

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-056

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 upon receiving the completed application, including the applicant's military and medical records, on February 6, 2014, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 21, 2014, 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, who was discharged from active duty due to weight control failure on May 8, 2009, alleged that he was not medically cleared for separation at the time and asked the Board to void his discharge, reinstate him on active duty, and award him back pay and benefits.

Regarding the delay of his application, the applicant alleged that on the day of his discharge, he was recovering from hernia surgery but was called into the office to sign his discharge papers. He alleged that he asked about his entitlements but was told he was not entitled to any benefits and received no out-briefing. As a result of these circumstances, he alleged, he did not learn about the BCMR until recently.

The applicant alleged that after serving on active duty in the Navy for 9 years and after several years in the Naval and Coast Guard Reserves, he returned to active duty in the Coast Guard in 2002. About a year later in 2003, he was placed on weight probation. The applicant alleged that at his command's request a BM2 who was a weight-lifter but had no formal training volunteered to "coordinate" his exercise so that he could achieve the required weight loss. He successfully met the terms of the probation by meeting the weight or body fat standard.

The applicant stated that while following the BM2's workout regimen, he repeatedly injured himself. On April 29, 2005, he first sought help for pain and swelling in his abdomen after he had been lifting weights. He underwent surgery for hernias in 2006 and 2007. Between

these two surgeries, on December 1, 2006, he was again placed on weight probation and su [REDACTED]

On November 20, 2008, the applicant alleged, he was diagnosed with severe right cubital tunnel syndrome with denervation after he complained of pain in his right arm and sensitivity at his elbow. This problem was surgically corrected on January 20, 2009. The applicant alleged that even though [REDACTED] ways under doctor's orders not to exercise, his command wanted him to "go against doctor's orders" to meet the weight standards. Recognizing that he had gained weight, on February 20, 2009, after he had completely healed from his cubital tunnel surgery, he requested a referral to a nutritionist to try to lose weight.

On March 23, 2009, the applicant stated, a surgeon recommended that the applicant undergo another hernia repair. On the morning of the surgery, April 10, 2009, his command called him and told him they were going to process him for discharge because "they felt even after my surgery and with the new weight standard coming up that September (6 months later) I would not be able to meet the new standard." After the surgery, the surgeon reported that the surgery had been more extensive than expected and so full recovery would take 3 to 6 months. The applicant alleged he "was instructed to stay at home with minimal ambulation."

On May 8, 2009, the applicant alleged, his command directed him to violate his "profile" by reporting for duty to sign discharge papers. He drove to the base on Cape Cod from his home in New Hampshire, turned in his equipment, underwent a ten-minute physical examination that considered only his recent surgery, and then went to the administrative office where he had to sign his discharge papers. He alleged that instead of supporting him in his recovery, his command "took this opportunity to separate him from the service as a weight control failure." Moreover, although he "remembers having a physical examination that lasted approximately 10 minutes," the report of the examination is not in his medical records.

The applicant argued that the records show that during the entire period from April 2005 through his discharge in May 2009, he was injured, in pain, on medication, or on convalescent leave through no fault of his own. Then, while he was still in recovery and had not had time for the "swelling from the hernia and surgery to recede and ... to show that he could make body fat measurements," he was suddenly discharged without due process. He argued that his command unjustly discharged him after more than 15 years of active duty with no notification, no information about his rights, no chance to consult counsel, and no chance to submit a statement on his own behalf. He alleged that he had accumulated many days of leave that he was not allowed to take and was not paid for.

The applicant alleged that the Coast Guard violated its own regulations because he was discharged for weight control failure even though he had not recovered from surgery and no doctor had certified that the proximate cause of his obesity was excessive, voluntary intake of food or drink instead of a cause beyond his control. The applicant alleged that his command failed to place him on weight probation and failed to provide him with an adequate weight control program, such as periodic weigh-ins and nutritional counseling. He alleged that his command should have placed him on weight probation again, instead of discharging him without due process, because he was only 11 pounds above his maximum allowed weight and only 4% above

the maximum body fat standard. The applicant alleged that he had been diligently trying to lose weight, but the circumference of his neck diminished more quickly than the circumference of his waist, which was affected by his hernia, and so his body fat percentage did not decrease. He noted that he had successfully completed weight probation in both 2003 and 2007.

