10] CGPC stated that Article 2.F. allows the abeyance of a probationary period

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[10] Article 2.E. of COMDTINST M1020.8E states the following:

> 1. 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. The unit commanding officer shall prepare the top portion of the Command Medical Referral Form (CG-6050), Enclosure (3); the bottom portion will be completed by the medical officer or local physician. This form shall be filed in the member's Health Record.
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> 2. If a medical officer or local physician determines that any weight or body fat loss would be detrimental to the member's health, the commanding officer shall initiate an Initial Medical Board (IMB) through the Physical Disability Evaluation System (PDES), COMDTINST M1850.2 (series). If the condition is not disqualifying for retention as per chapter 3.F of the Medical Manual, COMDTINST M6000.1 (series), the commanding officer shall process the individual for discharge in accordance with Paragraph 2.G. If a medical officer or local physician determines that any weight or body fat loss would be temporarily detrimental to the member's health, the member should be processed in accordance with Paragraph 3.A. [requiring an abeyance if the member is not fit for full duty].
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> 3. A member 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 findings in the member's health record.
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> 4. 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.

only if the member has a medical condition or is taking medication that prevents them from losing weight or body fat. CGPC quoted from the edition of the manual published in 2006, COMDTINST M1020.8F, in which the following explanation was added to Article 2.F.3.:

> The intent of this provision is to distinguish between physiological conditions that make weight loss difficult or impossible, and physical conditions that may restrict a member's ability to exercise but are not a physiological impediment to weight loss. Abeyance requests will generally not be granted for purely physical ailments, such as twisted ankles, pulled muscles, broken bones, etc. that make it difficult to exercise, but have no physiological impact on food intake.

CGPC alleged that although Dr. B's letter indicates that the applicant was instructed not to exercise from June 10 to July 22, 2005, there is no indication it would have been detrimental to his health to reduce his caloric intake or otherwise change his diet. CGPC argued that Article 2.E. of COMDTINST M1020.8E clearly indicates that personnel are still responsible for complying with Coast Guard weight and body fat standards within the probationary period regardless of their ability to participate in an exercise program. CGPC alleged that in June and July 2005, it "was still possible for the applicant to lose weight with a healthy diet combined with controlled caloric intake."

CGPC further noted that for military service members, a "diagnosis of compulsive overeating is specifically addressed through administrative channels and does not warrant PDES processing."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 13, 2008, the applicant responded to the views of the Coast Guard. The applicant argued that the Coast Guard "disposed" of him after nearly 20 years of service even though he "suffered from diagnosed medical conditions that affected his ability to meet the weight and body fat standards of the Coast Guard. That is error and injustice in the extreme. Indeed, it was brutal and wholly unnecessary." The applicant argued that the record shows that he was diagnosed with compulsive overeating disorder, which "directly affected his ability to control his caloric intake and meet Coast Guard weight and body fat standards." The applicant noted that he also suffered from anxiety and depression, which are known to affect appetite and weight.

The applicant argued that the Coast Guard's position was unjust because he was advised by Dr. B not to take the appetite suppressant he had been prescribed and not to exercise, which is "an essential component of most weight loss programs." The applicant alleged that the fact that he had previously achieved his MAW during at least seven prior probationary periods shows that, if his probation had been properly held in abeyance for 52 days, he would have met his MAW within the probationary period. Moreover, the applicant noted, if his probation had been held in abeyance in accordance with Article 3.A.4. of COMDTINST M1020.8E,[11] his probationary period would have been recalculated at the end of the abeyance. He alleged that if the Coast Guard had held his probationary period in abeyance until the cardiologist decided he could exer-

[11] Article 3.A.4. of COMDTINST M1020.8E states that "[t]he day following the determination of fit-for-full-duty or decision by medical authority to lift the abeyance, the probationary period shall be adjusted with the length of the probationary period based on the member's weight at that time."

cise, his probationary period would not have ended till April 2006, about three months prior to his retirement date.

