

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-126

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. After receiving the applicant's completed application on May 8, 2014, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 27, 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, who was honorably discharged on July 27, 2007, due to weight control failure asked the Board to correct his record to show that he was medically separated by reason of physical disability. The applicant alleged that although he knew of the error upon his discharge, he "did not know [he] had this option [to apply to the BCMR] until [he] contacted [his] congressman."

The applicant stated that he should have been processed for a medical separation under the Coast Guard's Physical Disability Evaluation System (PDES) because his sleep apnea, which was diagnosed in 1999, and consequent loss of sleep caused his weight gain. He stated that he had no weight issues until after he was diagnosed with sleep apnea, when he began to gain weight. He began using a CPAP (forced air) machine while sleeping in 2004 or 2005, but by then his weight "was already out of control."

In support of his allegations, the applicant submitted copies of his medical records, which are summarized below, and news releases about scientific studies showing a link between obesity and sleep apnea and/or lack of sleep. For example, one about a Harvard University sleep study notes that "people who habitually sleep less than six hours per night are much more likely to have a higher than average body mass index Sleep is now being seen as a potential risk factor for obesity along with the two most commonly identified risk factors: lack of exercise and over-

eating.”¹ Another news release dated 2004 states, “The less you sleep, the more you may gain. So say Stanford University School of Medicine researchers, who found in a recent study that sleep loss leads to higher levels of a hormone that triggers appetite, lowers levels of a hormone that tells your body it’s full and an increased body mass index.”² A third concludes that “sleep restriction promoted weight gain. Chronically sleep-restricted adults with late bedtimes may be more susceptible to weight gain due to greater daily caloric intake and the consumption of calories during late-night hours.”

SUMMARY OF THE RECORD

The applicant served on active duty in the Coast Guard for 6 years, 6 months from November 29, 1988, through May 28, 1995. He reenlisted on active duty on May 1, 1999.

On June 11, 1999, six weeks after he reenlisted, the applicant sought help because he was having difficulty sleeping and would stop breathing while asleep. He was diagnosed with obstructive sleep apnea,³ but he refused to use a CPAP machine as the doctor recommended and asked about surgical options.

On September 13, 1999, the applicant’s command entered a Page 7 in his record to document the fact that although he had been weighed at 213 pounds on July 8, 1999, which was above the maximum allowed weight (MAW) for a male of his age (30 years), height (69”), and wrist size (7¾”), he was in compliance with the Coast Guard’s standards based on his percent body fat, which was 25% (the maximum allowed for males). Therefore, his MAW for screening purposes had been raised to 213 pounds, and if he exceeded 213 pounds, his body fat would be re-measured to determine if he were in compliance. The applicant was provided a copy of the Coast Guard’s weight policies.

On November 2, 1999, the applicant was counseled on a Page 7 that he weighed 214 pounds during the semiannual weigh-in. However, because his body fat percentage was still 25%, he received another Page 7 stating that his new MAW for screening purposes was 214 pounds.

On November 2, 2000, the applicant was counseled on a Page 7 that he weighed 222 pounds during the semiannual weigh-in. However, he met the standards because his percent body fat was just 20%. Therefore, his new MAW for screening purposes was 222 pounds.

During a quinquennial physical examination on January 6, 2004, the applicant was found fit for duty.

¹ See <http://healthysleep.med.harvard.edu/healthy/matters/consequences/sleep-and-disease-risk>.

² See http://med.stanford.edu/news_releases/2004/December/mignot.htm.

³ Sleep apnea is caused by the obstruction of the airway during sleep, and obesity is the most common “predisposing factor” for the condition. A diagnosis of “obstructive sleep apnea/hypopnea syndrome” requires “unexplained daytime sleepiness with at least five obstructed breathing events (apnea or hypopnea) per hour of sleep.” HARRISON’S PRINCIPLES OF INTERNAL MEDICINE, 18th ed. (McGraw-Hill, 2012), p. 2186.

