

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-038**



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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application after receiving the applicant's completed application on December 30, 2013, 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 May 8, 2015, 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 alleged that her discharge on August 5, 2013, because of "weight control failure," was erroneous and unjust because she had a pending medical condition and had not received proper medical care. She requested "medical attention from a medical doctor and physical therapy, compensation for pain and suffering and for my service records to reflect past and present status."

The applicant stated that while on active duty aboard a Coast Guard cutter in Alaska, she fell down a ladder, injured her left knee, and was subsequently diagnosed with a 70% patellar tendon rupture. She stated that after waiting five months for the knee to heal on its own, she underwent surgery followed by two months of physical therapy. She stated that while she was on convalescent leave following the operation she was told that he was being discharged for failing to comply with the Coast Guard weight standards. The applicant alleged that the Coast Guard unjustly discharged her for weight control failure instead of providing her with proper medical care, a medical board, and a medical separation. She also stated that the Coast Guard failed to provide her physical therapy for her patellar tendon rupture before discharging her.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on February 21, 2006. On June 4, 2007, a Page 7 was prepared to document counseling that she was 17 pounds overweight. On January 22,

2008, another Page 7 was prepared to document that her probationary period had come to an end and that she had successfully met her weight requirement.

On October 31, 2008, another Page 7 was placed in the applicant's record to document that her body exceeded the maximum allowable body fat percentage of 27% by 1.7%.

On September 25, 2012, the applicant submitted a request to the Personnel Service Center (PSC) in which she asked to continue the alternative body fat measurements for which she was approved for on January 8, 2008. PSC approved the request on November 15, 2012, and stated that the authorization for these measurements would be terminated on May 1, 2013.

On November 20, 2012, at age 29, the applicant was weighed and found to be 45 pounds overweight because at a height of 65" she weighed 210 pounds, but her maximum allowable weight was 165 pounds. A Page 7 was prepared for her signature and record, notifying her that she was 45 pounds overweight and that if she failed to reach compliance by May 2013 then she would be recommended for separation.

On December 6, 2012, the applicant's CO completed a Command Referral Form, referring her to a medical officer to determine whether it was medically safe for her to lose weight.

On December 13, 2012, the applicant was evaluated at her local Coast Guard clinic. She weighed 214.6 pounds. She was counseled regarding her options for weight loss. The medical officer completed the Command Referral Form and certified that the applicant had no underlying medical condition for the excess weight; that she had been referred to a dietician for nutrition counseling; and that it was safe for her to engage in fitness activities and to lose the excess weight.

On December 27, 2012, the applicant received nutritional counseling. She weighed 215.8 pounds.

On January 8, 2013, the applicant slipped down a ladder on a cutter and was subsequently diagnosed with a 70% patellar tendon rupture. She was referred to an orthopedic surgeon.

On January 10, 2013, a Duty Status and Physical Profile was created which shows that the orthopedic surgeon found that because of her knee injury, the applicant was not to perform any exercises and was fit for limited duty (FFLD)—desk work only—through January 24, 2013. Subsequent profiles extended her FFLD and exercise limitations through March 1, 2013. The applicant was told to wear a brace and referred for a second opinion.

At a follow-up appointment at the clinic on February 1, 2013, the applicant was found fit for limited duty, authorized to work only half-days, and advised that she could swim for exercise.

On February 20, 2013, a second orthopedic surgeon stated that the applicant's knee was stable but that the MRI showed she had a partial patella tendon rupture. He discussed surgery with her but noted that he was optimistic that her injury might heal without surgery. He

indicated that in the meantime she should keep her leg in the brace and only perform desk or administrative work.

The record shows that at a duty status appointment on February 25, 2013, the applicant weighed 215 pounds, and her limited duty status was continued for another three weeks.

On March 14, 2013, the applicant's original orthopedic surgeon noted that he agreed with the second opinion provided on February 20, 2013, and that the applicant intended to follow-up with the other orthopedic surgeon in the future. He noted that she "has amazingly good motor function with ability to flex and extend the left knee with alacrity."

