

**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. 2016-183**

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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on August 4, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 8, 2017, 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 asked the Board to remove two CG-3307s ("Page 7s"), dated October 21, 2015, and February 22, 2016, from his record documenting the applicant's placement on and removal from weight probation due to non-compliance with the Coast Guard's weight and body fat standards. He also requested that the semi-annual weigh-in for October 2015 be corrected to show that he was in compliance because, he alleged, he would have been granted an abeyance had one been requested by his command.

In a statement the applicant provided with his application, he stated that on August 1, 2015, he went to a hospital due to severe back pain. He stated that he had been suffering from back pain for more than two years and had been receiving treatment and physical therapy. When he was taken to the hospital, he stated, he had started to lose sensation from the waist down. At the hospital, it was determined that the applicant had a herniated intervertebral disc and a pinched nerve. The applicant required urgent surgery, which he received on August 5, 2015. The applicant stated that he was placed on convalescent leave and returned to work on September 29, 2015, in a light duty status. He stated that he visited a medical clinic on October 19, 2015, when it was determined that he needed to be placed on a Temporary Limited Duty Status until February 2016.

The applicant stated that he was weighed on October 21, 2015, for the semi-annual weigh-in per the Coast Guard Weight and Body Fat Standards Program Manual. At that weigh-

in, the applicant was determined to have 28% body fat and to weigh 264 pounds, whereas his maximum allowable body fat was 24% and his maximum allowable weight was 214. The applicant stated that he was placed on weight probation “immediately” and was seen the next day by a doctor to complete a Command Weight Referral form. The applicant alleged that the doctor determined that there was a medical diagnosis or medication that had contributed to the applicant’s excess weight, and that the applicant was limited in what physical activities he could participate in. The applicant also alleged that he was not referred to a nutritionist because his excess weight was not due to bad eating habits or lack of exercise, but due to a medical condition.

The applicant stated that he received an email from his supervisor, [REDACTED] on October 26, 2015, forwarding an email from a Health Services Technician (HSC) who stated that the request to place the applicant in a Temporary Limited Duty Status had been approved through January 15, 2016. The applicant alleged that this proves that a doctor had determined that the applicant was temporarily unable to perform the essential duties of his office, grade, rank or rate. The applicant added that before placing a member on Temporary Limited Duty per COMDTINST M1850.2D, the Physical Disability Evaluation System Manual, the doctor must find that amelioration of the condition will allow for the member’s return within nine months.

At this point, the applicant stated, he informed his supervisor, [REDACTED] that he wished to request a medical abeyance through his chain of command to be sent to the Personnel Service Center (PSC). The applicant alleged that he also discussed this with a Chief Warrant Officer who encouraged the applicant to make the request “since he understand [sic] that due to [the applicant’s] medical unique situation it will be granted and that [his] medical condition was affecting [his] compliance with the weight standards.” The applicant stated that on November 6, 2015, he spoke with his supervisor who informed him that the abeyance would not be submitted because the applicant’s medical condition did not fit into the abeyance standards listed in the Weight and Body Fat manual. The applicant told his supervisor that the manual states that abeyances will be granted on a case-by-case basis; however, his supervisor stood by his decision not to submit the abeyance request to PSC.

The applicant stated that, despite the unfavorable treatment, he worked hard to come into compliance and performed physical activities that he was advised not to do because of his back. He stated, “I sacrifice my body and jeopardize my wellbeing just to meet the standards” that had been misunderstood by “a series of persons.”

The applicant claimed that he was not allowed to submit an abeyance request, which was an error by the Coast Guard. He stated that the intent of the policy is “to avoid penalizing a member who may be non-compliant due to medical conditions/medications that directly contribute to weight gain.” The applicant claimed that he was deprived of the opportunity to have PSC decide if an abeyance should be granted because each case is unique and is to be reviewed on a case-by-case basis. He reiterated that at the time of the weigh-in, he was recovering from a spinal fusion surgery which kept him in bed for four weeks and his movements were very limited. He stated that he was just returning to work at the time of the weigh-in. In addition, he stated, he was taking a prescription steroid medication to help with the pain and inflammation, which caused weight gain as a side effect.

The applicant stated that due to this “erroneous decision,” his career was adversely affected because he is unable to apply for a special assignment job within two years of being placed on weight probation. He therefore asked the Board to correct his record so that he can continue with his career.

