DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2017-250

FINAL DECISION

This proceeding was conducted in accordance with to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on July 27, 2017, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 6, 2018, 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 correct his record to show that he was medically retired due to a right knee disability and award him back pay and allowances. He is a former [redacted] who was honorably discharged on July 28, 2014, due to "weight control failure." Upon his discharge, he had completed more than 17 years of active duty.

The applicant explained that while on active duty in July 2003, he was injured in a motor vehicle accident on his way to work at [redacted] one morning. Among other injuries, he "sustained an open patellar fracture to his right knee" and ruptured patella tendon. Over time, he underwent several surgeries on his right knee, including a partial knee replacement in May 2014. Although his excruciating knee pain prevented him from running and left him physically disabled, the Coast Guard unjustly discharged him for weight control failure in July 2014. The applicant stated that he also suffered anxiety as a result of belittling criticism from one of his supervisors in 2008 and should have been medically retired in 2008, when his knee required additional surgery and, he alleged, it was clear that he would never again be fit for duty.

The applicant alleged that he did not struggle with his weight before the motor vehicle accident in 2003. He alleged that the records show that for years after he broke his knee cap in 2003, he "was incapable of using his right leg whatsoever, and due to his inability to participate in the physical activities he was accustomed to, he experienced an increase in his overall weight." However, he alleged, the Coast Guard just prescribed pain medications and required him to "push

through the pain in his right knee to lose weight." The applicant alleged that he changed his lifestyle by eating healthfully and working out twice daily with low-impact exercises, but he still stru[redacted]strict weight standards. T[redacted]plicant alleged that only his knee injury prevented from meeting the weight standards and that the Coast Guard required him to lose weight through diet and exercise despite his excruciating knee pain, the condition of his knee deteriorated.

The applicant alleged that his supervisor at Headquarters in 2008, the CWO, created a hostile work environment by ridiculing him, which gave him "mild to severe anxiety." After he transferred to the training center, he alleged, she continued to haunt him by telling a master chief at the training center that he was essentially worthless.

The applicant alleged that he should have been medically retired in 2008 after his second knee surgery, but instead the doctors elected to "pump [him] full of cortisone shots and pain medications.' [redacted] addition, the Coast Guar[redacted]tion and insistin[redacted]he exercise, which worsened the damage to his knee and his pain. The applicant stated that in 2010, rather than giving him the full knee replacement that he needed, the doctor advised that he lose weight and stay physically active "even though they knew he was in pain at all times." Even after he reinjured his knee on an obstacle course in May 2011, the applicant complained, the Coast Guard continued to push him to participate in physical activities, and they did so despite knowing that he was in constant pain.

The applicant stated that in November 2013, he was again placed on weight probation and encouraged to exercise to lose weight even though his doctors knew he was in excruciating pain. In May 2014, the applicant alleged, the orthopedic surgeon performed only a partial knee replacement although he knew that the applicant would eventually need a full knee replacement "due to the amount of irreparable damage that had been done to his right knee." After the surgery, he suffered complications and infections and was again in excruciating pain despite pain medications. Nonetheless, he was discharged for weight control failure on July 28, 2014, because the Coast Guard failed to consider his service and dedication to the Coast Guard, the magnitude of his injuries, and the fact that meeting the weight standards was an insurmountable task for him.

[redacted]

[redacted]The applicant stated that he continues to have pain in his right knee at all times, and walking up or down stairs is "almost impossible." In May 2016, he was evaluated by an orthopedic surgeon "for a possible total knee replacement in his right knee." The applicant noted that the VA has now awarded him a 30% disability rating for his right knee and a 20% rating for the painful scar, and that along with ratings for his anxiety and wrist and elbow conditions (due to how much typing he did in the Coast Guard), he has a combined 100% disability rating.

The applicant argued that he was entitled to a disability retirement under 10 U.S.C. § 2012 because he was at least 30% disabled in his right knee and all of his conditions left him 100% disabled. The applicant alleged that the CWO's complaints about his poor performance in April 2008 prove that he was physically unable to perform his duties well because of his right knee injury. Therefore, he should have been processed under the PDES and medically retired in 2008.

The applicant also alleged that the Coast Guard erred by failing to convene a Medical Board to evaluate his fitness for duty. He argued that he was entitled to such evaluation under applicable

statutes and Chapters 2.C.2.b. of the Physical Disability Evaluation System (PDES) Manual and 3.B.6. because his knee condition and pain showed that he had a disqualifying medical condition that [redacted] t for duty and also because [redacted] hysical condition reasonably prompted doubt as to his fitness for duty. The applicant claimed that his knee pain was so bad that he could not walk upstairs or perform routine daily tasks and so he was clearly not fit for duty and his fitness for duty was certainly in doubt. The applicant argued that because the Coast Guard failed to and refuses to convene a Medical Board for the applicant, the Board should require the Coast Guard to accept the VA's disability ratings. In support of his request, the applicant submitted copies of his medical records, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on March 25, 1997. After recruit training, he attended [redacted] "A" School to become a [redacted] and advanced to [redacted] E-4. Medical records and counseling documents (CG-3307s or "Page 7s") show that based on his height, age, and the circumference of his wrist, waist, and neck, the applicant exceeded the Coast Guard's weight and body fat standards in 1998, 2001, 2004, 2006, 2008, 2009, 2010, 2011, and 2013. Each time except the last, he successfully completed weight probation by meeting the Coast Guard's weight and/or body fat standards by the end of the probationary period to avoid being discharged. Except for an abeyance of the weight standards granted in 2004, after the applicant had undergone knee surgery and was prescribed cortisone, his doctors reported that there was no underlying medical cause for his weight gain, that he had received nutritional counseling, and that it was safe for him to lose the excess weight through diet and exercise and to undergo monthly fitness assessments. Doctors reported that the applicant admitted that he ate to relieve stress. During these probationary periods, the applicant received nutritional guidance and was required to make and follow a fitness plan, to participate in a fitness activity for at least three hours per week, and to undergo a monthly fitness assessment. Because of his knee condition, his doctors recommended low-impact exercises, such as swimming.