On April 3, 2013, the applicant's orthopedic surgeon stated that she would need six weeks of physical therapy and rehabilitation. He also stated that she "has good motion and strength in her left knee" and that he expected her to be fit for full duty after the next follow-up appointment in six weeks. He cleared her for full time duties, but with no running, jumping, climbing, (to include climbing stairs), and no ladders for six weeks.

On April 4, 2013, the applicant was seen at her local clinic regarding her duty status, and the report states that she was FFLD for six weeks and referred for physical therapy two to three times per week for six weeks, with no climbing, prolonged standing, or walking. Another Duty Status and Physical Profile was also created, which indicates that she was cleared to perform exercises such as sit-ups, push-ups, and upper body training, no running, light walking, light swimming, and light biking.

On May 1, 2013, the applicant went to the clinic to discuss her duty status with the doctor. She weighed 208 pounds and sought a medical certificate regarding her fitness. She reported that using ladders on the ship had aggravated her knee. Another Duty Status and Physical Profile was prepared, indicating that the applicant was no longer allowed to perform boat duty or the exercises that were approved on April 4, 2013. The doctor noted that her limitations would require TLD (temporary limited duty status) but not a medical board.

On May 2, 2013, a Page 7 was placed in the applicant's record to document that she weighed 203 pounds, was 38 pounds overweight, and was required to lose the excess weight or drop to no more than 32% body fat by the end of her probationary period, May 30, 2103.

On May 3, 2013, the applicant's duty status was updated to light duty, with no boat duty, running, stairs, or prolonged standing. She was advised that she could still swim, bike, and work out her upper body.

On May 8, 2013, the applicant returned to the clinic. She weighed 203 pounds. She noted that she was allowed to use an elliptical trainer but not a stationary bicycle. She was continued on limited duty, and advised that she could do unlimited walking, sit-ups, push-ups, upper body training, physical therapy for her lower body, and swimming and biking "at own pace and distance."

On May 15, 2013, the applicant's orthopedic surgeon indicated that she should refrain from running, jumping, climbing stairs and ladders, and should not do any prolonged standing or walking. She was advised to use an elliptical machine and work out her upper body.

On May 16, 2013, a Duty Status and Physical Profile report was prepared, indicating that the applicant's physical fitness limitations included no running and no lower body training. At a weigh-in on May 24, 2013, the applicant was advised that she weighed 210 pounds and 38% body fat. The latter measurement was later corrected to 45%.

On May 30, 2013, a Page 7 was placed in the applicant's record to document that her probationary period had come to an end, she weighed 198 pounds, had 41% body fat, and so was 33 pounds over the maximum allowable weight and 9% over the maximum allowable body fat percentage of 32%. Therefore, she had failed to meet the requirements of the Coast Guard's weight and physical standards program and would be recommended for separation.

On June 3, 2013, the applicant was notified that her Command had recommended that she be discharged for her failure to comply with the maximum allowable weight and body fat standards. She responded to the proposed discharge on June 6, 2013, stating that she objected to being discharged and argued that because of her knee injury she was not allowed to exercise for approximately six weeks and that she put herself on a strict diet during this time since she was unable to exercise. She noted that at one point during her probation, an error had occurred in her body fat measurements. On May 24, 2013, she was told that her body fat percentage was 38% but a few days later she was told it was 41% and had actually been 45% on May 24<sup>th</sup>. She stated, "I now question all weigh-ins that are conducted by an individual due to the possibility of human error."

On June 8, 2013, the applicant's physical therapist completed a progress note in which he reported that she was showing improvement, and her "rehab potential" was good, but that she had "not yet resumed prior level [of] function." He recommended she have physical therapy twice a week for four more weeks. He reported that her range of motion in her left knee was the same as in her right knee: flexion to 140 degrees and 5 degrees of hyperextension. Her strength was almost as good in her left knee as her right knee. She reported feeling less pain in her left knee, but it was still tender.

On June 10, 2013, the applicant's orthopedic surgeon indicated that she could return to all activities that do not cause significant left knee pain, but he also recommended that she undergo left knee surgery.