In support of his application, the applicant provided relevant documentation surrounding his non-compliant weigh-in, which is included below in the Summary of the Record.

### **SUMMARY OF THE RECORD**

On August 10, 2015, the applicant spoke with his primary care provider on the phone. The doctor memorialized the discussion on a Chronological Record of Medical Care. The diagnosis was stated as “Herniated Intertebral Disc.” The notes state the following:

PT went to ER VA hospital on Aug 1 2015 and [discharged] from ER same day. He went back to ER VA hospital on Aug 2 2015 [from which] was transfer to...medical center where he had back surgery on Aug 5 2015 and discharge home on Aug 6 2015... Follow up: with PCM...Will be in convalescence for at least 2 weeks and re-evaluate after that.

A Chronological Record of Medical Care dated August 24, 2015, documents the applicant’s postsurgical examination with his primary care doctor. The notes recommend three weeks of convalescence and another follow-up visit at that point. The notes also state that the applicant was “currently on Neurontin and Naproxen”<sup>1</sup> and that he weighed 258 pounds and had a body mass index of 33.13.

The applicant filled out an undated Pre-Encounter Questionnaire for his primary care doctor. In response to “Pending Consults” the applicant wrote “Physical therapy 17SEP15 VA Hosp.” On this questionnaire, in response to “All current Meds or Supplements” the applicant listed only Neurontin and Naproxen. His weight is again listed as 258 pounds.

A medical record dated September 14, 2015, shows that at a post-surgical follow-up examination, the applicant was advised not to lift more than ten pounds and that he still had a limited range of motion and was starting physical therapy.

A medical record dated September 28, 2015, states the following:

Status post L4-L5 laminectomy/discectomy. Will start physical therapy... Will start light duty with emphasis on no heavy lifting yet, no sea duty and [no] PT or high impact sports or training. Will continue in Neurontin and PNR Naproxen and Prilosec. ... No high impact sports or PT [physical training]. No heavy lifting. No sea duty.

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<sup>1</sup> Neither of these medications is a corticosteroid.

A medical record dated September 28, 2015, states that the applicant reported his pain level as “0/10,” that he was in physical therapy, and that he “[a]dmitt[ed] almost complete pre-op ROM [range of motion]. Pain only if suddenly rotate. Denies legs symptoms. Denies lower extremities tingling or weakness.”

A medical record dated October 19, 2015, lists the medications the applicant was then taking as “Neurontin – last night, Naproxen – last night.” It states that he reported his pain as “0/10” and that he had been in physical therapy. The applicant reported no radiculopathy or numbness. Another record dated October 19, 2015, states the following: [REDACTED]

Back: Almost full range of motion, no radiculopathy and no pain. Patient needs to have a TLD [Temporary Limited Duty] after his surgery that was done in August 6th. He was in convalescence leave and now he is in limited duty. He needs a TLD until February. It is possible by November, he will go fit for full duty... Continue doing core exercise, avoid gaining weight, decrease fat and carbohydrates in his diet.

On October 21, 2015, the applicant participated in a semiannual weigh-in. The record of the weigh-in states that the applicant was 74 inches tall, that his maximum allowable body weight was 214, his maximum allowable body fat was 24%, and that he weighed 264 pounds with 28% body fat. Next to “Compliant?” the corpsman checked No.

Also on October 21, 2015, the applicant received a Page 7 placing him on weight probation. The applicant’s signature appears on the Page 7 acknowledging receipt. The Page 7 states:

You have this date been determined to be 50 pounds overweight. Your measurements are: Height: 74 (inches), Weight; 264 (pounds), Waist: 45 (inches), Neck: 18.5 (inches), Your age is: 34 and your percent body fat is: 28. In accordance with Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series), you are hereby notified that you are required to lose 50 pounds or drop to at least or below 24% body fat by 21Feb2016...

This is your second documented time on weight probation during your current enlistment that began on 05MAR2013 and ends on 04MAR2016. If you are placed on weight probation a fourth time during this enlistment, you will become ineligible for reenlistment.<sup>2</sup>

On October 22, 2015, the applicant was seen for a Command Weight Referral. The record of the appointment states that the applicant’s neck was 18.5 inches, his height was 74 inches, his waist was 45 inches, his weight was 264 pounds, and his body fat was at 28%. Question 2 on the record asks “Are there any medical diagnoses or medications that could be contributing to the member’s excess weight?” which is answered affirmatively. Question 3 asks “Are there any medical or physical conditions that can limit participation in physical activity?”

