

**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. 2015-161**

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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. The Chair docketed the case on June 30, 2015, upon receipt of the completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 10, 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 April 21, 2004, due to "weight control failure" pursuant to Article 12.B.12. of the Coast Guard Personnel Manual.<sup>1</sup> The applicant submitted two separate applications to the Board to correct his record. The first application asked the Board to correct his record to reflect that he was granted a medical separation. The second application asked the Board to correct his record to show that his final pay grade/rank was E-4, Petty Officer Third Class.

In 2004, the applicant was discharged for weight control failure. Before being discharged, the applicant alleged, he was awarded non-judicial punishment (NJP) for failing to report for duty on time on multiple occasions due to oversleeping. The applicant contended that he had sleep apnea while serving on active duty and that this condition caused him to oversleep and not report on time. He alleged that his NJP included a reduction in rank and that this NJP was erroneous and unjust because his oversleeping was caused by sleep apnea. The applicant stated that he was diagnosed with sleep apnea after the NJP, and the Department of Veterans' Affairs (DVA) has found his condition to be service-connected.

In his first application, the applicant alleged that his record should be amended to reflect a medical discharge. He stated that his sleep apnea directly resulted in his discharge for weight

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<sup>1</sup> Coast Guard Personnel Manual, COMDTINST M1000.6.

control failure. In support of his application, the applicant submitted his DD 214 and a letter from the DVA dated March 17, 2008, showing that he had been diagnosed with sleep apnea; that the condition is considered "service-connected"; and that he has received a disability compensation for this condition since October 15, 2007.

In his second application, the applicant alleged that his final pay grade/rank should be E-4, instead of E-3, because his reduction in rate at mast for oversleeping was erroneous and unjust. He submitted documents showing that he has been diagnosed with sleep apnea and that he has received service-connected disability compensation for the condition from the Department of Veterans' Affairs (DVA) since October 15, 2007.

### **SUMMARY OF THE RECORD**

On November 27, 2001, the applicant enlisted in the Coast Guard at 19 years old. Upon enlistment, the applicant measured 74.75 inches tall and weighed 226 pounds. On two Report of Medical History forms, dated before and after his enlistment (February 7, 2001, and November 28, 2001), the applicant denied having ever had "frequent trouble sleeping."

On May 6, 2002, a Command Medical Referral form was prepared for the applicant, stating that he weighed 238 pounds. The applicant was informed that he was 14 pounds overweight and had 1 percent of excess body fat. The form shows that the doctor certified that the applicant did not have an underlying condition that was causing the excess weight, that it was safe for him to lose the weight, and that he was counseled on proper diet and exercise. The applicant was notified on a Page 7 that he was being put on weight probation and that he must lose 14 pounds by the end of the probationary period or he would be recommended for separation.

On June 10, 2002, the applicant's first probationary period ended. He weighed 220 pounds. He had achieved 20% body fat and therefore successfully met the requirements of the Coast Guard Weight Program.

On August 8, 2002, the applicant visited the clinic complaining that for years he had had difficulty falling asleep but would then sleep heavily and sleep through his alarm. A medical note dated November 5, 2002, states that the applicant's command had requested a sleep evaluation because the applicant was oversleeping and reporting late for watches. On October 17, 2002, a doctor specializing in "sleep medicine" evaluated the applicant and reported that he suffered from "delayed sleep phase syndrome" and needed light therapy. The applicant told the doctor that he had had trouble sleeping for more than two years, ever since he had worked odd hours as a snow plowman before he joined the Coast Guard.

On November 24, 2002, a health specialist at the Coast Guard clinic noted that a medical officer had reported that the applicant's condition should be handled administratively and that it was not a disability that should be processed under the Physical Disability Evaluation System (PDES).

On December 5, 2002, the applicant was awarded NJP for repeatedly failing to report for duty on time due to oversleeping. He was awarded 14 days of restriction to base with extra duties, 7 days of which was suspended for three months on condition of good behavior.

On February 19, 2003, the applicant was again awarded NJP for oversleeping and failing to report for duty. His NJP included a forfeiture of one-half a month's pay and a reduction in pay grade that was suspended for two months on condition of good performance.