Noting the authorized reasons for discharge under the weight program, the applicant alleged that there is no evidence that he had failed three successive semiannual weigh-ins or that he was placed on weight probation and failed to make progress. He argued that even if he had been placed on weight probation, his probation should have been held in abeyance while he was medically incapacitated and until he was fit for full duty. The applicant argued that but for his injuries and surgeries, he would have been able to comply with the weight standards.

The applicant argued that pursuant to paragraph 3.3.2.,¹ the applicant's separation package, with medical referral forms, weight probation documentation, and applicable medical records, should have been compiled by his command and submitted to the Personnel Command for review, but there is no evidence this was done. He argued that under Article 12.A.15. of the Personnel Manual, which governs discharges for disabilities, he should have been notified in writing of his commanding officer's intent to discharge him and given five working days to submit a response, but he was not. Instead, he was "ordered from his sick bed" thirty-seven days after his hernia surgery in violation of his doctor's orders so that he could sign papers and be discharged in a single day.

Thus, the applicant argued, he was discharged without due process, erroneously, and unjustly, after more than fifteen years of honorable service and just five years shy of retirement. He also alleged that his medical conditions had not been properly documented, which prejudiced his ability to receive veteran's benefits. Therefore, he asked the Board to overturn his discharge and return him to active duty retroactive to May 8, 2009, and to award him all back pay and allowances. In support of this request, the applicant submitted copies of numerous military and medical records, which have been included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Navy on July 22, 1985. Upon enlisting in the Navy at age 19, his height was 71 inches and he weighed 189 pounds. While in the Navy, the applicant was treated for various conditions, including alcohol abuse. He was placed in the weight control program and received nutritional counseling and remedial physical training in November 1987, July 1992, and April 1994. Following his discharge on August 1, 1994, the applicant served in the Naval Reserve.

On June 15, 1999, the applicant enlisted in the Coast Guard Reserve as a gunner's mate, second class (GM2/E-5). On July 11, 1999, he reported for training. On a Report of Medical History dated July 12, 1999, the applicant reported his height as 73 inches and his weight as 240 pounds, but medical personnel measured his height as 71 inches and his weight as 254 pounds.

¹ Article 3.3.2. of the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8G, states that "[a]ll separation packages must be submitted to CGPC [Coast Guard Personnel Command] for approval."

The applicant began serving on extended active duty as a reservist on February 3, [REDACTED]

On a Page 7 dated May 27, 2003, the applicant was advised that based on his age, height, and frame (neck, waist, and wrist size), he was 37 pounds overweight. He weighed 255 pounds and had 31% body fat and had to lose 37 pounds or reduce to 23% body fat by January 27, 2004. The Page 7 states [REDACTED] failed to do so, he would be recommended for separation. The applicant signed this Page 7 in acknowledgement on August 8, 2003.

On October 10 and November 13, 2003, the applicant sought treatment for pain and numbness in his left shoulder, arm, and hand. He told the doctor that he “worked out” four times per week, that his shoulder would “give out,” and that the pain was worse when he was working out. He was diagnosed with suspected ulnar nerve impingement and given a referral for a neurological consultation. (The record contains no evidence of a consultation.)

On May 7, 2004, the applicant again sought treatment for pain and numbness in his left arm. He was advised to treat it with ice and heat and prescribed a painkiller for seven days. The doctor released him as fit for full duty and gave him another referral for a consultation. (The record contains no evidence of a consultation.)

On a Page 7 dated December 6, 2004, the applicant was advised that he was in compliance with the weight/body fat standards because his body fat percentage was 25% although he weighed 244 pounds. Therefore, his maximum allowed weight (MAW) “for screening purposes” became 244 pounds. The command informed him that if he exceeded 244 pounds in the future, his body fat would be re-measured to determine if he was in compliance with the standards.

On February 1, 2005, the applicant advanced to GM1/E-6. On April 29, 2005, he was diagnosed with a ventral hernia. The doctor noted that the applicant had been “using the ab machine in the gym with 185 lbs. and thinks he did it then. When he does sit-ups or puts pressure on it, he can feel it. He can push on it and it goes back into his stomach. Wears a neoprene belt when exercising to keep it in place. Notices that it causes swelling in his umbilical region.” The doctor released the applicant without limitations and “discussed the possibility of progression of present condition due to physical exertion.” The applicant initially declined a referral for surgery because he was about to transfer to another unit. After transferring to a new unit, the applicant again sought treatment for his hernia on June 30, 2005. He was released without limitations and referred for surgery. (The record does not contain documentation of this surgery.)