On March 11, 2004, the applicant was counseled on a Page 7 that he weighed 240 pounds during the semiannual weigh-in. However, he met the standards because his percent body fat was 25%. Therefore, his new MAW for screening purposes was 240 pounds.

On October 21, 2004, the applicant weighed 250 pounds, which was 41 pounds overweight, and had 30% body fat, which was 5% above the maximum standard of 25%.

On November 1, 2004, the applicant went to the clinic for a medical evaluation concerning his obesity. He received nutritional counseling, and a note states that he had a history of sleep apnea. The doctor also completed a Command Medical Referral Form stating that the applicant had no underlying medical condition for his excess weight, that it was safe for him to lose the weight, that the applicant had no medical condition that made fitness activities unsafe, and that it was safe for him to participate in a monthly fitness test.

In June 2005, the applicant was reduced in rate from FS1/E-6 to FS2/E-5 apparently for mishandling or poor accounting for galley funds.

On June 22, 2005, the applicant underwent another sleep study and was again advised to use a CPAP machine. He agreed to use one.

On February 3, 2006, the applicant underwent a weigh-in and was advised that at 260 pounds, he was 51 pounds overweight and at 30%, had 5% excess body fat. He was referred for medical screening to determine whether it was medically safe for him to lose the excess weight and body fat and to comply with the standards.

On February 10, 2006, a doctor completed a Command Medical Referral Form and certified the following:

- The applicant did not have an underlying medical condition causing his excess weight.
- It was safe for the applicant to lose the excess weight and comply with the standards.
- The applicant had been counseled on diet and exercise.
- The applicant's "only restriction [for fitness activities] is no running" because of his lumbar.
- The applicant could safely participate in a monthly fitness assessment (push-ups, sit-ups, etc.) except for the running portion.

Also on February 10, 2006, the applicant's command prepared a Page 7 stating that he was 51 pounds overweight. After measuring 260 pounds—above his screening weight of 240 pounds—he had undergone a percent body fat determination, which showed that his percent body fat was 30%. Therefore, he was placed on weight probation and required to meet either the standard MAW for his age, height, and wrist size, which was 209 pounds, or the maximum allowed body fat percentage (25%) within five months (one month per percentage body fat over the 25% maximum) by July 10, 2006. He was required to complete wellness and fitness plans, to participate in a fitness activity for at least one hour per day, three days per week, and to undergo a monthly fitness assessment. He was advised that if he did not meet the standard when the pro-

bationary period ended, he would be processed for discharge. The applicant did not sign this Page 7 until March 23, 2006.

On May 23, 2006, the applicant sought help for lower back pain since having a motor vehicle accident in December 2005. He had undergone ten sessions of physical therapy and was diagnosed with lumbago. The doctor referred him for more physical therapy and to a nutritionist for his obesity because the applicant weighed 259 pounds.

On June 1, 2006, the applicant went to the clinic for a blood pressure evaluation because of a history of hypertension. He admitted having stopped taking Ambien to help his sleep because of a side-effect. The doctor discussed diet and exercise with him and referred him to a nutritionist and for another sleep study. The applicant was fit for duty.

On July 10, 2006, the Page 7 dated February 10, 2006, was reissued except that the end of the probationary period was adjusted to September 25, 2006. However, the applicant did not sign it until October 19, 2006.

On October 17, 2006, the applicant underwent a sleep study and was advised to increase the air pressure on his CPAP machine. Another medical report states that the applicant had been undergoing physical therapy for lumbago but was fit for duty.

On a Page 7 dated December 7, 2006, an Administrative Officer advised the applicant that his probationary period had ended that day, that he weighed 252 pounds, and that his percent body fat was 28%. Therefore, the applicant would be processed for separation.

On December 22, 2006, the applicant went to the clinic for a reevaluation. The doctor noted that the applicant “[h]as been on [weight] program since February of 2006. However he has not been able to lose weight. Upon further questioning, he denies being referred for a nutritionist evaluation or being briefed about his exercise target heart rate.” The doctor noted that the applicant weighed 278 pounds. He was again referred to a nutritionist.