On a Page 7 dated April 23, 2003, the applicant was informed that he had been placed on a six-month performance probation as a result of "continued performance and discipline problems," including "frequent misconduct and general apathetic attitude, specifically your failure to wake from sleep on 17 occasions and perform required security rounds on 7 occasions during the last 8 month period. You have also performed well below standards in that you required 120 days longer than the time normally allowed to become certified in your assigned position as boat crewman." The Page 7 notes that he had been "evaluated by several medical professionals and their diagnosis indicates that you could adapt your pre-sleep activity and correct any sleep difficulties you have. Despite this information, you have continued to report late for duty and miss the required security rounds." The applicant was advised that if his performance did not improve, he would be processed for discharge.

On May 9, 2003, the suspension of the punishment was vacated, reducing the applicant's rank from an E-4 to an E-3.

On a Page 7 dated May 13, 2003, the applicant was informed that weighed 226 pounds and was 2 pounds overweight. He was notified that he was required to lose the 2 pounds by the end of his probationary period, which was May 27, 2003. He acknowledged and signed the Page 7 on May 14, 2003.

On a Page 7 dated June 2, 2003, the applicant was advised that he weighed 236 pounds and was 12 pounds over the maximum allowable weight for his height and age and 7% over the maximum allowable body fat. The applicant was placed on weight probation and notified that if he did not lose the 12 pounds by the end of the probationary period, he would be recommended for separation. He was told he did not have an underlying condition that was causing the excess weight, that it was safe for him to lose the weight, and he was counseled on proper diet and exercise.

On June 3, 2003, a doctor signed a Command Medical Referral Form, certifying that the applicant had no underlying medical condition causing his excess weight, that it was safe for him to lose the excess weight to comply with standards, and that he had been counseled on diet and exercise.

On August 10, 2003, the applicant attended a sleep study to assess his delayed phase sleep syndrome, daytime fatigue, obstructive sleep apnea, and parasomnias. He was diagnosed with "significant sleep disordered breathing" and advised to use a CPAP machine while sleeping.

On August 13, 2003, the applicant was advised on a Page 7 that he weighed 239 pounds and was 4% over body fat and so had not met the terms of his weight probation. He was advised that he would be processed for separation.

On October 1, 2003, the applicant was referred to the clinic for a weight assessment. He weighed 256 pounds, which was 34 pounds overweight. The clinic noted that his weight probationary period had ended on August 25, 2003, and that he had not met the terms of probation. The applicant was referred for medical screening and to the Weight Control Program.

On November 4, 2003, the applicant was required to re-sign the same Page 7 regarding weight probation that he had signed on June 2, 2003.

On January 2, 2004, the clinic reported that the applicant's weight probationary period had ended. The applicant weighed 273 pounds and had a BMI of 29%. He was determined to be 48 pounds over the maximum allowable weight and 8% over the maximum allowable body fat. He was recommended for separation in accordance with Article 12.B.12 of the Coast Guard Personnel Manual.

On a Page 7 dated January 12, 2004, the applicant was notified that his weight probation had ended on January 2, 2004, and that he would be recommended for separation because he had not met the terms of his probation.

On February 9, 2004, the Officer in Charge (OIC) of the applicant's unit recommended to the Group Commander and the Personnel Command that the applicant be discharged because he had failed weight probation. The OIC explained that the applicant had received an extra probationary period, which ended on January 2, 2004, because he had initially been misadvised about his maximum allowed body fat percentage. The OIC admitted the administrative error but argued that because the applicant had received another probationary period, the error had not adversely affected the outcome.

On February 11, 2004, the Group Commander forwarded the OIC memorandum and recommended approval of the discharge. The Group Commander stated that the applicant was "apathetic toward losing the required weight. Combined with his sub-par performance, [he] demonstrates a lack of motivation to continue his Coast Guard career. He has become an excessive administrative burden to the unit as well as an operational risk on the boats." The Group Commander recommended that the applicant receive an honorable discharge. On March 19, 2004, the District Commander concurred with the Group Commander's recommendation and forwarded the separation package to the Personnel Command.

On April 21, 2004, the applicant received an honorable discharge due to weight control failure.

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

On November 17, 2015, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant partial relief in this case in accordance with the findings

and analysis provided in a memorandum submitted by Coast Guard Personnel Service Center (PSC). PSC stated that the applicant was awarded NJP on February 19, 2003, in which his reduction in rank from E-4 to E-3 was suspended for two months. The suspended reduction in rank was vacated on May 9, 2003, after more than two months had passed.

