

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2015-107**



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**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 19, 2015, 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 May 13, 2016, 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 was honorably discharged on July 12, 2007, due to weight control failure after completing 1 year, 11 months, and 4 days of military service. He asked the Board to correct his record to show that he was medically separated because of a physical disability. The applicant alleged that his administrative discharge for obesity was erroneous and unjust. He stated that the Department of Veterans' Affairs (DVA) has recognized that he suffers from disc herniation and knee problems, for which he has undergone surgeries, and that these conditions caused his weight gain. The applicant alleged that he discovered the error in his record on July 9, 2013.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on August 9, 2005, at age 18. At the time of enlistment, he stood 74 inches tall and weighed 213 pounds.

On June 6, 2006, the applicant underwent arthroscopic surgery on his left knee. On June 13, 2006, the surgeon noted that the applicant had a good range of motion from 0 to 130 degrees but would be unfit for duty for two weeks and should continue physical therapy. At a follow-up visit on July 10, 2006, the applicant was found fit for light duty, which was limited to desk work for the following 30 days. The medical record indicates that at the time, he weighed 238 pounds and had a body mass index (BMI) of 31.4.

On August 2, 2006, a doctor noted that the applicant's command had referred him for nutritional counseling. The doctor found that the applicant weighed 240 pounds and smoked tobacco. The doctor discussed weight loss, exercise, and lifestyle changes with the applicant. He also advised the applicant to read COMDTINST 6200.2 and referred him to a dietitian and for smoking cessation counseling. On August 3, 2006, the applicant received counseling from a dietitian. On August 24, 2006, he began a smoking cessation program.

At a physical therapy appointment on September 11, 2006, a physician noted that the applicant had a 0 to 122 degree range of motion in his knee and no gait limitations but complained of pain when jogging, squatting, kneeling, and climbing stairs.

On September 19, 2006, an MRI of the applicant's left knee revealed scar tissue at the surgical site and a "minimal fluid signal within the posterior horn root zone region of the tibial attachment of the medial meniscus, felt to represent an artifact related to partial volume averaging and not a tear."

On October 31, 2006, the applicant underwent surgery to remove scar tissue that had formed following his knee surgery. The surgeon reported that the applicant had "intact ACL, PCL, medial and lateral compartment to include articular cartilage and menisci, appropriate alignment of patellofemoral joint." The doctor also found "inferomedial plica" (scar tissue), which was debrided. At this time, the doctor noted that he still weighed 240 pounds.

At a follow-up appointment on November 8, 2006, the surgeon noted that the applicant was doing well, had a full range of motion in his left knee, and should continue physical therapy. He placed the applicant on light duty for a month.

On February 21, 2007, the applicant went to the clinic complaining of left knee pain and stated that it had been hurting for a few days. The doctor noted that the applicant had undergone "lateral release arthroscopic surgery" on June 6, 2006, followed by physical therapy, and had had scar tissue removed on October 31, 2006. He referred the applicant to the orthopedic clinic and released him without limitations.

On February 23, 2007, the applicant's orthopedic surgeon, who reported that the applicant had a full range of motion (ROM) in his knees and hips and ambulated well but had stopped running because of left knee pain. The surgeon diagnosed left patellar tendonitis and "possible mild IT band syndrome" and prescribed ice, anti-inflammatory medication, quadriceps strengthening and stretching of IT band through physical therapy, and no running. He advised the applicant to return in one month.

On February 27, 2007, a radiologist reported that x-rays of the applicant's left knee "show no significant abnormality. He has arthroscopic films available showing a lateral release [surgery]. At this time, the patella is well centered with no evidence of tilting." He noted that there might be a "posterior horn of the medial meniscus" in which case the applicant would likely need an injection of Euflexaa to supplement the fluid in his knee. He referred the

applicant for another MRI but noted that in the interim the applicant could “do his full work activities.”

At a semiannual weigh-in on April 18, 2007, the applicant weighed 311 pounds, which exceeded his maximum allowed weight (MAW). Because he exceeded his MAW, the applicant was referred to a doctor for an evaluation.

On May 3, 2007, the applicant underwent an MRI of his back due to complaints of lower back pain. An MRI showed herniation of the L5-S1 disc and a disc bulge at L4-5.

On May 7, 2007, during a medical evaluation for the weight program, a doctor noted that the applicant was complaining of lower back pain but also signed a Command Medical Referral Form certifying that there was no underlying medical condition causing the applicant’s obesity; that it was safe for him to lose the excess weight to comply with the standards; 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; and that it was safe for the applicant to participate in a monthly fitness assessment. The doctor noted that the applicant weighed 310 pounds and, because he was extremely obese, he should exercising by walking instead of jogging to put less stress on his joints and he should be monitored when doing physical training.