On January 24, 2007, the applicant’s command requested an abeyance of the weight standards on behalf of the applicant, arguing that his medical conditions were preventing his weight loss.

In March 2007, the applicant underwent further testing and a physical examination regarding his obesity.

On May 2, 2007, the Commandant advised the applicant’s command that based on a medical review of the records, the request for an abeyance for the applicant was denied. The Commandant noted that the applicant was on weight probation from February 10 through July 10, 2006, and even though he did not make the weight standards, the command had failed to follow through with separation processing. The Commandant stated that although the applicant had continued to be non-compliant through the Fall 2006 weigh-in, the command had not taken prompt action to separate him. The Commandant stated that the review had shown that the applicant did not have any “medical condition which precludes weight loss” and had not lost the

excess weight despite an extended probationary period. Therefore, the Commandant directed the command to submit a separation package for the applicant within five days.

On June 12, 2007, the applicant's command notified the applicant in writing of the intent to discharge him for weight control failure and that the applicant could submit a statement on his own behalf.

On June 21, 2007, the applicant submitted a statement and claimed that he should be evaluated by a medical board because he had incurred several medical conditions—sleep apnea and back problems—before he became non-compliant with the weight standards.

On June 28, 2007, the Personnel Command issued separation orders for the applicant to be honorably discharged by July 27, 2007.

The applicant was honorably discharged for weight control failure on July 27, 2007. Following his discharge, the applicant applied to the Department of Veterans' Affairs (DVA) for benefits. The DVA awarded the applicant a 70% combined disability rating, including 50% for sleep apnea, 20% for cervical spine strain, 10% for plantar fasciitis, 20% for thoracolumbar strain (lumbago), and 0% for hypertension.

VIEWS OF THE COAST GUARD

On September 18, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC). The JAG noted that the applicant's sleep apnea was well documented in his records but doctors repeatedly certified that he had no medical condition that prevented him from losing weight. The JAG also noted that the medical records show that the applicant was not compliant in using the CPAP machine.

PSC stated that the applicant's doctors found that he had no underlying medical condition that prevented him from losing weight and that he failed to lose the weight even though he had extra time to do so. PSC also noted that the applicant was entitled to reenlist at rate if he came into compliance with the weight standards within two years of his discharge, but he did not do so.

PSC alleged that the applicant's claim that he should have been evaluated by a medical board and processed under the PDES is "without merit." PDES processing is only triggered when a member is "unable to perform the duties of his/her rate/rank," which was not the case with the applicant.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 21, 2014, the Board received the applicant's response to the views of the Coast Guard. The applicant disagreed with the Coast Guard and stated that his medical records show that he was not overweight before 1999 when he was first diagnosed with sleep apnea.

Regarding the doctors' claims that no medical condition prevented him from losing weight, he asked how he was supposed to find the energy to exercise when he was not able to sleep. He stated that he stopped using the CPAP because it kept him awake all night and made his sleep worse. He stated that "it is very hard to lose weight and go out to work out when you get no sleep and I have not energy. In my opinion, the Coast Guard did not do enough to help me with my problem, and I contend that the sleep apnea made me gain the weight."

APPLICABLE LAW AND POLICY

COMDTINST M1020.8F provided the "Weight/Physical Fitness Standards for Coast Guard Military Personnel" in 2007. Article 2.D.1. states that all military personnel will be weighed each October and April, but COs may screen members against standards anytime they deem it necessary. Article 2.D.3. states that all members "exceeding both MAW and body fat will complete a detailed personal fitness plan." Article 2.D.4. states that members who are found to be overweight or "overfat" will not be advanced, transferred to a new unit, assigned to training, or paid bonus installations until they are in compliance with regulations.