The applicant's medical records show that his right knee cap was fractured in a motor vehicle accident in July 2003. Following surgery and physical th[redacted]ed duty in Janua[redacted]04 and to full-time duty in April 2004. Three years later, on December 11, 2007, the applicant sought treatment for pain in his right knee. The doctor reported that the applicant had a full range of motion and no swelling and prescribed ibuprofen.

On April 8, 2008, while assigned to Coast Guard Headquarters, the applicant sought help for stress. He stated that his boss was complaining about the quality of his work and how long it took him to complete tasks. He also reported "a lot of home stress, which makes the situation more difficult." The applicant was given 72 hours of "sick at home" status and referred for counseling. On April 14, 2008, the applicant reported that after the three-day break, he was feeling much more relaxed, had been "cordial" with his boss, and was looking forward to counseling.

On May 19, 2008, the applicant received a Page 7 noting that his two most recent performance evaluations had been below standard. The Page 7 states that he had been counseled formally and informally on several occasions regarding "the poor quality of your work, weak knowledge of your rating, inability to monitor and complete routine tasks, lack of follow-up on

work assignments, and inability to fulfill the responsibilities of a Second Class Petty Officer." The Page 7 describes examples of the applicant's poor performance and notes that failing to perform his [redacted] duties at the level of a [redacted] might result in performance probation and reduction in rate.

On July 14, 2008, because of recurrent pain, the applicant underwent a debridement of scar tissue in his right knee. He was granted 30 days of convalescent leave, found fit for full duty on August 22, 2008, and released without limitations except that he was advised to avoid high-impact exercises for two to three weeks.

On December 5, 2008, the applicant was counseled on a Page 7 for making a false statement to the Administrator of the Headquarters Weight Program. The Administrator had learned that the applicant had not been complying with the requirements for weight probation and asked the appli[redacted] about it. Although he c[redacted]n this regard an[redacted]ed having ignored the Unit Health Program Coordinator (UHPC), the UHPC had shown that she had tried to arrange meetings with the applicant several times by email and in person to fulfill the weight probation requirements, but he had disregarded her efforts.

Also on December 5, 2008, the applicant was placed on performance probation for six months. The Page 7 documenting the probation states that in the six months since he signed the May 19, 2008, Page 7, the applicant's performance had not improved:

> … You had incidents that exhibited a lack of integrity, disrespect toward a superior commissioned officer, failure to fulfill your duty requirements and setting a poor example for junior personnel. Specifically, on August 22, 2008, you supervisor, [a chief warrant officer (CWO)], inquired as to the status of your District of Columbia notary public certification – a certification you had been instructed to obtain and four months earlier had received time off work to take the required exam. You responded by saying "Ma'am I lied to you, I did not take the test." With ample opportunity to still receive the certification your failed to take the necessary steps while continuing to fabricate whenever asked for an update on the notary certification process by [the CWO]. On October 14, 2008, you failed to secure a standby for your duty. On October 15, 2008, in the presence of two third class petty officers, you were disrespectful toward [the CWO] [redacted] duty. You responded to her in a loud and unprofessional [redacted] what's the big deal, what do you want me to do about it?"

The Page 7 also listed the requirements for the applicant's performance probation and noted that the Command could recommend the applicant for separation if he violated the terms of the probation. In addition, it noted that the applicant was on weight probation until March 15, 2009.

On February 20, 2009, the applicant underwent a periodic physical examination. The physician's assistant (PA) noted that the applicant had arthritis in his right knee and sometimes took Celebrex to relieve pain but was not currently taking any medication. The applicant was released without limitations.

On April 24, 2009, the applicant underwent a command-directed psychiatric examination because he was overheard saying that he would slit his wrists. The applicant reported that he had been joking and others "took it wrong." He was feeling "stressed about wife/life situation and has been engaging with [the Employee Assistance Program] to address issues. There also appears to

be significant work conflict between patient and supervisor. Pt is w/o medical complaints or concerns." The doctor concluded that the applicant did not pose a risk to himself or others. At a follo[redacted]t on April 28, 2009, the d[redacted] noted that the applicant needed only a refill of his allergy medication and denied having pain or other concerns.

A medical note dated June 18, 2009, states that the applicant's only medication was for his allergies and he was pain free.

In the summer of 2009, the applicant transferred from Coast Guard Headquarters to a training center. At a medical appointment on October 20, 2009, a PA noted that the applicant complained of "joint pain, localized in knee: Spent approx. 10 minutes with pt discussing pain, conservative tx plan and further imaging if no response to PT. educ losing weight will help knee pain." The applicant weighed 261 pounds. The applicant was prescribed Naproxen and referred to radiolo[redacted] and physical therapy. [redacted]

On November 17, 2009, after being placed on weight probation again, the applicant underwent a psychiatric evaluation for "anxiety and self-esteem issues and use of food to feel good." The applicant reported that he ate to relieve stress, anxiety, and depression and had been very stressed recently. He was prescribed the anti-depressant Celexa, diagnosed with an eating disorder, and referred to psychotherapy.

At a medical appointment on January 12, 2010, the applicant complained of constant, throbbing right knee pain. Xrays showed degenerative changes, and the applicant was referred to an orthopedic surgeon. On January 25, 2010, the orthopedic surgeon reported to the applicant's Coast Guard physician that the applicant stated that he had "intermittent, constant, sharp, throbbing and aching" with "stiffness, weakness, and instability." Examination revealed "no deformity, atrophy, ecchymosis or swelling. Mild effusion. Mild patellar crepitus. Mild medial and lateral patellar facet tenderness. Patellar osteophytes evident. Rank of motion is 0 to 130 degrees. Strength testing is 5/5 in all muscle groups tested. Sensations are intact. Normal gain and station. Reflexes are normal and symmetrical. McMurray's, Anterior Drawer, Posterior Drawer, Apley's, Lachman's, Patellar Aprehension and Varus/Valgus Stress tests [redacted] showed a healed [redacted]lar fracture with moderate patellorfemoral degenerative joint disease (osteoarthritis). There is a retained wire in the proximal tibia." The orthopedic surgeon stated that he had discussed the findings and options for treatment with the applicant, who had "elected to proceed with aspiration and corticosteroid injection to the right knee," which he received. The orthopedic surgeon also recommended an MRI of the knee.