Also on May 7, 2007, the applicant received a Page 7 stating that he weighed 310 pounds, which was found to be 88 pounds over the MAW, which was 222 pounds. Based on his height (74 inches), wrist, and neck size, he had 34% body fat, but the maximum allowed body fat percentage was 23%. The Page 7 advised him that because the weight probationary period for losing the excess weight and/or body fat would exceed the maximum allowed probationary period of 35 weeks, he would be processed for discharge.

On May 8, 2007, the applicant was diagnosed with depression. On May 10, 2007, the applicant returned to the clinic following an MRI of his back. The doctor discussed the results with him and referred him to a neurosurgeon for evaluation of his L5/S1 disc. He also noted that the applicant was being seen by a psychologist because he was depressed about his pending separation for obesity. He released the applicant without limitations.

On June 1, 2007, the applicant’s command sought permission from the Personnel Command to discharge the applicant for weight control failure. The command noted that he was not eligible for weight probation because the probationary period would exceed the maximum allowable probationary period of 35 weeks.

On June 14, 2007, the Personnel Command issued separation orders for the applicant to be honorably discharged for weight control failure on July 12, 2007, pursuant to Article 12.B.12. of the Personnel Manual.

On June 18, 2007, the applicant underwent laboratory tests pursuant to his pre-separation physical examination. At the pre-separation physical examination on June 20, 2007, the applicant reported having no pain but feeling down about his pending separation.

On July 12, 2007, the applicant received an honorable discharge for weight control failure with an RE-3F reentry code (eligible to reenlist if he met the weight standards).

Following his discharge, the applicant applied to the Department of Veterans' Affairs (DVA) for benefits. He received a combined 70% service-connected disability rating, including 10% for intervertebral disc syndrome, 10% for tinnitus, 10% for tendon inflammation, and 50% for major depressive disorder.

### APPLICABLE REGULATIONS

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. Article 2.E.1. states that members not in compliance with MAW and body fat standards "shall be referred to a medical officer or local physician, who shall make a recommendation to the command as to the member's health, whether or not weight and/or body fat loss would be detrimental to the member's health, and the member's ability to participate in each component of the monthly fitness assessment." Article 2.E.2. states that if during this evaluation the medical officer or physician "determines that any weight or body fat loss would be detrimental to the member's health, the commanding officer shall initiate an Initial Medical Board (IMB) through the Physical Disability Evaluation System (PDES), COMDTINST M1850.2 (series)."

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 probationary period "shall equal the amount of time it would take the member to lose all excess weight at an average of one pound per week or one percent body fat per month, whichever is greater."

Article 2.F.5. states the following:

The probationary period shall not equal or exceed 36 weeks (except as noted in paragraph 2.F.3 above). Members whose probationary period has been determined to be greater than 35 weeks by weight calculations and more than 8 months by body fat standards, except those granted an exception per Chapter 3, shall be processed for separation after confirmation of weight and body fat measurements by a member of the command cadre. If the situation exists in which one of the two probationary period calculations results in a period in excess of the above limits, and one less than those limits, the member shall be assigned a probationary period based upon the lesser calculated period

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. It further explains that—

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

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

Article 2.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.”

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.”

Chapter 2.C.2. of the Physical Disability Evaluation System (PDES) Manual, COMDT-INST M1850.2D, 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. ...

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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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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.

## IEWS OF THE COAST GUARD

On October 5, 2015, 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).

PSC stated that the application is not timely since the applicant was discharged in 2007

and so it should not be considered beyond a cursory review.

PSC stated that under Article 2.F.5. of COMDTINST M1020.8F, when a member exceeds the weight standards, the member must comply with the weight standards within a probationary period that “shall not equal or exceed 36 weeks,” and if the probationary period would exceed 35 weeks, the member must be processed for separation.

PSC stated that under Article 2.F.1. of COMDTINST M1020.8F, if a medical officer or doctor certifies that a member’s medical condition or medication prevents the member from losing weight or body fat to meet the standards, the member’s command may request to hold the weight probationary period in abeyance for a specific period of time. However, PSC stated, abeyances are granted only for “physiological conditions that make weight loss difficult or impossible” and not for “physical conditions that may restrict a member’s ability to exercise but are not a physiological impediment to weight loss.” PSC stated that abeyances are not normally granted for “purely physical ailments, such as twisted ankles, pulled muscles, broken bones, etc., that make it difficult to exercise but have no physiological impact on food intake.” In this regard, PSC pointed out that Article 2.E.3. of COMDTINST M1020.8F states that members with physical injuries that restrict them from exercising are still required to comply with the weight standards.

PSC stated that under Article 2.E.2. of COMDTINST M1020.8F, an obese member is only entitled to processing under the Physical Disability Evaluation System (PDES) if a medical officer or physician “determines that any weight or body fat loss would be detrimental to the member’s health.”