Article 2.E.1. states that members not in compliance with MAW and body fat standards "shall be referred to a medical officer or local physician, who shall make a recommendation to the command as to the member's health, whether or not weight and/or body fat loss would be detrimental to the member's health, and the member's ability to participate in each component of the monthly fitness assessment." Article 2.E.3. states that a "member with any underlying medical condition that limits or prohibits his/her participation in a specific portion of the fitness assessment will be excused from only that portion of the fitness assessment, but must continue to participate in weekly fitness enhancing activities outlined in his/her detailed fitness plan. The physician will document his or her finding in the member's health record." Article 2.E.4. states that a "member found to have an underlying medical condition that would make fitness activities detrimental to his/her health is still responsible for meeting MAW standards within the timeline specified by the probationary period."

Article 2.F.1. states that "overweight members who also exceed their maximum body fat percentage shall be placed on probation, during which they must lose their excess weight or body fat. The probationary period cannot equal or exceed thirty-six weeks, however." Article 1.A.3. states that healthy weight loss "should be at a rate of 0.5 to 1.0 pound per week." Article 2.F.4. states that the probation period "shall equal the amount of time it would take the member to lose all excess weight at an average of one pound per week or one percent body fat per month, whichever is greater." Article 2.F.5. states that "[m]embers whose probationary period has been determined to be equal to or greater than 36 weeks both by weight calculations and by body fat calculations ... shall be processed for separation. If the situation exists in which one of the two calculations results in a period in excess of 36 weeks, and one less than 36 weeks, the member shall be assigned a probationary period based upon the calculated period which is less than 36 weeks."

Article 2.F.2. states that a probationary weight loss period "shall not commence until *after* a medical examination. Therefore, the medical exam must be completed as expeditiously as possible, usually within three to four weeks of the discovery that MAW standards have been

exceeded. However, written notification and acknowledgment that the member exceeds the maximum standards shall be completed regardless of any delay.” Article 2.F.3. states that if a doctor determines that the member has a medical condition that prevents him from losing weight or body fat at the required rate, the CO may request permission from Headquarters to hold the probation in abeyance.

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

Article 2.F.13. states that “[a]ny member who has been in two probationary weight or body fat loss periods in any 365-day period will be processed for separation from the Coast Guard in lieu of being placed in a third probationary period during the same 365-day period.”

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

Article 3.A.1. states that a “[m]ember who incurs an injury or illness during a probationary period that may adversely affect their weight loss should be referred to a medical officer or contract physician to determine whether it is medically safe and feasible for the member to continue the weight loss program.” Article 3.A.2. states that if such members are found to have a medical condition that precludes weight loss, their probationary periods should be held in abeyance.

Article 3.C.1. states that if during weight probation a member attains his maximum body fat percentage while remaining above his MAW, “the member will be assigned a screening weight equal to the member’s weight when the body fat determination is made. This does not establish a new MAW. It is designed to avoid requiring the member to have additional body fat determinations as long as he or she does not gain additional weight. ... Should the member exceed the screening weight, he or she will be screened for a new body fat determination. If determined to be over body fat, he or she shall be placed on probation [in accordance with] the standards outlined in Paragraph 2.F. with calculations based upon the member’s original MAW or body fat %, not his or her screening weight.”

Article 3.C.2. states that if “a command believes that unique conditions exist that do not fit under provisions of this Manual, yet special consideration is warranted, the command should contact Commandant ..., which is the final authority for procedural and policy determinations.”

Article 2.H.2. states that “[a]ctive duty enlisted members discharged for exceeding MAW or body fat standards, and now seeking to re-enter the service, 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. Commander (CGPC-epm) will evaluate requests based on Service needs and the member's past performance."

Enclosure 1 to the COMDTINST includes a table showing that men whose height is 69 inches and whose wrist size is from 8 to 8¼ inches (frame size "J") have a MAW of 209 pounds. Enclosure 1 also shows that from age 30 to age 40, a man's maximum body fat percentage is 25%. For men under age 30, the maximum is 23% percent, while for men age 40 or more, the maximum is 27%.

Enclosure 5 provides procedures for measuring percentage body fat with a tape measure. Body fat percentage is determined by subtracting the circumference of a member's neck from the circumference of a member's abdomen, measuring the member's height to the nearest half-inch, and checking a chart.