On a Page 7 dated December 1, 2006, the applicant was advised that based on his age, height, and frame, at 256 pounds and 29% body fat, he was 14 pounds overweight. To meet the standards, he had to lose 14 pounds or reduce his body fat to 27% by March 9, 2007. The command required him “to complete both a personal wellness profile and a detailed fitness plan; participate in a mandatory fitness activity at least one hour per day three days per week; and perform a monthly mandatory fitness assessment until your probationary period ends. If you fail to reach compliance by the end of this probationary period, you will be recommended for separation.”

On a Page 7 dated February 15, 2007, the applicant was advised on a Page 7 that he had successfully completed his weight probationary period.

On October 22, 2007, the applicant was diagnosed with a symptomatic (painful) ventral hernia. He was placed on limited duty, with no lifting of weights greater than ten pounds, sea duty, or climbing until the hernia was repaired. On December 13, 2007, he underwent an open surgical repair on a ventral hernia and began four weeks of convalescent leave. At a follow-up examination on January 7, 2008, the applicant was “released w/o limitations” except that he was told not to try to lift a weight greater than thirty pounds for the next six weeks.

On July 22, 2008, the applicant underwent a quinquennial physical examination. He weighed 262 pounds. The doctor noted the applicant’s prior gallbladder removal and two hernia repairs and found him fit for duty.

On September 2, 2008, the applicant signed an indefinite reenlistment contract. The contract states that he was selling sixty days of annual leave.²

On October 20, 2008, the applicant injured his right index finger with a drill bit. While the wound was being treated, he also reported a “loss of grip” in his right hand and “other pains in the hand/wrist but unsure of relation to finger injury.” After xrays showed no abnormality, the applicant was referred to a neurologist for more tests. His weight was recorded as 260 pounds.

On November 20, 2008, a neurologist diagnosed the applicant with “severe right ulna neuropathy” and reported that he “must not engage in any repetitive motion of the right elbow or any lifting of over 10 pounds with the right arm” as it could result in permanent damage. On November 21, 2008, the applicant went to the clinic for a duty status determination because of an upcoming physical fitness test. His weight was recorded as 268 pounds, and he was placed on a limited duty status for five days pending an orthopedic consultation. He was told to do desk work only, “no sports or PT, no climbing, no lifting over 10 lbs with right arm.”

On November 24, 2008, at a follow-up appointment, the applicant weighed 270 pounds.

On December 1, 2008, the applicant’s commanding officer (CO) referred him to the Coast Guard clinic on Cape Cod to be evaluated on a Command Medical Referral Form (CG-6050) to determine whether it was safe for the applicant to lose his excess weight and body fat. The CO reported that the applicant had been weighed at 274 pounds, was 48 pounds overweight, and had 31% body fat, when 27% was the maximum for his age.

² Whenever a member reenlists, his record automatically shows that he was discharged from his prior enlistment the day before the date of reenlistment. Under 37 U.S.C. § 37(b), a member of the armed forces “who has accrued leave to his credit at the time of his discharge, is entitled to be paid in cash or by a check on the Treasurer of the United States for such leave on the basis of the basic pay to which he was entitled on the date of discharge. ... However, the number of days of leave for which payment is made may not exceed sixty, less the number of days for which payment was previously made under this section after February 9, 1976.” This statute is reflected in Article 7.A.20.a. of the Personnel Manual, which authorizes upon discharge a lump sum payment of unused leave “to a maximum career total of 60 days.”

On December 2, 2008, a physician at the clinic noted that the applicant was overweight. On the CG-6050, the doctor reported that there was no underlying medical condition causing the applicant's obesity; that it was safe for the applicant to lose the excess weight; that he had been counseled on diet and exercise; that there was no underlying medical condition that would make fitness activities detrimental to his health even though he was "currently unable to perform exercises with arm"; it was safe for him to participate in a monthly Fitness Assessment although he should not perform pushups.

On a Page 7 dated December 2, 2008, the applicant's CO advised him that at 274 pounds and 31% body fat, he had to lose at least 48 pounds or reduce to no more than 27% body fat by April 2, 2009, and that if he failed to reach compliance with the weight or body fat standard by that date, he would be recommended for separation. The CO advised him to complete a personal wellness profile and detailed fitness plan, to participate in a mandatory fitness activity at least one hour per day three days per week, and to perform a monthly fitness assessment during his probationary period.