PSC concluded that the applicant was properly discharged for weight control failure in accordance with the regulations because he was 88 pounds overweight and so his probationary period would have greatly exceeded 35 weeks. PSC noted that a doctor had certified that there was no underlying medical cause for the applicant’s weight gain and that he was fit to diet and exercise and to comply with the weight standards even though the doctor knew that the applicant had back pain. PSC stated that the applicant’s physical conditions—specifically, his prior knee surgeries and complaint of back pain—did not qualify him for an abeyance of the weight standards.

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

The BCMR staff mailed copies of the advisory opinion to the applicant three times—on October 20, 2015; November 30, 2015; and January 15, 2016. No response has been 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.

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 has alleged that his administrative discharge for obesity was erroneous and unjust and that he should have received a medical separation due to his back and knee problems. Although he claimed that he discovered the alleged error or injustice in 2013, the preponderance of the evidence shows that the applicant knew that he was being administratively separated for obesity and not receiving a medical retirement because of his back and knee impairments at the time of his discharge in 2007. Therefore, his 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.<sup>1</sup> 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 the delay and the potential merits of the claim based on a cursory review”<sup>2</sup> 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.”<sup>3</sup>

4. The applicant provided no explanation for his delay except to claim that he did not discover the alleged error and injustice in his record until 2013. However, the record shows that he clearly knew the circumstances of his separation for obesity and was aware of his then-existing medical conditions in 2007. Therefore, his delay in submitting his application is not justified or excused, and the statute of limitations should not be waived.

5. Even if his delay were excused, however, the records show that the applicant’s claim could not prevail. The record shows that the applicant was properly discharged for obesity in accordance with Article 12.B.12. of the Personnel Manual, COMDTINST M1000.6A, and Article 2.G.1. of COMDTINST M1020.8F, when he exceeded his MAW by 88 pounds and his maximum allowed body fat percentage by 11%, which would have required at least an 11-month probationary period. Under Article 2.F.1. and 2.F.5. of COMDTINST M1020.8f, the maximum allowed probationary period is 35 weeks or 8 months.

6. The record shows that almost a year before his discharge, in August 2006, the applicant’s command referred him to a doctor for a weight assessment when the applicant was 18 pounds overweight. The doctor counseled him about the need for diet, exercise, and lifestyle change and referred him to a dietitian for additional nutritional counseling, which the applicant received. However, the applicant did not lose weight and on May 7, 2007, he was found to be 88 pounds over his MAW. His primary physician noted that the applicant was complaining of lower back pain but also signed a Command Medical Referral Form certifying that there was no underlying medical condition causing the applicant’s obesity; that it was safe for him to lose the excess weight to comply with the standards; that he had been counseled on diet and exercise; and that there was no underlying medical condition making fitness activities detrimental to his health, although he recommended walking for exercise instead of jogging. The doctor’s findings comport with the Article 2.F.3., under which only physiological conditions that cause weight

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<sup>1</sup> 10 U.S.C. § 1552(b).

<sup>2</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

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



gain justify an abeyance of the weight standards, whereas physical impairments such as strains and broken bones that prevent exercise do not justify an abeyance. Under Article 2.E.4., even 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.” As the applicant’s doctors indicated, his knee and back conditions may have precluded certain types of exercise, such as jogging, but he was nonetheless required to meet the standards.

7. The applicant alleged that he should have received a medical separation, but 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 the spring and summer of 2007 he was permanently unfit (unable) to perform his duties.<sup>4</sup> Moreover, because he was being administratively discharged, Article 2.C.2.b. of the PDES Manual applied. Article 2.C.2.b. states that the law providing for disability separations “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.” Under Article 2.C.2.b.(2), a member who, like the applicant, is being administratively discharged for obesity “shall not be referred for disability evaluation [by an MEB] unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.” Those paragraphs require that the officer be physically incapable of performing his duties or suffer an “acute, grave illness or injury, or other deterioration ... which rendered him or her unfit for further duty.” There is no evidence in the record that the applicant met these requirements. Although he has in the intervening years received a 70% combined disability rating from the DVA, 50% of that disability rating is apparently due to an increase in his depression, and his DVA rating is not evidence that he was permanently unfit to perform his duties because of his back and/or knee condition prior to his administrative discharge.<sup>5</sup> Nor is the DVA rating evidence that he could not have met the Coast Guard’s weight standards despite his medical conditions, and his doctor certified that he could have met them.

8. The applicant’s discharge for weight control failure is presumptively correct,<sup>6</sup> and he has submitted insufficient evidence to prove that he was entitled to PDES processing and a medical separation instead. The Board finds no grounds for excusing the application’s untimeliness or waiving the statute of limitations. The applicant’s request should be denied.

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<sup>4</sup> 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”).

<sup>5</sup> *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”); *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.”).

<sup>6</sup> 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.

May 13, 2016