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<sup>2</sup> No weight probation documentation was located in his record after March 2013. However, the applicant was placed on weight probation in May 2009 and December 2007.

which is also answered affirmatively. In response to Question 4, "Please list the activities the member cannot safely participate in," the doctor wrote "He cannot run, push up or abdominal [exercises]." Question 5 asks if the member has been referred to a dietician, which was answered negatively. Lastly, the doctor indicated that the applicant could not safely participate in a 1.5 mile run, push-ups, or curl-ups.

The applicant provided an email dated October 26, 2015, which states that the applicant was approved and entered into the Temporary Limited Duty program. The TLD approval would expire on January 15, 2016.

On October 29, 2015, a Chronological Record of Medical Care states [REDACTED] the applicant was seen for a follow-up for "labs and weight waiver." The notes states that the applicant had received back surgery and "has started PT. [The applicant's] TLD was approved and will expire in JAN 2016. He stated he is changing his diet. He started to do some stretches and walk. No back pain, no numbness."

On February 9, 2016, a Chronological Record of Medical Care entry states that the applicant was "still able to run without problems."

On February 22, 2016, the applicant completed a weigh-in. T [REDACTED] cant was found to weigh 252 pounds with body fat at 24%. The corpsman who completed the weigh-in checked that the applicant was compliant.

Also on February 22, 2016, the applicant received a Page 7 taking him off of weight probation. It states:

On this date your probationary period has come to an end. You weighed 214 (pounds) or achieved 24% body fat and have successfully met the requirements of the Weight/Physical Fitness Standards for Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series).

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

On January 24, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. In so doing, the JAG adopted the recommendations provided by the Personnel Service Center (PSC).

PSC stated that the applicant had been on convalescence leave after his surgery on August 5, 2015, until September 28, 2015, and was then on TLD until February 2016. When the applicant weighed in on October 21, 2015, he was 50 pounds overweight and 4% over his allowable body fat percentage. PSC stated that he correctly received a Page 7 documenting the non-compliance and affording him until February 21, 2016, to lose 50 pounds or obtain at least 24% body fat. PSC stated that in almost all cases, neither an injury nor illness will warrant a medical abeyance or exemption from the weight standards. The intent of an abeyance is to avoid penalizing a member whose non-compliance is caused *directly* by a medical condition or medication. PSC stated that per policy, the applicant was referred for a medical evaluation to

ensure that he could safely lose the excess weight or body fat in order to come into compliance. PSC acknowledged that the doctor noted that a medical diagnosis or medication *could* be the cause of the applicant's weight gain and that there was a medical condition that limited the applicant's participation in physical activities.

In regards to the applicant's contention that he was denied the opportunity to request an abeyance by his CO, PSC argued that the applicant did not provide any evidence to prove this point. PSC also pointed out that Coast Guard officials are presumed to have performed their duties correctly, lawfully, and in good faith. Therefore, PSC concluded, it is presumed that the applicant's CO acted correctly and according to policy in regards to the applicant's abeyance request. PSC also stated that the applicant's "supervisor" has since retired from the Coast Guard, and is therefore unavailable to provide a statement either in support of or to refute the applicant's claim. PSC did not specify the name of the applicant's supervisor who has retired. PSC also stated that after review of the applicant's medical record, the applicant would not have qualified for an abeyance. The applicant had stated that he was "taking prescription steroid medication to help the pain and inflammation." PSC admitted that prescribed corticosteroids do qualify members for a medical abeyance. However, PSC stated that there is no evidence that the applicant was prescribed corticosteroids following his surgery as he suggested in his application. The only medications found in his medical record are Neurontin, Naproxen, and Prilosec, and these medications are not identified as ones which directly affect a member's ability to comply with weight standards.

In regards to the applicant's contention that he was unable to exercise, PSC pointed out that the manual clearly states that "injuries or illnesses that interfere with a member's ability to exercise are not grounds for a medical abeyance." PSC pointed out that on February 9, 2016, the applicant's medical record states that he was able to "run without problems" which indicates that the applicant was able to complete some exercises. PSC also argued that the applicant's condition did not stop him from maintaining a healthy diet to lose weight.