On December 10, 2008, an orthopedic surgeon reported that the applicant had been feeling numbness in his right hand and hypersensitivity in his right elbow for six to seven months and that an EMG had shown motor conduction delays of the ulnar nerve, which were diagnosed as "severe right cubital tunnel syndrome with denervation changes." He recommended surgery.

On January 20, 2009, the applicant underwent "a right elbow ulnar nerve decompression with anterior subcutaneous transposition using fasciadermal sling." He was given five days of convalescent leave, through January 24, 2009, and limited duty "with no use of right arm" until February 17, 2009. At a follow-up appointment on January 29, 2009, the orthopedic surgeon noted that the applicant had a full, pain free range of motion with no numbness and said he was "feeling great." The applicant's weight was recorded as 263 pounds.

On February 5, 2009, the applicant went to the Coast Guard clinic on Cape Cod for post-surgery physical therapy. The physical therapist noted that the applicant "[h]as a highly physical job teaching defense/tactical" and that his improvement since the surgery was good although he still had some soreness and decreased strength in his right arm.

On February 20, 2009, the applicant went to the Coast Guard clinic on Cape Cod for another post-surgery follow-up examination. He weighed 263 pounds. The applicant reported that he felt "outstanding and [was] ready to go back to full duty. [He] states that he is able to do pushups, weights, pullups with no difficulties. ... He is also requesting a referral to nutrition for recommendations as [he] is overweight and on weight program." The doctor noted that the applicant was full recovered and fit for fully duty and referred him to a nutrition clinic.

On March 19, 2009, the applicant reported to the clinic complaining of an umbilical hernia. He weighed 270 pounds. The doctor noted that the applicant had undergone surgical repairs of umbilical hernias in December 2006 and 2007. The applicant reported no pain or bowel problems but had noticed the same "palpable swelling mass" as before. The applicant was told not to

participate in sports or PT or to lift more than fifteen pounds for thirty days. He was referred [REDACTED]

On March 23, 2009, a surgeon advised the applicant's primary physician at the Coast Guard clinic that the applicant should undergo laparoscopic repair of the umbilical hernia and would be "out of work anywhere from four to eight weeks with light duty upon his return for a few weeks." [REDACTED]

On March 24, 2009, the applicant went to the clinic for lab tests. The physician noted that the applicant weighed 264 pounds and had "lost 15 pounds since beginning 3-4 mo[nths] ago. The physician counseled the applicant about diet and exercise, noted that the applicant was on "lifting profile" because of the hernia, and also diagnosed him with "obesity; no known DM, CAD." The physician placed the applicant on convalescent leave from April 1 to 29, 2009, and advised him to come back for a follow-up on April 30, 2009.

In a memorandum dated March 30, 2009, the applicant's CO notified him of the CO's intent to recommend the applicant for an honorable discharge as a result of his failure to comply with the weight and body fat standards and "failure to demonstrate reasonable and consistent progress during the probationary period, which began in November 2008." The CO advised the applicant that he had a right to object to the discharge and to submit a statement within five days, which would be forwarded to the Personnel Command with the CO's recommendation. The applicant acknowledged receiving this notification, objected to the discharge, and submitted an undated statement with the subject line "Statement concerning discharge due to exceeding MAW" in which he wrote the following:

I [name] do object to being discharged from the United States Coast Guard for being over the MAW. I have been on a probationary period for 4 months to lose the weight and body fat percentage of 48 lbs or 4 percent body fat. I have been on limited duty for 3 of those 4 months due to an ulna nerve decompression in my right arm and when cleared for full duty I have extended my work out program from just cardio to cardio and weight training at which time I have received a hernia, which I was placed on light duty again. Even while I am on limited duty I still give 5-6 hours a week 3 hours which is supervised.

I do not know if it is because of the injuries or the combination of stress factors, trying to lose the weight to avoid being discharged or the stress of my wife being pregnant with my first child which is hindering the major weight loss the military expects from me. I am giving it 100 percent and will even give 110 percent if this extension is allowed.

I have also been seen by [a clinic] and had blood work completed to see if there is something wrong with me physically which would hinder my weight loss. LT ... from [the clinic] did review my results and had lab work processed again on my blood testing the insulin and glucose levels which were borderline Type 2 diabetes.