On April 19, 2010, the orthopedic surgeon reported that the applicant's knee pain had returned after several weeks of relief due to the corticosteroid injection. An MRI had shown "no meniscal tears or evidence of osteomylelitis." The orthopedic surgeon stated that he had discussed the findings and options for treatment with the applicant, who had "elected to proceed with aspiration and corticosteroid injection to the right knee," which he received.

At a medical appointment on July 27, 2010, the applicant reported that he had knee pain every day and that it varied based on his activity. The doctor diagnosed him with osteoarthritis

and advised alternating Naproxen with Tylenol, strengthening his quadrilateral muscles, and continuing Supartz injections. On September 20, 2010, the applicant reported to the PA that "his knee feels [redacted]t's been in a long time. [redacted]s been able to increase the intensity of his workouts since pain levels are down. He has not started rehab but wants to give it a try so I will issue him a new referral."

On November 23, 2010, the PA completed a Medical Referral Form for the applicant's weight probation. She noted that he should not run but had no other limitations.

At a periodic physical examination on January 4, 2011, the applicant noted his history of knee surgeries but reported having no current pain. The applicant reviewed the results of his lab tests with the doctor on January 7, 2011, and she reported that he weighed 270 pounds, had a BMI of 35.6%, and

> [redacted] scored in the high risk category: BMI, stress, sexual health, nutrition and dental. The patient is overweight and does not meet CG weight standards. He is on probation for his weight. He exercises regularly. He has seen a nutritionist. He does eat a lot of fruits and vegetables. … His lab work was normal. … The patient has chronic R knee pain secondary to trauma and surgery. The pain has improved with a series of Supartz injections. He has mild depression which is well controlled with Celexa. He takes no other medications. … He has no outstanding medical referrals. Spent approximately 15 minutes with patient discussing lab results, healthy diet, continues exercising and flossing.

On June 1, 2011, the applicant sought help for right knee pain after he "landed wrong" while on an obstacle course during a morale event. He was walking with a slight limp but denied feeling instability or swelling in his knee. He could do a squat but reported moderate pain when standing up from the squat. The applicant was told to ice the knee, wear a knee brace for a week, and take 800 mg Motrin. He was told to return if he was still having pain at the end of the week.

On July 22, 2011, a PA noted that the applicant's knee pain had returned: "He had good relief with Supartz and is willing to try again. Cortisone injections and NSAIDs not effective in the past. Gets some relief with ice." [redacted]

At an annual physical examination on January 9, 2012, the applicant reported no pain in his knee. The PA noted his history of right knee surgeries.

On May 22, 2013, the applicant sought help for pain in his right knee. The applicant told the PA that he had previously been "offered a total knee replacement for the right knee, [but] he would like to see ortho for options." The applicant was prescribed Naproxen and referred to an orthopedic surgeon and physical therapist after examination showed

> palpable bony deformities. Patella demonstrated crepitus. Knee showed full range of motion. Pain was elicited by motion. An apprehension test was positive. Tenderness was observed on ambulation. No effusion. No erythema. No warmth. No popliteal cyst. No tenderness on palpation. No tenderness on palpation at the joint line. No medial instability. No lateral instability. No anterior drawer sign was present. No posterior drawer sign was present. A Lachman test did not demonstrate one plane anterior instability. A McMurray test was negative.

On October 31, 2013, the applicant was counseled on a Page 7 that he weighed 244 pounds, was 42 pounds over his maximum allowed weight (MAW) of 202 pounds, and had 30% body fat. The [redacted] if he did not lose 42 pou[redacted] drop to 26% body fat by February 28, 2014, he would be processed for separation. During probation, he had to complete a Personal Wellness Profile and a detailed fitness plan, participate in a mandatory fitness activity at least one hour per day three days per week; and undergo a monthly fitness assessment.

On November 6, 2013, the applicant sought treatment for right knee pain. The PA reported that the pain "is currently 6/10; located medial knee; worse with impact exercises. No buckling or locking up of knee. Had ortho referral entered in May 2013 by [doctor] but never followed up. … No longer sees Dr. … (psych). No pending consults." The PA stated that the knee showed normal motion, no muscle weakness, no swelling, no deformity, no tenderness on palpation, and no anterior or posterior drawer sign. A McMurray test was also negative. The PA provided the applicant new refe[redacted]s to the orthopedic surge[redacted]d that the applic[redacted]as exhausted conservative treatments; he prefers not to restart oral pain medication."

On November 15, 2013, the applicant went to the clinic to have the Command Weight Referral form completed for his weight probation. The PA noted that the applicant was taking Celexa, which could make it "more difficult" to lose weight and checked a box stating that it could be "contributing to" his excess weight. He also noted that the applicant could not run or perform high-impact exercises because of his right knee condition but could perform push-ups, curl-ups, and other non-high-impact exercises while on weight probation. Neither the PA, the doctor, nor the command recommended an abeyance of the weight standards.

At a periodic physical examination on December 9, 2013, the applicant weighed 247 pounds. He reported "[n]o specific complaints but is pending Ortho apt. tomorrow for chronic right knee pain." He described his knee pain as "3/10." The doctor noted that the applicant was on weight probation and told him to eat three servings of vegetables per day. The doctor reported that the applicant had "normal movement" in all his extremities.

On March 4, 2014, the applicant's body fat was 29% an[redacted], which was still [redacted] pounds over his MAW. He was advised on a Page 7 that he would be processed for discharge because he had not successfully completed weight probation by meeting his MAW or having 26% or less body fat.

On March 25, 2014, the applicant consulted an orthopedic surgeon about options for treating his right knee before his separation from the Coast Guard. The doctor recommended diagnostic arthroscopy to fully evaluate the damage to his right knee.

On March 31, 2014, the Commanding Officer (CO) of the training center informed the applicant in writing that he had initiated the applicant's honorable discharge for weight control failure and that the decision rested with Commander, Personnel Service Center (PSC). The CO advised the applicant that he had a right to submit a statement on his own behalf for consideration by PSC.