On June 11, 2013, a Duty Status and Physical Profile was prepared to document that the applicant was FFLD for 30 days. She could swim and bike at her own pace, use an elliptical, and do upper body training.

On June 25, 2013, the applicant underwent surgery to repair her patellar tendon, and on June 26, 2013, her doctor noted that she should not perform any work until July 24, 2013. He also noted that she should wear a knee brace locked in full extension on left leg at all times except for bathing.

On July 1, 2013, a Duty Status and Physical Profile was prepared to document that the applicant had been given 30 days of convalescent leave during which time she was not permitted to do any work or exercising.

On August 1, 2013, the applicant underwent a pre-separation physical examination. On her Report of Medical History, she noted her various past illnesses and injuries, and the certified physician's assistant (PAC) who conducted the examination noted that she was "still recovering" from knee surgery; "doing much better"; and "has appt. with VA 07 AUG 2013." On the Report of Medical Examination, the PAC noted that she weighed 198 pounds. In addition, the PAC noted that the applicant's patellar tendon repair was "healing well" and that she should follow-up with VA. On the last page of the report, the PAC marked her as "qualified for service," and the clinic administrator signed this page, but on the first page of the report, the administrator failed to circle the words "does" or "does not" to indicate whether the applicant met the physical standards for separation, but he did not list any disqualifying defects.

The applicant was honorably discharged on August 5, 2013. Upon her discharge, she had completed 7 years, 5 months, and 16 days of active duty. Her DD 214 shows that she was discharged for "Weight Control Failure" under Article 1.B.12. of the Personnel Manual, with separation code JCR (separation due to weight control failure) and reenlistment code RE-3F (eligible to reenlist with a waiver). Her separation authorization states that she may request reenlistment to her former rate provided she is within the maximum allowable weight, meets appearance standards, and has been out of the service no more than 24 months.

## APPLICABLE LAW

### *Weight and Body Fat Regulations*

The Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8H, provides the Coast Guard's weight and fitness standards and regulations. Article 4.A.3. states that members must be processed for separation if they fail to comply with their weight or body fat by the end of their probation.

Article 5.A.2. of the Manual states that a member may receive a medical abeyance of body fat standards if their non-compliance is due to medical conditions/medications that directly contribute to weight gain. Injuries or illnesses that interfere with a member's ability to exercise are not grounds for a medical abeyance. Examples of non-qualifying injuries include twisted ankles, pulled muscles, broken bones, and lower back pain.

Article 3.D.7. of the Manual states that non-compliant members who have an injury or illness should be referred to their primary care manager. Members are encouraged to seek guidance from their Unit Health Promotion Coordinator (UHPC) and primary care manager concerning safe exercises and healthy eating habits to maintain progress towards compliance. In most cases, neither illness nor injury will indicate authorization of an abeyance or exemption and members should continue to make vigilant effort to come into compliance.

*Physical Disability Evaluation System (PDES)*

Title 10 U.S.C. § 1201 provides that a member who is found to be “unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay” may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, “at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.”

Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the schedule shall be discharged with severance pay.

Chapter 3.F. of the Coast Guard Medical Manual, COMDTINST M6000.1E, lists the conditions that may be disqualifying for retention in the Service. Chapter 3.F.1.c. states the following:

Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or reserves on extended active duty considered permanently unfit for duty shall be referred to a Medical Evaluation Board (MEB) for appropriate disposition.

Chapter 3.F.12.b.(3) of the Medical Manual states that an internal derangement of the knee may be disqualifying if there is “[r]esidual instability following remedial measures, if more than moderate; or with recurring episodes of effusion or locking, resulting in frequent incapacitation.” In addition, each knee must flex to at least 90 degrees and hyperextend no more than 15 degrees.

Chapter 2.C.2. of the PDES Manual, COMDTINST M1850.2D, states the following:

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

- (1) there must be findings that the disability
  - (a) if of a permanent nature and stable; and
  - (b) was not the result of intentional misconduct ...