I have lost approximately 14 pounds but unfortunately lost 3 inches around my neck which increased my body fat percentage. I do take the weight standards very serious and would like to request a four-month probationary extension after I am fit for full duty from the hernia operation to lose the necessary weight or body fat to make standards. If I fail to meet the standard in that 4 month extension, then I will voluntarily accept the separation from the Coast Guard.

On March 30, 2009, the applicant's CO again asked the doctor to complete a Con [REDACTED] his excess weight and body fat. The doctor completed the form, reporting that there was no underlying medical condition causing the applicant's obesity; that it was safe for the applicant to lose the excess weight; that he had been referred to a dietician for counseling; and that there was no underlying medical condition that would make fitness activities detrimental to his health. Regarding the ap [REDACTED] ability to perform fitness testing, the doctor reported that the applicant could walk and swim but should not run or do push-ups, sit-ups, or bench presses. The doctor noted that the applicant was recovering from a hernia repair and would not be able to perform those tests for about two months. In the medical notes, the doctor reported that the applicant's height as 72 inches and his weight as 262 pounds.

In a memorandum to the Personnel Command dated March 30, 2009, which was cc'ed to the applicant, the CO recommended the applicant receive an honorable discharge "for failure to comply with maximum weight/body fat standards ... and failure to demonstrate reasonable and consistent progress" during the probationary period, which began in November 2008. He noted that the applicant's height had previously been reported as 74 inches but a re-measurement showed that it was just 71.75 inches. The CO stated that the final probation weigh-in that day had shown that the applicant "was not showing any progress" in losing weight or body fat. He also noted that the applicant was undergoing surgery on April 1, 2009, and would be "sick in quarters" for 28 days afterwards. The CO attached to this memorandum copies of his notification to the applicant, the applicant's acknowledgement of his rights, the applicant's statement, the CG-6050s dated December 1, 2008, and March 30, 2009, showing the applicant's weight loss, and supporting documentation from the applicant's record.

On April 1, 2009, the applicant underwent a laparoscopic ventral hernia repair with mesh emplacement. After a follow-up appointment on April 10, 2009, the surgeon reported to the applicant's primary physician at the Coast Guard clinic that the surgery was "quite extensive." The applicant had reported pain and discomfort, and the surgeon told him this was normal based on "the degree of dissection and removal of the old mesh as well as the large mesh replacement and current repair." The surgeon noted, "I have explained to him that he may not be ready to return to full work for anywhere from three to six months."

Also on April 1, 2009, the Personnel Command issued orders authorizing the applicant's discharge for weight control failure no later than May 8, 2009. The orders note that the applicant could request reenlistment if he met his MAW within two years.

On April 17, 2009, a doctor at the clinic reported that the applicant had elevated glucose and testosterone "at the very bottom of the normal range." The doctor advised him that he was "pre-diabetic and the answers are more exercise and try to lose some weight. Diet modifications should include minimizing consumption of simple carbohydrates, particularly highly processed foods." He also referred the applicant to an endocrinologist "for consideration of hormone replacement." He noted that the applicant should "schedule a follow-up with me when you are able to come in. You do not need to be out of your post-op convalescent period."

On April 28, 2009, the applicant advised his primary physician that he still had pain [REDACTED] at home, splinting abdomen with minimal ambulation for self-care only.” The doctor also noted that the applicant was being processed for separation due to weight control failure and recorded his height as 72 inches, his weight as 255 pounds, and his body fat as 34.59%.

On April [REDACTED], the doctor added an update stating that the applicant was on thirty days of convalescent leave and had been referred for a pre-separation physical examination.

On May 8, 2009, the applicant was honorably discharged due to “weight control failure” pursuant to Article 12.B.12. of the Personnel Manual.

VIEWS OF THE COAST GUARD

On July 2, 2014, the Judge Advocate General (JAG) of the Coast Guard adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC) and recommended that the Board deny the requested relief.

PSC stated that the application should be denied based on its untimeliness. PSC stated that the record shows that the applicant was placed on weight probation in May 2003 when he was required to lose 37 pounds or 8% body fat; in December 2006, when he was required to lose 14 pounds or 2% body fat; and on December 2, 2008, when he was required to lose 48 pounds or 4% body fat by April 2, 2009. PSC noted that the Command Medical Referral Form dated December 2, 2008, shows that although the applicant could not exercise his arm, the doctor determined that there was no underlying medical condition that was causing his obesity or making fitness activities unsafe.