Also on a memorandum dated March 31, 2014, the CO sent PSC a memorandum initiating the applicant's honorable discharge for failing to comply with the weight and body fat standards. The [redacted] d that the applicant be re[redacted]d on active duty because the applicant had continued losing weight and had attained compliance since February 28, 2014. The CO noted on the memorandum that the applicant had reduced his body fat to 26% after the deadline but also that the applicant had been on weight probation multiple times. The CO also noted that the applicant and his wife were adopting two children and that the adoption would not be final until July 2014. Therefore, if PSC decided to discharge the applicant, the CO recommended a 90-day delay to alleviate the hardship on the applicant's family. The CO enclosed the applicant's statement and documentation of the weight probation.

The applicant signed a memorandum the same day stating that he did *not* object to being discharged. In his statement, however, the applicant asked to remain on active duty and explained his circu[redacted]ances as follows: [redacted]

> My weight has been a hindrance in both my professional and personal life. I've struggled with weight loss and maintenance and have been on and off the program since joining the Coast Guard. … In addition to the personal struggles I was going through a difficult time professionally and was subject to a somewhat hostile work environment. I muddled my way through these life changing events but always sought comfort from food. I continued down this path and every time I encountered a difficult obstacle I turned to food. A few years later, new command and the idea to adopt children put me on a new path in life. I sought counseling for my food addition/disorder and also worked with a nutritionist. In addition I sought the help of mental professionals to ensure I addressed all aspects of my life.
>
> I'm finally at a place in my life where everything is coming together. Though I've faced some setbacks along the way I have learned new ways to handle stress. I no longer turn to food for comfort. During this last probationary period I worked out harder than ever and maintained strict dietary regulations. I actually look forward to and enjoy my time at the gym. I used no dietary supplements, diuretics, etc. I lost weight and body fat by sticking to a strict workout regimen. Overall, things are clicking for me. I have made some significant life changes and feel as though I have finally defeated my weight disease. …
>
> I am the sole bread winner for my family. My wife and I have been [redacted] for the past three years. We are in the process of adopting them and expect everything to be wrapped up by July 2015. I ask that you allow me to remain on active duty and continue to serve in the Coast Guard and provide for my family.

On April 14, 2014, Commander, PSC issued orders for the applicant to be honorably discharged for weight control failure on May 19, 2014.

On April 15, 2014, the applicant reported feeling depressed, and his prescription for Celexa was increased from 20 mg to 40 mg daily. He weighed 223 pounds, and his BMI was 28.6%. The applicant also complained of constant right knee pain for which he was not taking any medications. He received another referral to the orthopedic surgeon.

On April 25, 2014, the orthopedic surgeon reported to the Coast Guard that the applicant had returned to discuss his options and told the doctor that he experienced pain every day and could not "engage in normal activities as required of him to stay active both with family or job." The doctor said that the applicant "again localizes pain to the patellofemoral joint exclusively" and

showed "exquisite tenderness in the patellofemoral joint; crepitant with any loading. He has a bit of a patella baja with some nodular spurring on the anterior pole noted in the subq anteriorly. The coll[redacted] No medial or lateral dis[redacted]rt." The doctor recommended a diagnostic arthroscopy resulting in a "unicompartmental arthroscopy of the patellofemoral joint … We had a lengthy discussion regarding the risks and benefits, and the likely progression to a total knee arthroplasty at some later point in life." The doctor stated that if the diagnostic arthroscopy showed degenerative changes in the medial or lateral compartments, he would perform a total knee arthroplasty on the applicant, rather than a partial one.

On April 28, 2014, Commander, PSC issued orders for the applicant to be discharged for weight control failure by May 28, 2014.

On May 12, 2014, the applicant underwent the diagnostic arthroscopy, which resulted in a partial kn[redacted]replacement. At a post-su[redacted]May 29, 2014, th[redacted]or noted that the applicant was convalescing at home. The applicant stated that he was taking all of his medications but "still has 8/10 pain." The applicant was referred for physical therapy. On June 5, 2014, the applicant suffered inflammation after a physical therapy appointment and was given an immobilizer. The orthopedic surgeon reported that an ultrasound had shown there were no blood clots and xrays had shown that the prosthesis was "well seated." The applicant's range of motion was zero to 85 to 95 degrees.

On June 23, 2014, the applicant's referral for physical therapy was renewed. The doctor noted that the applicant "had to have the knee replaced to be functional and stop pain. He is somewhat depressed over his surgical outcome."

On June 24, 2014, a physical therapist noted that the applicant had recently fallen over his daughter and "experienced significantly increased knee pain along with increased edema and reddening of the superior aspect of the knee along the incision." The orthopedic surgeon noted that the applicant was "still having some difficulty with his [physical therapy]. … He has a well-healed anterior incision. No warmth or induration. He has a 0 – 110 degree arc of motion. Good patellar tracking. The patella is tracking excellently. … Continued p[redacted]g patellofemoral arthroplasty 6 weeks ago."

On June 30, 2014, the applicant's physician noted that the applicant had undergone his third surgery on his right knee on May 12, 2014, and he weighed 240 pounds. The applicant told the doctor that the orthopedic surgeon, Dr. B, had not been happy with the applicant's progress on June 24, 2014, because he was still using a walker and having a lot of pain. The applicant told the doctor that the surgeon had recommended six more weeks of physical therapy and that if the applicant's pain continued, another exploratory surgery might be needed.

On July 3, 2014, the applicant's doctor reported that she had spoken to the orthopedic surgeon, Dr. B, who was unhappy to hear that the applicant had shown up at the clinic using a walker because he had told the applicant not to use it and he would "blast him" for it. Dr. B also stated that he had no reservations about the applicant doing desk work and that he should stop using the walker so that his knee would get stronger and he could drive a vehicle with greater comfort. Dr. B denied having told the applicant that he might need exploratory surgery. Dr. B said that he had

told the applicant that if his knee pain did not improve, then "under anesthesia, [Dr. B would] do a ROM [range of motion] therapy session to loosen up adhesions." Dr. B said there was no infection [redacted]

On July 14, 2014, the applicant requested and received a referral for a second opinion from his primary physician.