The applicant alleged that the Coast Guard also failed to refer him to a dietician for counseling on proper nutrition and methods to reduce body fat through healthy nutritional choices, as required by Article 4.C.4. of COMDTINST M1020.8E.[12] The applicant also alleged that the physician who completed the Command Referral Forms on April 13, July 22, and August 10, 2005, certifying that he had no underlying medical conditions that impeded his ability to lose weight "clearly erred" because the applicant's diagnosed compulsive overeating disorder and treatment for depression were documented in his medical record.

The applicant also argued that Dr. B's letter proves not only that he was instructed not to exercise but also that it was not safe for him to continue his weight loss regime, which should have triggered an abeyance under Article 3.A.1. of COMDTINST M1020.8E. He argued that his probationary period should have been held in abeyance for 52 days because, "apart from dieting, [he had to] stop [his weight loss] regime for a period of 52 days."

The applicant alleged that the Coast Guard's claim that it had to discharge the applicant for obesity "to send a message to its personnel that weight and body fat standards are taken seriously … simply is untrue." He stated that what truly shocks the sense of justice is the involuntary separation within months of retirement of a member who suffered from an eating disorder, depression, and anxiety. The Coast Guard's action has caused him "emotional, psychological, and financial devastation." He further alleged that the applicant's command used the weight program to discharge him "due to their misguided perception that he was a substandard performer." He alleged that he had been an "exceptionally capable and dedicated" petty officer who won numerous prestigious awards and commendations and who "never committed misconduct."[13]

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 applicant's request for reconsideration was timely submitted under 33 C.F.R. § 52.67(e).

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.

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[12] Article 4.C.4. states that commanding officers must ensure that overweight members are referred to a doctor before formally placing them on weight probation and are also referred for "a one-time visit to a registered dietician for counseling on proper nutrition methods to reduce excess body fat through healthy nutritional choices."

[13] The applicant's record contains many high performance evaluation marks, awards, and commendations, as well as many low marks and two old non-judicial punishments for offenses. Professional performance and conduct, however, are not criteria for, or germane to, a member's entitlement to an abeyance of a weight probationary period under COMDTINST M1020.8E or to processing under the PDES Manual (unless a disability resulted from an act of misconduct).

3. The applicant asked the Chair to grant reconsideration based on two different allegations of error regarding the procedures that led to his discharge: (a) his alleged entitlement to a physical disability separation and (b) his command's failure to grant him an abeyance of his weight probationary period. The Chair granted reconsideration based on the latter claim because information in Dr. B's May 7, 2007, letter contradicted a statement in Finding 8 in the Board's Final Decision. However, the Chair did not grant reconsideration based on the applicant's argument that he was entitled to a physical disability separation. The Board finds that the record contains no substantial evidence[14] to support the applicant's claim that while serving on active duty he suffered from a physical disability that rendered him unfit for continued service and entitled him to PDES processing and a physical disability separation. The fact that he had been treated for anxiety and mild depression due to stressful events in his life is not proof that he was unfit for duty because of a disqualifying anxiety disorder or major depression. Compulsive overeating disorder is not a physical disability under the VASRD.[15] Members whose compulsive overeating prevents them from meeting Coast Guard weight standards or from achieving compliance during weight probationary periods are not processed for disability separations; instead, they are, like the applicant, discharged administratively under Article 12.B.12. of the Personnel Manual. Therefore, the Board concurs in the Chair's decision to grant reconsideration only on the issue of whether the Coast Guard erred in failing to grant the applicant an abeyance of his weight probationary period.