PSC stated that under Chapter 1.1.2. of COMDTINST M1020.8G, the Coast Guard’s Weight and Body Fat Standards Program Manual, any member who “fails to demonstrate reasonable and consistent progress during the probationary period” must be processed for separation. PSC stated that at the end of a probationary period, if there is a “reasonable expectation” that the member will meet the standards if given an extension, the CO may extend the probationary period by four weeks. However, the manual limits the term “reasonable expectation” to members who have “no more than four pounds or one percent body fat to lose and continue[] to demonstrate a strong desire and commitment toward reducing their weight and/or body fat.”

PSC stated that with the probationary period ending on April 2, 2009, and a hernia repair scheduled for April 1, 2009, the applicant’s command referred him for a weigh-in on March 30, 2009. The doctor found that the applicant had lost only 12 pounds and had not reduced his body fat percentage. The doctor also found that there was no underlying medical condition making fitness activities unsafe or causing excess weight. PSC stated that the Command Medical Referral Forms (CG-6050) refute the applicant’s claims that he was medically unfit for exercise throughout the probationary period and that his command wanted him to violate his doctor’s orders.

PSC stated that because the applicant had not shown reasonable and consistent progress in losing weight and body fat during his probationary period and needed to lose more than four

pounds and more than one percent body fat, his CO properly notified him of his pending s [REDACTED] and, PSC stated, the Personnel Command approved the discharge and issued separation orders. PSC noted that after his discharge, the applicant had the right to request reenlistment if he came into compliance with the weight or body fat standards within two years, but he did not.

PSC reco [REDACTED] that no relief be granted because the CG-6050s show that the applicant's physician concluded that his obesity was not caused by a medical condition and that it was safe for him to diet and exercise to lose his excess weight and body fat. PSC stated that the applicant's claim that his probationary period, which ended on April 2, 2009, should have been held in abeyance because he underwent surgery for a hernia on April 1, 2009, lacks merit. PSC concluded by stating, "Weight control failure challenges are significant issues with respect to CG policy," and so any decision to grant relief should be subject to review by the delegate of the Secretary.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 2, 2014, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within thirty days. No response was received.

APPLICABLE REGULATIONS

Separation Authorization

Article 12.B.12.a.10. of the Personnel Manual in effect in 2009 states that a member may be discharged for the "convenience of the Government" for a variety of reasons, including general demobilization, conscientious objection, sea sickness, sleepwalking, and "[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."

Weight and Body Fat Program

COMDTINST M1020.8G, the Coast Guard Weight and Body Fat Standards Program Manual, provided the regulations of the Coast Guard's weight program in effect in 2009. Article 2.2.1.1. states that the weight and body fat standards are based on a member's height and frame size, which is determined by measuring the wrist. Article 2.2.1.2. of the manual provides that all military personnel will be weighed each October and April to determine if they fall within their maximum allowable weight (MAW) but that height and wrist size, which do not change much, need only be re-measured if they are suspected to be inaccurate. (See attached MAW table.)

Article 2.2.2. of the manual states that following the semiannual weigh-in, members well within their MAW should continue to follow their basic fitness plans; members 10 pounds or less under their MAW must be encouraged to complete a Personal Wellness Profile; and members over their MAW must have their body fat percentage measured in accordance with Article 2.3.2. Under Article 2.3.2., a member's body fat percentage is determined by subtracting their neck

circumference from their waist circumference to establish a “circumference value” and use [REDACTED] See attached body fat percentage table.)

Article 3.1.1. provides that members who do not comply with the standards will be referred for a medical assessment to determine whether there is an underlying medical condition that makes weight [REDACTED] safe or too difficult. Article 3.1.6. provides that if the medical officer finds that there is no underlying medical condition that precludes the member from losing weight and/or body fat but that there is a medical condition that prevents a member from participating in a specific portion of the fitness assessment, then the member is excused from that portion of the fitness assessment but “is still responsible for meeting MAW standards within the timeline specified by their probationary period.”