On July 28, 2014, the applicant was honorably discharged for weight control failure with an RE-3 reenlistment code, which means that he is eligible to reenlist except for the disqualifying factor of his excess weight. He had served 17 years, 4 months, and 4 days of active duty.

On February 26, 2015, at a physical examination by a doctor for the VA to determine benefits, the applicant reported that his knee was very painful, he wore a knee brace, and he sometimes used a ca[redacted] The doctor found that th[redacted] was 120 degree[redacted] of 140 degrees maximum) on both flexion and extension. The doctor stated that the range of motion did not contribute to any functional loss. Muscle strength was 5/5 on flexion and 4/5 on extension with "pain inhibition on testing strength." Testing showed no joint instability. Diagnostic testing showed degenerative arthritis. The functional impact of the condition was described as "pain with prolong[ed] walking and standing."

On October 2, 2015, the VA awarded the applicant a combined disability rating of 90% based on the following conditions:

Left wrist tendonitis:	0%
Right wrist tendonitis:	0%
Left elbow supination:	20%
Right elbow supination:	10%
Left elbow epicondylitis:	20%
Right elbow epicondylitis:	20%
Right knee impairment:	10%
Right knee painful scar:	10% [redacted]
[redacted]l health:	50%
Hearing loss:	0%
Right shoulder arthritis:	0%
Left arm radiculopathy:	30%
Degenerative disc disease:	0%

The applicant appealed the VA's findings, and on June 6, 2017, the VA increased his disability rating for major depression, anxiety, and post-traumatic stress disorder to 70% and awarded him a 10% disability rating for tinnitus. The VA also listed several other conditions for which service connection had been denied but noted that the applicant's right knee condition was still under appeal. On July 11, 2017, the VA informed him that his disability rating for his right knee condition had been retroactively raised to 100% for the period from his date of his discharge to July 1, 2015. Thereafter, it was rated 30% because that was the minimum evaluation authorized following a prosthetic replacement. In addition, the rating for right knee painful scar was increased to 20%.

VIEWS OF THE COAST GUARD

On February 20, 2018, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief.

The JAG stated that even though the applicant's CO reported that he had met the body fat standard on March 31, 2014, after his probationary period had ended, the Coast Guard did not err or commit an injustice by discharging the applicant for weight control failure. The JAG noted that members who fail to meet the standards by the end of their probationary period are subject to discharge even if they later gain compliance.

The JAG stated that the VA's ratings are not determinative of Coast Guard ratings because the Coas[redacted]uard rates only disabilities[redacted] AG noted that t[redacted]li-cant was found fit for fully duty in August 2008 after the debridement of his scar tissue and there is no evidence that his knee injury rendered him unfit to perform his duties as a yeoman (administrative specialist).

The JAG noted that in response to his CO's notification of intent to discharge, the applicant admitted that he had struggled to comply with the weight standards ever since he enlisted and attributed his struggles to personal and professional problems that led him to overeat, and he never once mentioned or attributed his weight gain to his knee injury.

The JAG attached to his advisory opinion and adopted a memorandum signed by Commander, Personnel Service Center (PSC), who also recommended denying relief. PSC stated that the applicant suffered a fractured patella in 2003 but recovered with surgery and physical therapy. Then in July 2008, he underwent a debridement of scar tissue, received thirty days of convalescent leave, and was found fit for duty in August 2008. PSC stated that while being processed for discharge due to weight control failure in May 2014, the applicant underwent a partial knee replacement and by July 2014, the orthopedic surgeon reported that the applicant was fit to do his desk work and did not need another surgery. Therefore, the applicant[redacted]

PSC stated that in 2014, the applicant was processed for discharge because he failed to meet the Coast Guard's weight standards within the probationary period. Although his CO recommended retention because he met the body fat standard a month later, PSC ultimately decided to discharge him in light of the excessive number of times he had been on weight probation. PSC noted that the applicant attributed his obesity to the fact that he sought comfort in food when faced with challenging situations and had received counseling for food addiction.

PSC concluded that although the applicant did have three surgeries on his knee while on active duty, "there is no evidence that this injury rendered him unable to perform his duties as a Yeoman. The applicant displayed he was able to lose weight and maintain weight standards once placed on weight probation" multiple times. PSC stated that the applicant was required to adhere to and maintain the weight standards despite his knee injury and was given ample opportunity and treatments. Therefore, PSC recommended denying relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

[redacted]2018, the Chair sent a copy [redacted]e views of the Coast Guard to the applicant's attorney and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 1169 states, "No regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; …"

Coast Guard Weight and Body Fat Standards Program Manual

A[redacted]le 1.A.3. of COMDTINST [redacted]ght and Body Fa[redacted]d-ards Program Manual in effect in 2014, states that the standards are applicable to all Coast Guard military personnel. Article 1.B.1. states that members are required to "[m]aintain compliance with weight and body fat standards at all times, unless specifically stated otherwise"; complete the mandatory semiannual weight screening; follow the requirements in Article 3 if found to be non-compliant; and be familiar with the requirements of the manual.

Article 1.B.3. states that the commanding officer is responsible for ensuring the unit's adherence to the policies in the manual and must submit a separation package to PSC within 30 days for any member who meets the conditions for separation provided in the manual.

Article 2.C. provides the procedures for measuring weight and body fat. Under Articles 2.C. and 2.D., body fat is calculated in men by measuring their height and the circumference of their neck and waist (the abdomen at the level of the naval) in inches. The circumference of the neck is subtracted from the circumference of the waist to provide a "circumference value," which is compared to a chart showing body fat percentages based on the member's height and circumference value. Before making this calculation, each circumference is measured three times, and the average circumference of the waist is rounded down, while [redacted]e of the neck is [redacted]ed up, which effectively minimizes the circumference value before that value is compared to the chart to find the member's percentage of body fat.

Article 3.C.1. states that non-compliant members must contact their Unit Health Program Coordinator (UHPC) and their regional Health Program Manager (HPM); follow all of the mandates in the Coast Guard Health Promotion Manual, COMDTINST M6200.1; and schedule an appointment with a Coast Guard "medical officer or civilian medical officer and complete a form CG-6050 within 30 days of a non-compliant weight screening. Failure to complete this requirement in a timely fashion may result in administrative and/or disciplinary action." Article 3.C.2. states that a member's failure to complete these requirements may be considered a failure to demonstrate progress pursuant to Article 3.D.5.b.(1).