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply:

(1) Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or

(b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered him or her unfit for further duty. ...

(2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.

c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is presumed fit for duty even though medical evidence indicates he or she has impairments.

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e. An evaluatee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found not fit for duty even though the member is currently physically capable of performing all assigned duties. Conversely, an evaluatee convalescing from a disease or injury that reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found fit for duty. ...

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f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluatee is not fit for duty by reason of physical disability:

(1) inability to perform all duties of the office, grade, rank, or rating in every geographic location and under every conceivable circumstance. ...

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(5) the presence of one or more physical defects that are sufficient to require referral for evaluation ...

(6) pending voluntary or involuntary separation, retirement, or release to inactive status (see article 2.C.2.b.(1)).

h. An evaluatee found unfit to perform assigned duties because of a physical disability normally will be retired or separated. ...

i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability.

Article 1.B.6.a. of the Coast Guard Separations Manual provides that before involuntary separation, every enlisted member, except those discharged or retired for physical or mental disability, shall be given a complete physical examination in accordance with reference (d), Coast Guard Medical Manual, COMDTINST M6000.1 (series).

### **VIEWS OF THE COAST GUARD**

On June 19, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

The JAG argued that the applicant was notified in November of 2012 that she had failed to meet the weight standards, even when using the alternate body fat measurements, and that this occurred well before she injured her knee in January 2013. Moreover, the JAG argued, the Coast Guard complied with Article 3.D.7. of the Coast Guard Weight and Body Fat Standards Program Manual regarding non-compliant members who are injured while on weight probation.

PSC argued that the applicant's discharge for weight control failure was proper because a Medical Officer determined that there was no underlying medical condition for her excess weight gain and her knee injury did not qualify her for an abeyance or extension of time to lose the necessary weight. PSC stated that the applicant asserts a challenge to a significant Coast Guard policy issue and any recommendation contrary to its recommendation must be reviewed by DHS-OGC.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On June 30, 2014, the BCMR sent the applicant a copy of the Coast Guard's views and invited her to respond within 30 days. She responded by email on July 30, 2014, stating that although she does not dispute her discharge for failing to comply with weight standards, she feels that she was discharged without receiving proper physical therapy for her knee. She also alleged that the Coast Guard failed to provide her with any guidance on how to apply to the Department of Veterans' Affairs (VA), how to request a medical board, or how to request compensation for her injury.

After reviewing the applicant's response to the Coast Guard's recommendation, the Chair contacted her by email on August 6, 2014, and asked if she was amending her request because her response contradicted the claims that she made in her original application. The BCMR noted that in her original application she alleged that her discharge was unjust because she was undergoing medical care at the time of her discharge and that her discharge for weight control failure was "just an excuse" to discharge her. However, in her response to the Coast Guard's advisory opinion, she stated that she was not disputing her discharge for failing to comply with weight standards, but was alleging that she should have been processed through the medical board system or that her paperwork should have been processed faster so that she could get more timely care through the VA.

On August 11, 2014, the applicant responded to the Chair's August 6, 2014, email and asked for a deadline to respond, stating that she was going over the paperwork trying to formulate a response. The Chair agreed to put her case on hold while she decided how to clarify her request. However, nothing more was heard from the applicant. On November 20, 2014, the BCMR staff sent the applicant another email requesting a response. No response was received. On March 4, 2015, the BCMR staff sent her another email, but no response was received. On



April 20, 2015, the Chair notified the applicant that because no word from her had been received since August 2014, and the case would be taken off hold status on May 1, 2015, so the Board could deliberate her case. No response was received.

### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission 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 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.<sup>1</sup>

3. The applicant alleged that it was unjust for the Coast Guard to discharge her for weight control failure before providing her with physical therapy and general guidance on how to obtain physical therapy after discharge or how to seek care from the VA. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>2</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>3</sup>

4. The JAG argued that relief should be denied because the applicant was properly discharged for failing to meet Coast Guard weight standards. Moreover, the JAG noted, a medical officer determined that there was no underlying medical condition for the applicant's excess weight gain, and the applicant's knee injury did not qualify her for an abeyance or extension of the period during which she was required to lose the necessary weight.