Article 3.2.3. states that members on weight probation must develop a detailed fitness plan, complete a personal wellness profile, and sign a Page 7 acknowledging the terms of their probation. Under Articles 3.2.4. and 3.2.5., the duration of the probationary period is determined by the amount of time it would take the member to lose all of the excess weight at a rate of one pound per week or one percent body fat per month, whichever is greater. However, if the probationary period would be greater than 35 weeks or 8 months by both of these calculations, the member must be processed for separation instead of being placed on probation. If the probationary period calculated at a rate of one pound per week is greater than 35 weeks but the period calculated based on one percent body fat per month is less eight months, then the probationary period is determined with the calculation based on the member’s body fat percentage. Under Article 3.2.6., although the weigh-ins occur in October and April, the probationary periods begin on the day a physician determines that the member can safely lose the weight on the CG-6050.

Article 3.2.7. states that members “must demonstrate reasonable and consistent progress throughout their probationary period,” which is defined as one pound per week and one percent body fat per month. In addition, “[f]ailure to demonstrate such reasonable and consistent progress may provide sufficient grounds for commanding officers to proceed with separation before the probationary period expires. Members undergo monthly weigh-ins and fitness assessments during probation.

According to Article 4.1.1., members may receive a medical abeyance of the weight and body fat standards if a medical officer determines that they “have a medical condition or medication that creates a physiological change causing the member to gain significant weight or have extreme difficulty in losing weight or body fat.” Article 4.1.1.4. states that “[a]beyance requests will typically be granted for cases involving physiological conditions, which are not disqualifying for continued service, that make weight loss, at the standard rate, extremely difficult or impossible” and provides examples of conditions that may and may not justify an abeyance. The examples of conditions for which an abeyance may be justified include hypothyroidism and polycystic ovarian syndrome. The examples of conditions for which an abeyance is not justified include twisted ankles, pulled muscles, broken bones, cosmetic surgery, and lower back pain.

Article 3.2.10. states that if a member is not compliant with the weight or body fat standards by the end of the probationary period, the member must be processed for separation. How-

ever, “if the case warrants special consideration,” the CO may extend the probationary period [REDACTED] the standards within four weeks, which is defined as needing to lose only four more pounds or one percent body fat and demonstrating a strong commitment to do so.

Article 3.3.1. states that members may be separated for obesity if their probationary periods based on both [REDACTED] and body fat exceed 35 weeks and 8 months, respectively; if they fail to demonstrate reasonable, consistent progress during probation; if they fail to attain their MAW or maximum body fat percentage by the end of their probation; if they are placed on weight probation for a third time in 14 months; or if they have failed a third consecutive weigh-in.

Under Article 7.10., a member being separated for failing to comply with the weight or body fat standards is entitled to written notification of the intent to discharge and may submit a statement objecting to the discharge, which must be forwarded to the Personnel Command with the CO’s memorandum initiating the separation.

Article 3.4.6. states that “[a]ctive duty enlistment members discharged for exceeding the MAW or body fat standards and subsequently seeking to re-enter the Service may request a re-entry enlistment into the Service provided: they comply with MAW or maximum percent body fat, and have been out of the Service no more than 24 months.”

Medical Regulations

Chapter 3.A.7.c. of the Coast Guard Medical Manual in effect in 2009 states that “[a] complete physical examination is required within 12 months for retirement, involuntary separation, or release from any active duty (RELAD) of 30 days or longer into the Ready Reserves (selected drilling or IRR). The physical examination shall follow the guidelines set forth for quinquennial physicals.” Under Article 12.B.6. of the Personnel Manual, a member must undergo a physical examination prior to discharge and “[a]ll physical examinations for separations are good for 12 months.”

Article 2.C.2. of the Physical Disability Evaluation System Manual states the following:

b. The law that provides for disability retirement or separation (10 U.S.C. 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 significant 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 [REDACTED]

(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 articles 2.C.2.b.(1)(a) or (b) are met.

(3) [REDACTED]mination of a grave or serious condition or significant deterioration must be made by a competent Coast Guard medical officer. ...

• • •

e. ... 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. ...