Article 3.D. provides the terms for weight probation. Article 3.D.2. states that members who are more than 35 pounds overweight and members who are non-compliant at three consecutive weigh-ins are not eligible for probation and must be processed for discharge. Article 1.D.4.

states that for members eligible for a probationary period, the period should equal the amount of time it would take the member to lose all the excess weight or body fat at a rate of one pound per wee[redacted]body fat per month, which[redacted]s greater. However, if the calculated probationary period exceeds eight months, the member must be processed for separation.

Article 3.D.5.a. states that while on probation, the member must weigh-in at least monthly and comply with COMDTINST M6200.1. However, the command may require a random weigh-in at any time with no notice.

Article 3.D.5.b.(1) states that members on weight probation "must demonstrate reasonable and consistent progress throughout their probationary period. Failure to demonstrate reasonable and consistent progress may provide sufficient grounds for separation before the probationary period expires. (For example, members who gain weight or are not halfway towards compliance at the mi[redacted]int of their probationary p[redacted]paration.)" [redacted]

Article 3.D.7. states that non-compliant members must consult their primary care managers and seek guidance on safe exercises and healthy eating habits, and "[i]n most cases, neither illness nor injury will indicate authorization of an abeyance or exemption."

Article 4.A. states, "[m]embers who meet any one of the following criteria must be recommended for separation." The list of criteria includes the following:

1. Being more than 35 pounds overweight or having a probationary period that would exceed eight months.
2. "Fail[ing] to demonstrate reasonable and consistent progress during probation (example: a member who is not halfway towards compliance at the midpoint of their probationary period)."
3. Members who fail to comply by the end of their probation.
4. Having a third probationary period in 14 months.
5. Failing three consecutive semiannual weigh-ins.

[redacted]

[redacted]Article 4.B. states that PSC is the approving authority for such separations, and Article 4.C. states that within 30 days of the member meeting one of the separation criteria in Article 4.A., the command must send a separation package to PSC with a memorandum and all application documentation and health records.

Article 4.C.5. states that a member who is processed for separation but who becomes compliant before being separated is still normally separated, but PSC may "suspend the execution of the discharge based upon service needs, the member's history of compliance, and the member's past performance."

Article 4.G.4. states that members who have been discharged for non-compliance but come into compliance within two years may request to reenlist. PSC will evaluate the request based on service needs, the member's history of compliance, and the member's past performance.

Article 5.A. provides the rules for medical abeyances of the weight standards. Article 5.A.2. states that "[t]he intent of authorizing a medical abeyance 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."

Article 5.A.3. lists examples of medical conditions and prescription medications that warrant a medical abeyance. They are hypothyroidism, polycycstic ovarian syndrome, and prescribed corticosteroids. The manual states that "requests that stem from medical conditions which may restrict a member's ability to exercise, but otherwise have no physiological impact on the member's ability to lose weight/body fat through proper diet or exercise, will not be approved."

Coast Guard Health Promotions Manual

Chapter 4.C.7. of the Coast Guard Health Promotion Manual, COMDTINST M6200.1, states that members placed on weight probation must meet with their UHPC within 72 hours; complete a new Personal Fitness Plan; start a fitness log to be submitted to the UHPC weekly; log their daily food intake for at least seven days; and perform a physical assessment every month. Chapter 4.C.6. states that for members on weight probation, the UHPC shall provide them with information on nutrition, weight management, and exercise; ensure that they complete a new fitness plan after consulting their primary care physician; review the fitness log at least weekly to determine whether the member is losing the required weight progressively at an average of about one pound per week; and conduct monthly fitness assessments.

Chapter 5 of COMDTINST M6200.1 advises members to maintain a healthful diet with low fat and cholesterol and to focus on "caloric intake for successful weight management." Under Article 5.F., members have access to nutritional counseling and education and weight management planning, techniques, and resources.

Military Separations Manual

Article 1.B.12.a.(10) of COMDTINST M1000.4, the Military Separations Manual in effect in 2014, authorizes the discharge of members for obesity if a medical officer has determined that a proximate cause of the obesity is the member's "excessive voluntary intake of food or drink" rather than something beyond his or her control.

Coast Guard Medical Manual

Chapter 3.F.1.c. of the Coast Guard Medical Manual, COMDTINST M6000.1E states the following regarding Medical Evaluation Boards:

> Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or reserves on extended active duty considered permanently unfit for duty shall be referred to a Medical Evaluation Board (MEB) for appropriate disposition. …

Chapter 3.F. lists the conditions that are normally considered disqualifying for retention on active duty. None of the knee surgeries that the applicant underwent is listed as disqualifying in Cha[redacted]er 3.F.12.b.(3) states that [redacted]ternal derangement of the knee is normally disqualify if there is "[r]esidual instability following remedial measures, if more than moderate; or with recurring episodes of effusion or locking, resulting in frequent incapacitation." Chapter 3.F.12.b.(4) states that knees must have a range of motion of at least 90 degrees on flexion and at least 15 degrees on extension. Chapter 3.F.12.c. states that osteoarthritis may be disqualifying if there are "[s]evere symptoms associated with impaired function, supported by x-ray evidence and documented history of recurrent incapacity for prolonged periods."

Physical Disability Evaluation System (COMDTINST M1850.2D)

Chapter 2.C.2. states the following regarding fitness for duty:

a. [redacted]e sole standard in making dete[redacted]sis for retirement o[redacted] 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. Each case is to be considered by relating the nature and degree of physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank, or rating. In addition, before separation or permanent retirement may be ordered:

(1) there must be findings that the disability

(a) is of a permanent nature and stable; and

(b) was not the result of intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence.

Chapter 2.C.2.b. states the following:

b. The law that provides for disability retirement or separation (10 U.S.C. 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments th[redacted] [redacted]Guard service. The following policies apply.

(1) Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that

(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or

(b) acute, grave illness or injury, or other significant deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered him or 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 articles 2.C.2.b.(1)(a) or (b) are met.