The JAG concluded that the suspended punishment was vacated outside the window of the suspension period in which the punishment could have been vacated.<sup>2</sup> Therefore, PSC recommended that the applicant be granted relief to correct his service record to remove his reduction in rank and that he be granted appropriate pay and allowances lost during the timeframe of May 9, 2003 until his separation on April 21, 2004.

The Coast Guard did not address the applicant's claim requesting a medical separation. The Coast Guard stated, "According to [DD Form 214], the applicant was discharged on April 21, 2004 for weight control failure. The applicant is not disputing his discharge from the Service."

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

On November 24, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

### **APPLICABLE LAW**

The Military Justice Manual, COMDTINST M5810.1E, states the following at Article 1.E.5., Vacation of Suspension:

Any commanding officer competent to impose upon the member punishment of the type and amount involved in the vacation of the suspension may vacate a suspended punishment during the period of suspension.

The Military Justice Manual, COMDTINST M5810.1E, Article 1.E.5.f., Remitted Punishment, states the following:

Remitted punishment may not be vacated. By definition, remitted punishment no longer exists in any form to be resurrected.

The Notes section of Article 1.E. of the Military Justice Manual, COMDTINST M5810.1E, states the following:

If the member is subject to suspended punishment(s) from a prior NJP, the suspension may be vacated and the suspended punishment imposed if:

- (1) The period of suspension has not expired (e.g., not more than 3 months has passed if the prior punishment was suspended for 3 months)

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<sup>2</sup> Military Justice Manual, COMDTINST M5810.1E, Art. 1.E.5.

Article 2.G.1. of COMDTINST M1020.8E, which was in effect in 2004, states that “[m]embers who exceed their MAW [maximum allowed weight] 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.E. of COMDTINST M1020.8E states the following:

1. Members not in compliance with MAW and body fat standards shall be referred to a medical officer or local physician, who shall make a recommendation to the command as to the member’s health, whether or not weight and/or body fat loss would be detrimental to the member’s health, and the member’s ability to participate in each component of the monthly fitness assessment. The unit commanding officer shall prepare the top portion of the Command Medical Referral Form (CG-6050), Enclosure (3); the bottom portion will be completed by the medical officer or local physician. This form shall be filed in the member’s Health Record.
2. If a medical officer or local physician determines that any weight or body fat loss would be detrimental to the member’s health, the commanding officer shall initiate an Initial Medical Board (IMB) through the Physical Disability Evaluation System (PDES), COMDTINST M1850.2 (series). If the condition is not disqualifying for retention as per chapter 3.F of the Medical Manual, COMDTINST M6000.1 (series), the commanding officer shall process the individual for discharge in accordance with Paragraph 2.G. If a medical officer or local physician determines that any weight or body fat loss would be temporarily detrimental to the member’s health, the member should be processed in accordance with Paragraph 3.A. [requiring an abeyance if the member is not fit for full duty].
3. A member with an underlying medical condition that limits or prohibits his/her participation in a specific portion of the fitness assessment will be excused from only that portion of the fitness assessment, but must continue to participate in weekly fitness enhancing activities outlined in his/her detailed fitness plan. The physician will document his or her findings in the member’s health record.
4. A member found to have an underlying medical condition that would make fitness activities detrimental to his/her health is still responsible for meeting MAW standards within the timeline specified by the probationary period.

Article 2.F.3. states that if a doctor determines that the member has a medical condition—such as a thyroid condition—that actually prevents him from losing weight or body fat at the required rate, the CO may request permission from Headquarters to hold the probationary period in abeyance.

***Provisions of the Medical Manual (COMDTINST M6000.1B)***

Article 3.F.1. of the Medical Manual provides that members with medical conditions that “are normally disqualifying” for retention in the Service shall be referred to an Initial Medical Board for possible processing under the PDES. Article 3.F.15.1. states that obstructive sleep apnea (OSA) may be disqualifying for retention on active duty “when not correctable by use of CPAP or surgical means.”

Article 3.B.6. provides that “[w]hen a member has an impairment (in accordance with section 3-F of this Manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation.”

***Provisions of the PDES Manual (COMDTINST M1850.2C)***

The PDES Manual governs the separation of members due to physical disability. Chapter 2.C.2. states the following:

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate members 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 service 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 the service member 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.