5. The applicant appears to have withdrawn her allegation that her discharge for weight control failure was improper, but the Board will consider this allegation nonetheless. The applicant was determined to be 45 pounds overweight on November 20, 2012, was placed on probation, and was notified that she was required to lose this excess weight or drop below 27% body fat by May 30, 2013, or she would be discharged. A Command Medical Referral Form was completed on December 6, 2012, to determine if it was medically safe for her to lose weight, and

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<sup>1</sup> See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at \*21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>3</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

the medical officer determined that there was no underlying medical condition for her excess weight and that it was safe for her to lose the excess weight. After her probationary period came to an end on May 30, 2013, she was notified that she would be recommended for separation because of her failure to comply with the Coast Guard's Weight and Physical Standards. The Board notes that the applicant's maximum allowable weight on May 30, 2013, was still 165 pounds, but her maximum allowable body fat percentage had increased from 27% to 32%. However, her body fat percentage on May 30, 2013, was 41%—well above the maximum.

6. The applicant injured her knee on January 8, 2013, during her probation period and was placed on convalescent leave for two days followed by several months of limited duty with restrictions on what types of exercise she could do. However, Article 5.A.2. of the Weight and Body Fat Standards Program Manual states that abeyances of the probation period will generally not be given for members who are injured. Instead, she was required to maintain satisfactory progress towards her weight loss through her diet and whatever exercise she was medically allowed to do. Because the applicant had not lost the necessary weight or body fat by the end of her probation, May 30, 2013, the Board finds that her discharge for weight control failure was proper.

7. The applicant alleged that the Coast Guard failed to provide physical therapy before her discharge, guidance on how to obtain physical therapy and assistance from the VA, and asked to be provided medical care for her knee. The Board notes that the applicant received weeks of physical therapy before she had knee surgery on June 25, 2013. Following this surgery, she was on convalescent leave through July 31, 2013, and was discharged on August 5, 2013. During the convalescent leave, she was advised to keep her foot raised and not to exercise. When her convalescent leave ended and she was allowed to begin some work and exercise, there was insufficient time for her to begin physical therapy before her separation because she was discharged five days after her convalescent leave ended. Her medical records do not show that her doctors recommended physical therapy immediately following her surgery, and the Board presumes that the health care professionals who cared for her determined that she should not begin physical therapy immediately following surgery. With regards to the applicant's claim that she was not told how to seek care through the VA, the Board notes that on the Report of Medical History dated August 1, 2013, the PAC wrote that her patellar tendon repair was healing well, that she should follow-up with the VA, and that she already had an appointment with the VA scheduled for August 7, 2013. Although her records do not indicate to what extent she was counseled with regards to VA procedures, her record clearly shows that she was advised to follow-up with the VA for medical care after her discharge and already had an appointment.

8. The applicant requested medical care for the knee injury that she sustained while on active duty. The record shows that, although convalescing when she was discharged, she was found fit for duty during her pre-separation physical and did not have any permanent disabilities or other disqualifying conditions listed in Chapter 3.F. of the Medical Manual as requiring evaluation by a medical board. Under Chapter 2.C.2. of the PDES Manual, members who are being discharged for reasons other than disability may be found fit for duty and separated even if they are convalescing as long as they are reasonably expected to become fit for duty in the near future. The applicant submitted nothing that shows that her knee was permanently disabled following her surgery in accordance with the requirements of Chapter 3.F.12. of the Medical

Manual. Therefore, she has not proven by a preponderance of the evidence that the Coast Guard erred in finding that she was fit for service/separation and separating her because she had failed weight probation. As her doctors noted, the VA is the proper source for medical care and benefits for veterans with service-connected medical conditions who are discharged for non-medical reasons.

9. The applicant has not overcome the presumption of regularity accorded the Coast Guard and the application should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

The application of former [REDACTED] for correction of her military record is denied.

May 8, 2015