(3) The determination of a grave or serious condition or significant deterioration must be made by a competent Coast Guard medical officer. Such medical authority will consult with the CGPC senior medical officer, as necessary, to ensure proper execution of this policy in light of the member's

condition. The member's command may concurrently submit comment to the CGPC senior medical officer.

[redacted]ing processed for separation or [redacted]ent for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments.

d. Inadequate performance of duty, by itself, does not constitute physical unfitness. The evidence must establish a cause and effect relationship between the inadequate performance and the evaluee's physical impairments.

e. An evaluee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found not fit for duty even though the member is currently physically capable of performing all assigned duties. Conversely, an evaluee convalescing from a disease or injury that reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found fit for duty. In this instance, the evaluee will continue in an interim duty status until convalescence is complete, at w[redacted] time he or she will be returned[redacted]

f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluee 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. Where feasible, and if requested by the evaluee, consideration should be given to providing the member an opportunity for a change in rating to one in which the disability is no longer a disqualifying factor;

(2) inability to satisfy the standards for initial entry into military service, except as specified in article 2.C.2.g.;

(3) lack of a special skill in demand by the service;

(4) inability to qualify for specialized duties requiring a high degree of physical fitness, such as flying, unless it is a specific requirement of the enlisted rating;

(5) the presence of one or more physical defects that are sufficient to require referral for evaluation or that may be unfitting for a member in a different office, grade, rank, or rating; or

(6) pending voluntary or involuntary separation, retirement, or release to inactive status (see article 2.C.2.b.(1)).

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[redacted]valuee found unfit to perform assigned duties because of a physical disability normally will be retired or separated. Under special circumstances, disability separation or retirement may be delayed in the best interest of the government.

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. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the DVA for disability compensation after release from active 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. The application was timely filed.[1]

2. The applicant alleged that his discharge for weight control failure was erroneous and unjust and asked the Board to correct his record to show that he was medically retired because of his right knee injury. 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.[2] 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."[3]

3. The record shows that the applicant was placed on weight probation at least twice before he injured his right knee in 2003. He was frequently non-compliant with the Coast Guard's weight and body fat standards throughout his service, but each time he was placed on probation and, until 2013, he complied with the weight and/or body fat standards through diet and exercise. The applicant received a temporary abeyance of the weight standards in 2004, when he was taking corticosteroids, in accordance with the Weight and Body Fat Standards Program Manual.

4. When the applicant was placed on weight probation on October 31, 2013, he was 42 pounds over his MAW and had 30% body fat, when the maximum allowed for his age was 26%. Pursuant to Article 3.D.1. of COMDTINST M1020.8H, the applicant's command should have immediately processed him for discharge in October 2013 because he was more than 35 pounds over his MAW and so ineligible for weight probation. Instead, however, they placed him on probation based on his body fat percentage. Article 1.D.4. allows a probationary period to be measured by body fat percentage, instead of weight, and the probationary period must be set to require the loss of at least 1% body fat per month. Therefore, needing to lose at least 4% body fat, the applicant was informed in writing that he had to comply with the standard within four months—by the end of February 2014. Although the applicant's command erred in October 2013 by placing him on weight probation, instead of processing him for immediate discharge, the error was in the applicant's favor because it gave him a chance to remain on active duty by dropping to 26% body fat by the end of the probationary period, as he had done in the past.

5. The applicant argued that he should not have been discharged for failing weight probation because he could not exercise due to his knee condition. He claimed that he only failed probation because of his knee condition, but his medical records show that the applicant repeatedly admitted to his doctors that he ate to relieve stress. Nevertheless, the Board must decide whether

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[1] 10 U.S.C. § 1552(b).
[2] 33 C.F.R. § 52.24(b).
[3] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

the applicant was entitled to an abeyance of the weight standards at the time of his separation. Article 5.A.2. of COMDTINST M1020.8H states that "[t]he intent of authorizing a medical abeyance 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." Therefore, although the applicant's knee condition interfered with his ability to perform certain exercises, it was not grounds for an abeyance of the weight standards. Article 5.A.3. states that "requests [for abeyances] that stem from medical conditions which may restrict a member's ability to exercise, but otherwise have no physiological impact on the member's ability to lose weight/body fat through proper diet or exercise, will not be approved." The medical conditions warranting an abeyance that are listed as examples in Article 5.A.3. are conditions that physiologically cause weight gain, such as hypothyroidism, and the applicant has not shown that he had such a condition. Therefore, the applicant has not proven by a preponderance of the evidence that he was entitled to an abeyance of the weight standards based on his knee condition.

6. The Board notes that the applicant was taking Celexa while on weight probation in 2013 and 2014, and a PA claimed on the Command Weight Referral form that it might make it "more difficult" for him to lose weight. Therefore, the Board must decide whether the Coast Guard erred by failing to grant him an abeyance based on his taking Celexa. Article 5.A.3. of COMDTINST M1020.8H provides corticosteroids as an example of medications that warrant a medical abeyance of the weight standards because they physiologically cause weight gain.[4] Celexa is not a corticosteroid, however, and the applicant has not shown that it physiologically causes weight gain. In fact, the proven potential side effects include weight loss, not weight gain.[5] The applicant has not proven by a preponderance of the evidence that the Coast Guard erred by not granting him an abeyance of the weight standards in 2013 and 2014 based on his prescription for Celexa.

7. The applicant alleged that he should have been medically separated either in 2008, when he underwent a debridement of scar tissue, or in 2014, when he underwent a partial knee replacement, because he was not fit for duty. The applicant was a yeoman, and so his duty was administrative deskwork. Chapter 3.F.1.c. of the Medical Manual provides that members "considered permanently unfit for duty shall be referred to a Medical Evaluation Board for appropriate disposition." Neither of the surgeries that the applicant underwent in 2008 and 2014 are listed as disqualifying for retention on active duty in Chapter 3.F.9., however, and in both cases the applicant's surgeon reported that he was fit for his deskwork within a few weeks of his surgery. Many members of the military have continued to serve on active duty following such surgery.