4. The applicant alleged that his weight probationary period in 2005 should have been held in abeyance because he was told not to exercise by Dr. B and also not to take a previously prescribed appetite suppressant. He produced a letter from Dr. B, dated May 7, 2007, in which Dr. B wrote the following: "In regards to whether the patient was advised to refrain from exercise until testing was completed, it is my policy that when patients present with chest discomfort suspicious for coronary artery disease that they not participate in strenuous activity until stress testing can be completed. In this case, I specifically remember advising the patient of same, but apparently failed to dictate it into my progress notes." It is not clear from the letter whether this advice was given on May 31, 2005, or June 10, 2005, but it is clear that the applicant was verbally advised not to "exercise" or "participate in strenuous activity" for more than a month while he was on weight probation. Of course, the word "exercise" could theoretically be interpreted so broadly as to preclude even walking, but given Dr. B's reference to "strenuous activity," the Board will not interpret it thus. In light of Dr. B's prohibition of strenuous activity, the Board must determine whether the applicant was entitled to an abeyance and whether the applicant would not have been separated had Dr. B made note of his advice in the applicant's medical record.

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[14] In this regard, the Board notes that the finding of the doctor for the DVA that the applicant suffered from service-connected recurrent, moderate major depression in March 2007 does not prove that he suffered from this condition at the time of his discharge in September 2005. DVA ratings are "not determinative of the same issues involved in military disability cases." *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983); *see also Kirwin v. United States*, 23 Cl. Ct. 497, 507 (1991) ("The VA rating is irrelevant to the question of plaintiff's fitness for duty at the time of his discharge."); *Dzialo v. United States*, 5 Cl. Ct. 554, 565 (1984) (holding that a VA disability rating "is in no way determinative on the issue of plaintiff's eligibility for disability retirement pay. A long line of decisions have so held in similar circumstances, because the ratings of the VA and armed forces are made for different purposes.").

[15] 33 C.F.R. § 4.130.

5. Article 2.F.3. of COMDTINST M1020.8E states that if a doctor determines that a member's "medication or medical treatment or condition prevents them from losing weight or body fat at the required rate," the member's CO may request authority from CGPC to hold the probationary period in abeyance to prevent penalizing a member "who, through no fault of his or her own, is battling a medical condition that makes weight loss challenging or impossible." Article 2.E.4. of the manual 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." CGPC explained these regulations by noting that under Coast Guard policy, the phrase "medical condition" in Article 2.F.3. was intended to denote a physiological condition that prevented weight loss and not just any condition that precluded strenuous activity. CGPC pointed out that in next edition of the manual, COMDTINST M1020.8F, which was issued in April 2006, language was added to explain that the "intent of this provision is to distinguish between physiological conditions that make weight loss difficult or impossible, and physical conditions that may restrict a member's ability to exercise but are not a physiological impediment to weight loss. Abeyance requests will generally not be granted for purely physical ailments, such as twisted ankles, pulled muscles, broken bones, etc., that make it difficult to exercise, but have no physiological impact on food intake." While this explanation was not in the regulation in 2005, the policy is consistent with that applied in a prior case, BCMR Docket No. 2007-155, which concerned an officer's administrative separation for obesity under the provisions of COMDTINST M1020.8E despite several conditions that impeded his ability to exercise. In Finding 6 of the Final Decision for Docket No. 2007-155, the Board found the following:

> The fact that the applicant took medications listing weight gain as a possible side effect, had arthroscopic knee surgery in 2001, developed tendonitis in his right shoulder in the summer of 2003, and strained his back in October 2004 does not persuade the Board that his doctors erred in certifying that he had no medical condition that prevented him from dieting and exercising to lose weight to attain his MAW. Under Article 2.E.4. of COMDTINST M1020.8E, even members with injuries that preclude certain fitness activities are expected to lose weight as necessary to attain their MAWs. The record shows that the applicant had been placed on weight probation a few times before the Coast Guard's new fitness standards went into effect in 2004 and had previously received fitness and nutritional counseling.

The Board is not persuaded that "compulsive overeating disorder" is the type of underlying medical condition contemplated in Article 2.F.3. of COMDTINST M1020.8E to justify an abeyance of weight probation. It is not a physiological condition and it is not even a defined mental illness or disorder under the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM), which is relied on by the Coast Guard in identifying mental illness and disorders. The DSM lists only anorexia nervosa, bulimia nervosa, and eating disorders "not otherwise specified" in its discussion of eating disorders.[16] The last category includes a "binge-eating disorder," but the applicant's responses to the medical questionnaire in 1995 indicate that his diagnosis of "compulsive overeating disorder" was based not on binge eating, but on regularly overeating at and between meals.