PSC therefore concluded that the applicant did not provide sufficient evidence to show that the disputed Page 7s are erroneous or unjust. The applicant was found to be non-compliant with weight standards and was appropriately awarded a Page 7 documenting his non-compliance and the end of his probationary period. The applicant's medical condition and prescriptions did not qualify him for a medical abeyance, and therefore PSC recommended that no relief be granted.

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

On January 20, 2017, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within 30 days. On March 7, 2017, the applicant responded and stated that he disagreed with the Coast Guard's opinion. The applicant stated that PSC did not take his medical record into consideration. This assertion is based on the fact that PSC claimed that the applicant was not prescribed corticosteroids. However, the applicant stated that he was prescribed Prednisone<sup>3</sup> on June 30, 2015.

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<sup>3</sup> Prednisone is a corticosteroid.

The applicant also reiterated his argument that the intent of the medical abeyance is to avoid penalizing members who are non-compliant due to medical conditions or medications, and that PSC is to determine abeyance requests on a case-by-case basis.

The applicant stated that the advisory opinion also showed “poor knowledge” of the applicant’s case when it stated that his supervisor had retired and was unable to provide a statement. The applicant stated that his supervisor at the time, [REDACTED] is not retired, and is currently on active duty. In addition, the applicant’s “immediate supervisor,” [REDACTED], is also still serving on active duty. The applicant claimed that this shows the Coast Guard did not consider the facts of his case closely.<sup>4</sup>

With his response, the applicant provided a medical record dated June 17, 2015. This record shows that the applicant sought help for lower back pain and was diagnosed with sciatica, lumbago, and spondylosis. He was taking Naproxen and Norflex.<sup>5</sup> It states that he weighed 248 pounds (34 pounds over his maximum allowed weight) and had a body mass index of 33.63. The doctor noted that he would “consider Neurontin and O/R steroids if no improvement after complete physical therapy.” The applicant also provided a medical record dated June 30, 2015, which shows that he was referred for an MRI and states, “Prescription for Prednisone 20 mg daily X3 then tapering down and Neurontin provided.”

### APPLICABLE REGULATIONS

Chapter 3.B.1. of COMDTINST M1020.8H, the Coast Guard Weight and Body Fat Standards Program Manual, states that members found to be non-compliant with weight standards must sign the Page 7 documenting their non-compliance unless covered by an abeyance.

Chapter 5.A.1. states that PSC-psd is the approving authority for medical abeyance requests. All “medically related abeyance request[s] will be treated as unique and evaluated on a case-by-case basis. Commands should not forward requests for medical abeyances to CG PSC-psd until a diagnosis is made.” Chapter 5.A.2. states that the intent of medical abeyances is to “avoid penalizing a member who may be non-compliant due to medical conditions/medications that directly contribute to weight gain. Injuries or illnesses that interfere with a member’s ability to exercise are not grounds for a medical abeyance.”

Chapter 5.A.3. states that medical abeyance requests will only be granted for cases involving a diagnosed physiological medical condition or use of prescription medication that contributes to the member’s inability to maintain compliance with weight standards. Listed as qualifying medical examples are hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids. Chapter 3.D.7. states that members who are unable to exercise due to injury or illness must utilize healthy eating habits in order to maintain a healthy weight.

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<sup>4</sup> This contention has been verified; both CWO2 M and EMC G are both currently serving on active duty.

<sup>5</sup> Naproxen and Norflex are not corticosteroids.

Chapter 5.A.3. also includes the following table with qualifying and non-qualifying medical examples:

Qualifying Medical Examples	Non-Qualifying Medical Examples
<ul style="list-style-type: none"> <li>• Hypothyroidism</li> <li>• Polycystic Ovarian Syndrome</li> <li>• Prescribed Corticosteroids</li> </ul>	<ul style="list-style-type: none"> <li>• Depression</li> <li>• Twisted ankles</li> <li>• Pulled muscles</li> <li>• Broken bones</li> <li>• Lower back pain</li> </ul>