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.
2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant admitted that he knew of the alleged error and injustice in his record on the date of his discharge, May 8, 2009. Therefore, the Board finds that the application is untimely.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further instructed that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995). The Board will therefore conduct this required analysis below.
4. The applicant provided no reason for his delay in contesting his discharge except to state that he was unaware of the BCMR. The Board finds that this explanation is not compelling because it does not show that the applicant could not have complained about his discharge and learned about the BCMR within three years of his discharge.
5. The Board's cursory review of the record indicates that the applicant's claims cannot prevail on the merits for the following reasons:
 - a) Although the applicant alleged that he was not medically cleared for separation and received only a ten-minute physical examination on the day of his discharge, the record shows that he was found fit for duty during a quinquennial physical examination on July 22, 2008, which was good for a year, and a member may be found fit for duty even while

convalescing if he is expected to improve and become fit for duty in the near future. Personnel Manual, Art. 12.B.6.; PDES Manual, Art. 2.C.2.e

- b) Although the applicant alleged that he received no due process, the record shows that he received all due process under the Coast Guard Weight and Body Fat Standards Program Manual (as summarized above) because on December 2, 2008, he was notified by Page 7 that he was being placed on weight probation after a medical officer certified that there was no underlying medical cause of his obesity and it was safe for him to lose the weight; he was informed that he would be separated if he did not meet the standards by the end of the probationary period; he was afforded nutritional counseling and a fitness program; and when he failed to meet the standards, he received formal notification of his CO's intent to discharge him and was allowed to submit a statement objecting to his discharge, which his CO forwarded to the Personnel Command for consideration.³
- c) Although the applicant alleged that throughout his career, he was unable to exercise because he had to undergo several surgeries, the record shows that the applicant recovered quickly after his prior surgeries and that his physician certified on both December 2, 2008—at the start of his weight probation—and on March 30, 2009—three days before the end of his probation, when he had undergone arm surgery and was about to undergo hernia surgery—that it was medically safe for the applicant to diet and exercise to lose his excess weight and body fat at the required rate. In this regard, the Board notes that under Article 4.1.1.4. of the Coast Guard Weight and Body Fat Standards Program Manual, a member must meet the terms of his weight probation—presumably by diet alone—even if he breaks a leg.
- d) Although the applicant alleged that he should have received an abeyance or extension of his probationary period, the record shows that he was never diagnosed with the type of physiological condition that would warrant an abeyance under Article 4.1.1. of the Coast Guard Weight and Body Fat Standards Program Manual and that at the end of his probationary period, he was not within 1% of his maximum allowed body fat percentage of 27% or within 4 pounds of his MAW as required for an extension under Article 3.2.10. The Board notes that he did not meet the requirements for an extension whether the standards for a height of 72 or 74 inches were applied.

6. The applicant could have requested reenlistment if he came into compliance with the weight or body fat standards within two years of his discharge, but he apparently did not.

³ An enlisted member has a constitutionally protected liberty interest in his discharge if the type of discharge awarded is stigmatizing. *Canonica v. United States*, 41 Fed. Cl. 516, 524 (1998)). When the type of discharge is stigmatizing, due process is “fulfilled by notice of the government act and an opportunity to respond before or after the act.” *Id.*; see *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Lee v. United States*, 32 Fed. Cl. 530, 546 n. 17 (1995). Notice of a proposed adverse action is adequate when it “apprises the employee of the nature of the charges ‘in sufficient detail to allow the employee to make an informed reply.’” *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (quoting *Brook v. Corrado*, 999 F.2d 523, 526 (Fed. Cir. 1993), and *Brewer v. United States Postal Serv.*, 227 Ct. Cl. 276, 647 F.2d 1093, 1097 (1981), cert. denied, 454 U.S. 1144 (1982)). Enlisted members do not have a constitutionally protected property interest in their military employment because by statute they may be discharged “as prescribed by the Secretary.” 10 U.S.C. § 1169; *Flowers v. United States*, 80 Fed. Cl. 201, 223 (2008) (citing *Canonica*, 41 Fed. Cl. at 524).


Furthermore, the Board notes that this applicant's case is similar to that of the plaintiff in [REDACTED] in [REDACTED] which both the Court of Federal Claims and the Federal Circuit Court of Appeals upheld a BCMR decision not to void the discharge for weight control failure of a Coast Guard veteran even though he had served more than 19 years on active duty and was placed in a limited duty status because of a medical condition while on weight probation. Given the similarities between this case and the [REDACTED] case, the Board finds that the applicant's claim lacks potential merit.

7. The Board notes that the applicant complained that he was not allowed to sell his accumulated leave at the time of his discharge, but the record shows that he had already sold the maximum allowed by statute—60 days—when he was discharged and reenlisted in September 2008.

8. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case because the applicant delayed applying to the Board and his claims cannot prevail on the merits. The application should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

November 21, 2014