[16] *See* American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000), pp. 583-95.

6. The applicant was unable to participate in strenuous activity for several weeks during his weight probationary period, but like the applicant in Docket No. 2007-155, he was still required by Article 2.E.4. of COMDTINST M1020.8E to achieve compliance with Coast Guard weight and/or body fat standards within his probationary period, presumably by adopting a healthy, low calorie diet. There is no evidence that any doctor ever found that weight and/or body fat loss would be detrimental to the applicant's health, as stated in Articles 2.E.1. and 3.A.1. of the manual. Nor is there any evidence that he was unfit for duty during his probationary period, as required for an abeyance under Article 3.A.2. Under Article 2.E.3., Dr. B's advice excused the applicant only from participating in strenuous activity and taking the appetite suppressant Phentermine, and he was required to continue with the rest of his fitness/weight loss regime. The records show that the applicant had been placed on weight probation several times previously and had received counseling from dieticians and medical professionals throughout his career, as well as treatment for compulsive overeating. In light of these facts, the Board finds that the Coast Guard did not commit error or injustice by not granting the applicant an abeyance of his weight probationary period even though he could not participate in strenuous activity and could not take a prescribed appetite suppressant.

7. The applicant alleged that he was not referred to a dietician when he was placed on weight probation in April 2005, as required by Article 4.C.4. of COMDTINST M1020.8E. However, Dr. B's medical notes dated April 13, 2005, indicate that he was referred to a dietician. Even assuming *arguendo* that the applicant did not meet with a dietician immediately before or during the probationary period in 2005, the lack of another consultation with a dietician would constitute harmless error[17] in this case because the record shows that the applicant received counseling from dieticians and medical professionals because of his obesity on numerous occasions throughout his military career. The Board does not believe that the applicant lacked knowledge of healthy eating habits for weight loss during his probationary period.

8. The applicant alleged that under Chapter 5.B.1. of the Medical Manual, instead of discharging the applicant, the Coast Guard should have provided therapy for his compulsive overeating disorder. The record shows that in 1995, when the applicant was first diagnosed with compulsive overeating, a doctor recommended Level III treatment, and the applicant underwent such treatment at an addiction rehabilitation clinic in 1998. However, despite the intensive therapy, he was again on weight probation in 2000, 2001, 2002, 2003, 2004, and 2005. The applicant also had access to counselors through the Employee Assistance Program, health services technicians, and military medical officers. Nothing in Chapter 5.B.1. waives the regulations requiring the administrative separation[18] of obese members who fail weight probation or who fail

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[17] *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be "no substantial nexus or connection" between the proven error and the prejudicial record that the applicant wants the Board to remove or correct); *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer's military record is harmless unless the error is "causally linked with" the record the officer wants corrected); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error … will not warrant judicial relief.").

[18] Article 2.G.1. of COMDTINST M1020.8E 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.F.6. states that "[d]uring probation, members

to make both reasonable and consistent during weight probation. The Board finds that the provisions in Chapter 5.B.1. did not entitle the applicant to retention on active duty or an abeyance of his probationary period.