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant asked the Board to remove two Page 7s from his record, dated October 21, 2015, and February 2, 2016, and to change his October 21, 2015, weigh-in to show he was compliant with the Coast Guard's weight standards. The applicant claimed that the Coast Guard erred in not allowing him to request a medical abeyance due to his back surgery. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>6</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>7</sup>

3. The applicant claimed that the Coast Guard erred in not submitting his request for a medical abeyance to PSC due to his back surgery. In his response to the Coast Guard's advisory opinion, he provided evidence that he was prescribed Prednisone, a corticosteroid, on June 30, 2015. A corticosteroid is one of three medical conditions or prescriptions listed in the weight standards manual as warranting an abeyance of the weight standards and, hence, a delay of the weight probationary period. The same medical record that the applicant submitted, however, shows that on June 30, 2015, his doctor planned to taper him off of the corticosteroid and onto Neurontin. While it is not clear from the records he submitted when he stopped taking Prednisone, the records clearly show that he was not taking it by August 24, 2015, which is two months before the non-compliant weigh-in. There is no evidence in the record that the applicant

<sup>6</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>7</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).



did not taper off taking the corticosteroid, as his doctor planned, or that he continued taking the corticosteroid after his surgery on August 6, 2015. To the contrary, medical records dated August 24, 2015, September 28, 2015, and October 19, 2015, all state that the applicant was taking only Neurontin and Naproxen, which are not corticosteroids. One of these records was written by the applicant himself. The applicant's non-compliant weigh-in was on October 21, 2015, and because the medical records dated in August, September, and October 2015 show that the applicant was not taking a corticosteroid, the Board finds that the applicant has not proven by a preponderance of the evidence that he was taking a prescribed corticosteroid during the weeks before or at the time of his non-compliant weigh-in. Therefore, he has not shown that he was entitled to an abeyance of the weight standards in October 2015 based on his medications or that his command erred by placing him on weight probation and expecting him to lose his excess weight.

4. The weight manual does not require a command to submit a member's abeyance request to PSC-psd. Chapter 5.A.1. states that PSC-psd is the approving official for abeyance requests and gives instructions for a command to submit a request, but nowhere does the manual require a request to be forwarded to PSC when a member requests one. In fact, Chapter 5.A.1. also states, "Commands should not forward requests for medical abeyances to CG PSC-psd until a diagnosis is made." There is no evidence that the applicant was diagnosed with a physiological condition that causes weight gain, such as hypothyroidism, or that [REDACTED] taking prescribed corticosteroids in the fall of 2015. Without such a physiological diagnosis or prescription, it appears that the command acted correctly in refusing to forward the applicant's request for an abeyance (assuming he did submit it to the command).

5. The medical records do show that in October 2015, the applicant had some physical limitations because he was recovering from back surgery. And on the medical referral form dated October 29, 2015, a doctor checked a box indicating that the applicant had "medical diagnoses or medications that could be contributing to the member's excess weight" and then listed the applicant's physical limitations. As PSC noted, however, there are no diagnoses of physiological conditions of the sort listed in Chapter 5.A.3. of the weight manual in the applicant's medical records, and Chapters 3.D.7. and 5.A.3. provide that physical limitations and inability to exercise are not grounds for an abeyance of the weight and body fat standards. As PSC argued, Chapter 3.D.7. provides that members are expected to stay in compliance with the weight standards through a well maintained diet if they are unable to exercise.

6. Regarding the applicant's contention that the Coast Guard did not "verify the details" of his case because of their statement that the applicant's supervisor had retired, the Board notes that it does appear that both members the applicant named are still on active duty. However, the Board also notes that the burden of proof is on the applicant, and it is therefore his responsibility to solicit and provide comments from anyone he feels may produce a statement supporting his claims for the Board's consideration. The Coast Guard is not required to include in its advisory opinion any comments from current or former Coast Guard members.

7. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his CO exceeded his authority or abused his discretion in placing the applicant on weight probation on October 21, 2015, and expecting him to lose his excess weight

and/or body fat by February 2016. The applicant has not proven by a preponderance of the evidence that his Page 7s dated October 21, 2015, and February 22, 2016, or his mark of non-compliant on his October 21, 2015, weigh-in constitute errors or injustice in his record.<sup>8</sup> The applicant's request for relief should be denied.

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

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<sup>8</sup> Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

**ORDER**

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

June 8, 2017