**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 had been reduced in rate to E-3 and that he was not being medically separated because of his diagnosed sleep apnea at the time of his discharge on April 21, 2004. Therefore, his requests for correction should have been submitted no later than April 2007. His requests were not timely filed.<sup>3</sup>
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>4</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

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<sup>3</sup> The first application was received on June 24, 2008, and the second on June 9, 2010. Docketing the applications was delayed pursuant to 33 C.F.R. § 52.21 because the applicant's medical records were not received from the DVA until June 29, 2015.

<sup>4</sup> 10 U.S.C. § 1552(b).

the delay and the potential merits of the claim based on a cursory review”<sup>5</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>6</sup>

4. Regarding his requests for medical separation and the restoration of his pay grade, the applicant claimed that he applied as soon as he learned that he could seek correction of the errors. However, the records show that the applicant was aware of his pay grade, his sleep apnea diagnosis, and the type of discharge he was receiving in 2004. He signed his DD 214 showing his rate and his honorable discharge for weight control failure upon his separation on April 21, 2004. By regulation, all members receive information about the BCMR during their pre-separation counseling.<sup>7</sup> Therefore, the Board finds that the applicant’s explanation for his delay is not persuasive.

5. The applicant alleged that his final pay grade/rank should be E-4 instead of E-3. The applicant acknowledged that before being discharged, he was awarded NJP for failing to report on time to duty on multiple occasions due to oversleeping. However, as the Coast Guard admitted, the record shows that the applicant’s reduction in pay grade was suspended on condition of good behavior for two months, and this suspension was improperly vacated about three months after the mast. Therefore, the Board agrees with the Coast Guard that the period of the suspension had expired and the suspension was no longer subject to vacation when his command vacated the suspension and reduced the applicant’s pay grade. Based on the merit of the applicant’s request for the higher pay grade, the Board finds that the untimeliness of the application should be excused with regard to this complaint, and the applicant’s pay grade/rank should be corrected to E-4 from May 9, 2003, until his separation on April 21, 2004.

6. The applicant alleged that his sleep apnea was the reason for his weight gain and that he should have received a medical separation instead of being discharged for weight control failure. Under Article 2.C.2.b. of the PDES Manual, however, medical separations are only awarded for medical conditions incurred or aggravated in the line of duty that render a member permanently disabled, and a member being discharged for obesity is only eligible for PDES processing if he incurs a grave injury or illness or becomes physically unable to perform his duties prior to discharge. The applicant has not shown that he met these requirements. Moreover, although the DVA has found the applicant’s sleep apnea to be “service connected,” the applicant’s military medical records show that he admitted to at least two doctors that his frequent problems with sleep began before he enlisted in the Coast Guard, when he worked as a snow plowman. His medical records also show that he erroneously denied having frequent trouble sleeping on his pre-enlistment and enlistment Report of Medical History forms.

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

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

<sup>7</sup> The Coast Guard Personnel Manual, COMDTINST M1000.6A, Art. 12.B.53 h. states, “During the separation processing of any member being discharged, commanding officers will explain the purpose and scope of the Discharge Review Board and the Board for Correction of Military Records, established pursuant to 10 U.S.C. 1552 and 1553.”



7. The records show that despite his sleep problems, the applicant's doctors certified that he did not have an underlying medical condition that was causing the excess weight gain and that it was safe for him to lose the weight. Therefore, although he had been diagnosed with sleep apnea, the Board finds that the preponderance of the evidence shows that there was no underlying medical condition that caused the applicant's obesity and that it was safe for him to diet and exercise to lose the excess weight as he had done during his first weight probation. The applicant has not shown that it was erroneous or unjust for him to be required to meet the Coast Guard's weight standards despite his sleep apnea. Therefore, he has not shown that his honorable discharge due to weight control failure was erroneous or unjust, and the Board finds that his claim that he should have been processed under the PDES for a medical separation lacks apparent merit. The Board will not excuse the untimeliness of the application or waive the statute of limitations with regard to this claim.

8. Accordingly, the Board finds that the applicant's request should be denied in part and granted in part. His request for a medical separation should be denied because it was not timely and lacks potential merit. His request that his E-4 pay grade/rank be reinstated should be granted.

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

**ORDER**

The application of former [REDACTED] USCG, for correction of his military record is granted in part as follows: His record shall be corrected to show that he was not reduced in pay grade and rate from E-4 to E-3—i.e., that the suspension of his reduction in rate was not vacated—following his NJP on February 19, 2013, and that he was discharged as an MK3/E-4. The Coast Guard shall pay him any amount due as a result of this correction. All other requests for relief are denied.

June 10, 2016