9. In his August 12, 2005, letter to CGPC recommending the applicant's discharge, his CO stated that "since being formally put on the program, [the applicant] has put forth a myriad of medical complaints. All complaints were quickly and thoroughly assessed by qualified medical professionals who consistently concluded there were no grounds to cease weight loss activities. … [The applicant] is and has always been fit for full duty and fitness exercise." In his request for retention, which was also submitted to CGPC, the applicant stated that since May 31, 2005, he had been under medical care and undergoing testing for pain in his back, chest, neck, and left arm. He stated that he had had to discontinue aerobic exercise and Phentermine and asked that his weight probationary period be held in abeyance "until all medical issues are identified and I am returned to a fit for full duty status." This information was reviewed by the applicant's CO before he submitted the recommendation for discharge and by the District Commander, who stated that he had carefully reviewed the matter and concurred with the CO's recommendation. After the recommendation was forwarded to CGPC, the applicant emailed CGPC information about his medical condition, Dr. B's advice, and weight loss and again argued that he should receive an abeyance and should not be discharged. Therefore, although Dr. B's letter about his advice to stop strenuous activity was not in the record when the CO's recommendation for discharge was reviewed and approved by CGPC, the Board is not persuaded that the applicant's request for an abeyance was not carefully investigated and considered. The Board notes in this regard that even after the recommendation for discharge was formally approved, the Coast Guard ordered hydrostatic testing of his weight and body fat to assess his condition. The applicant's CO, District Commander, and CGPC were all aware of his request for an abeyance and had access to his medical records and doctors, and their decision to discharge him shows that they agreed that he was not entitled to an abeyance under the regulations. Absent evidence to the contrary, the Board must presume that these officers carried out their duties "correctly, lawfully, and in good faith."[19] The applicant has submitted insufficient evidence to overcome this presumption and to prove by a preponderance of the evidence that they were mistaken in their assessment of his entitlement to an abeyance under the Coast Guard's regulations.

10. The applicant repeated his allegation that his separation for obesity, without retirement, after completing 19 years and 2 months of active duty was very unjust. The applicant's separation without retirement after 19 years and 2 months of service may seem shocking, but the Board finds that it was not the applicant's "treatment by military authorities"[20] that was shocking. The record indicates that in 2004, the applicant was noted to be overweight upon arriving at his new unit within a few months of undergoing abdominoplasty to attain compliance within a weight probationary period. Rather than immediately place him on weight probation,

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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."

[19] *Arens v. United States*, 969 F.2d 1034, 1037 (1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b).

[20] For the purposes of the BCMRs, "'[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

the command gave him a "grace period" to come into compliance before the April 2005 weigh-in, and the applicant agreed to do so. Instead of doing so and despite repeated counseling about his weight and appearance, the applicant gained 32 pounds prior to the April 2005 weigh-in. When his supervisor counseled him in April 2005 and reminded him that he could be discharged for failing to attain compliance with the weight standards, the applicant told his supervisor that the Coast Guard would not discharge him for obesity because he was a chief petty officer with more than 18 years of service. The applicant was warned about the regulations several times in 2005 and throughout his career about the consequence (discharge) of failing to meet the standards. Instead of heeding those warnings in 2005, as he had always done in the past, the applicant lost only 5 of 70 pounds by August 2, 2005—about a week before his probation mid point—when he was told that he would in fact be discharged as he had been warned. Although the applicant claims that he was losing weight, the records of his weigh-ins and counseling support the command's determination that he was not making "reasonable and consistent progress" in his weight-loss program at least in part because he refused to believe the regulations would be enforced against a chief petty officer about a year shy of earning a 20-year retirement. Moreover, under Article 2.H.2. of COMDTINST M1020.8E, even the applicant's discharge did not prevent him from earning 20-year retirement, because he could have qualified for reenlistment simply by complying with the weight standards within two years his discharge. The fact that the applicant did not make progress and actually gained weight during the "grace period" given him by his command from late 2004 through April 12, 2005; failed to make "reasonable and consistent progress" during his weight probationary period, resulting in his discharge ten months shy of his retirement date; and failed to achieve compliance with the weight or body fat standards within two years of his discharge is surprising. However, the Coast Guard's decision to discharge him rather than to ignore his non-compliance with weight standards and weight-probation regulations is not "treatment by military authorities that shocks the sense of justice."[21]

11. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed error or injustice when it discharged him for weight control failure on September 27, 2005. The Board is not persuaded that, because the applicant had more than 18 years of service when he was placed on weight probation and more than 19 years of service on his date of discharge, the Coast Guard was not entitled to enforce its weight and fitness policies and regulations.

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

[ORDER AND SIGNATURES APPEAR ON THE NEXT PAGE]

[21] *Id.*

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.