Article 12.B.12.a.10. of the Personnel Manual in effect in 2007 states that a member may be discharged for the convenience of the Government due to "[o]besity, provided a medical officer certifies a proximate cause of the obesity is excessive voluntary intake of food or drink, rather than organic or other similar causes apparently beyond the member's control."

Article 2.C.2. of the PDES Manual in effect in 2007 states the following:

Fit For Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:

- 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. ...
- 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. ...

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.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant clearly knew that he was not being medically separated upon his discharge in 2007. Therefore, the application is not timely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁴ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for

⁴ 10 U.S.C. § 1552(b).

the delay and the potential merits of the claim based on a cursory review”⁵ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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.”⁶

4. Regarding the delay of his application, the applicant explained that he did not know he could seek relief through the BCMR in 2007 and only recently learned that he could do so when he contacted his congressional representative about the issue. The Board finds that the applicant’s explanation for his delay is not compelling because he failed to show that anything prevented him from complaining about his lack of PDES processing within three years of his discharge, learning about the BCMR, and applying for correction of the alleged error or injustice more promptly.

5. A cursory review of the merits of this case indicates that the applicant’s claim cannot prevail. Under Article 2.C.2.a. of the PDES Manual, the sole basis for initiating PDES processing is a member’s inability to perform his assigned duties. Although the applicant was diagnosed with several medical conditions while on active duty, there is no evidence that in 2006 or 2007 he was unfit (unable) to perform his duties.⁷ Therefore, his command did not commit error or injustice by not processing him under the PDES.⁸ In addition, although the applicant alleged that his sleep apnea caused his obesity and submitted news articles showing that people with sleep apnea may gain weight, before he was discharged, more than one doctor certified that he did not have a medical condition that prevented him from losing weight safely to comply with the weight standards. Moreover, the Board notes that the applicant was both counseled on a Page 7 about his weight and diagnosed with sleep apnea within months of his return to active duty in 1999, and obesity is the most common “predisposing factor” for sleep apnea.⁹

6. The Board notes that the applicant has received a 70% combined disability rating from the DVA, including a 50% rating for sleep apnea. However, DVA ratings are “not determinative of the same issues involved in military disability cases,”¹⁰ Under 38 C.F.R. § 4.1, the DVA considers the extent to which all of a veteran’s “service-connected” disabilities currently render him unable to work in civilian life, whether or not these disabilities rendered the veteran unfit for duty at the time of separation. In contrast, under 10 U.S.C. § 1201, a military physical evaluation board assigns disability ratings according to the extent to which the member has been rendered “unfit to perform the duties of the member’s office, grade, rank, or rating because of

⁵ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁶ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

⁷ U.S. Coast Guard, COMDTINST M1850.2D, Physical Disability Evaluation System Manual, Article 2.A.35 (defining “not fit for duty” as being “unable to perform the essential duties of the member’s office, grade, rank, or rating”).

⁸ *Id.* at Art. 2.C.2.a.

⁹ *See* HARRISON’S PRINCIPLES OF INTERNAL MEDICINE, 18th ed. (McGraw-Hill, 2012), p. 2186.

¹⁰ *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983); *see Kirwin v. United States*, 23 Cl. Ct. 497, 507 (1991) (“The VA rating [in 1986] is irrelevant to the question of plaintiff’s fitness for duty at the time of his discharge in 1978. Indeed, the fact that the VA retroactively applied plaintiff’s 100% temporary disability rating only to 1982, and not 1978, gives some indication that plaintiff was not suffering from PTSD 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.”).

physical disability” prior to his discharge. Therefore, the fact that the DVA assigned the applicant a 70% combined disability rating does not *per se* prove that the Coast Guard erred by not processing him for a medical separation under the PDES.

7. The applicant’s discharge for weight control failure is presumptively correct,¹¹ and he has submitted insufficient evidence to prove that he was entitled to PDES processing and a medical separation instead. Accordingly, the Board will not excuse the application’s untimeliness or waive the statute of limitations. The applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties “correctly, lawfully, and in good faith.”).

ORDER

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

February 27, 2015