8. A knee condition may also be disqualifying for retention on active duty if there is recurrent instability, effusion, or locking resulting in frequent incapacitation,[6] but the applicant's

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[4] The U.S. National Institutes of Health National Library of Medicine's databases, MedlinePlus and DailyMed, list changes in body fat, fluid retention, and weight gain as common side-effects of taking a corticosteroid (see, e.g., https://medlineplus.gov/druginfo/meds/a601102 html#side-effects; https://dailymed nlm.nih.gov/dailymed/drugInfo.cfm?setid=3400d26a-41cb-40e4-99b4-780e1e0ec561).

[5] *See* footnote 4. The National Institutes of Health National Library of Medicine's databases, MedlinePlus and DailyMed, do not list changes in body fat, fluid retention, or weight gain as side-effects of taking Celexa, but decreased appetite, nausea, and weight loss are reported side-effects. https://medlineplus.gov/druginfo/meds/a699001 html#side-effects and https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=4259d9b1-de34-43a4-85a8-41dd214e9177.

[6] Coast Guard Medical Manual, Chapter 3.F.12.b.(3).

doctors repeatedly reported that he did not have instability or locking in his right knee. A doctor reported "mild effusion" in January 2010, but there was none by May 2013. In addition, the applicant's range of motion in his right knee met the requirements for retention in Chapter 3.F.12.b.(4), and he has not shown that the osteoarthritis in his knee caused "recurrent incapacity for prolonged periods." The applicant pointed out that when the doctor declared him fit for duty on August 22, 2008, the doctor also said that he should avoid high-impact exercises for two or three weeks, but the applicant's medical records show that he later reported being pain-free and did not seek help for knee pain again until October 2009. The Board finds that he has not proven by a preponderance of the evidence that he was left permanently unfit for duty by his knee condition in either 2008 or 2014. Nor has he proven that the Coast Guard's failure to convene a medical board to evaluate him was unjust because of any doubt about his permanent fitness for duty.

9. The applicant alleged that a documented decline in his performance is evidence that he could not perform his duty because of his knee condition in 2008 and so was not fit for duty. He also alleged that he was subject to a hostile work environment in 2008. The record shows that the applicant sought counseling for stress in 2008, which he attributed to both his personal life and his supervisor's dissatisfaction with his performance. Page 7s show that he was counseled about having "weak knowledge of [his] rating," failing to complete routine tasks and follow-up on assignments, showing disrespect to a superior commissioned officer, failing to secure a standby, lying to his supervisor about his notary public certification, and lying to the Administrator of the Headquarters Weight Program about disregarding the UHPC. The Board finds, however, that the applicant has not established any causal connection between the condition of his right knee and his documented performance problems in 2008.[7] Nor has he established that he was subject to a "hostile work environment." For a hostile work environment to exist, occasional hostile or humiliating words and actions are insufficient.[8] Factors that courts consider include the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening or humiliating or merely offensive; and whether the conduct unreasonably interfered with an employee's work performance.[9] A "hostile work environment" in the civilian sector exists "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[10] There is evidence showing that the applicant felt stress in 2008 and 2009 at least in part because he knew his supervisor was dissatisfied with his performance, but he has not overcome the presumption of regularity that she performed her supervisory duties properly and without creating a hostile work environment.[11]

10. The applicant alleged that he was erroneously and unjustly discharged within a few weeks of his May 2014 knee surgery and that the surgery left him permanently unfit for duty. Chapter 2.C.2.b.(2) of the PDES Manual states that a member being processed for discharge for a reason other than physical disability should not be referred to a Medical Evaluation Board unless the member is physically unable to perform his assigned duties or if an acute, grave illness or

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[7] PDES Manual, Chapter 2.C.2.d. ("Inadequate performance of duty, by itself, does not constitute physical unfitness. The evidence must establish a cause and effect relationship between the inadequate performance and the evaluee's physical impairments.").
[8] *See Overton v. N.Y. State Div. of Military and Naval Affairs*, 373 F.3d 83, 99 (2d Cir. 2004) (Pooler, J., concurring).
[9] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).
[10] *Id.* (citations omitted).
[11] 33 C.F.R. § 52.24(b).

injury renders him unfit for further duty. In addition, Chapter 2.C.2.c. states that if a member being processed for discharge for a reason other than physical disability adequately performs his duties, he i[redacted]duty even if he has impai[redacted]s. Moreover, Chapter 2.C.2.e. states that a member "convalescing from a disease or injury that reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank or rating in the near future may be found fit for duty," and Chapter 2.C.2.f.(6) states that a pending separation is not a reason for finding a member unfit for duty.

11. The record shows that the applicant received a referral to an orthopedic surgeon in May 2013 but failed to follow through. After being placed on weight probation again in October 2013, he received another referral to the orthopedic surgeon and consulted one in December 2013. In March 2014, the applicant again consulted the orthopedic surgeon, who was recommending surgery with a partial or total replacement of his right patella. The applicant knew at this point that he w[redacted]being processed for disch[redacted]ause he had not[redacted]he weight or body fat standards by February 28, 2014. PSC initially issued orders to separate the applicant by May 19, 2014, but after the applicant elected in April 2014 to undergo knee surgery, his separation was delayed until after his surgery. The record shows that the applicant was not discharged until July 28, 2014, after his surgeon reported that the applicant had "good patellar tracking" and a 110-degree range of motion in his right knee and that he was fit for walking without a walker and deskwork. Therefore, the preponderance of the evidence shows that the applicant was fit for duty when he was discharged in July 28, 2014, in accordance with Chapter 3.F. of the Medical Manual and Chapter 2.C.2. of the PDES Manual even though he was still in physical therapy to recover from surgery. The applicant has not shown that in July 2014, he was physically unable to perform his assigned duties or that he suffered an acute, grave illness or injury that rendered him unfit for further duty, as required by Chapter 2.C.2.b.(2) of the PDES Manual.

12. The applicant argued that his 100% disability rating from the VA shows that he was not fit for duty before his discharge and should have been medically retired. Under 10 U.S.C. § 1201, only a condition that renders a member permanently unfit to perform his duties warrants PDES processing for a disability rating and medical separation. In contrast, under 38 C.F.R. § 4.1, the VA considers the extent to which all of a veteran's "service[redacted]urrently affect h[redacted]ity to work in civilian life, whether or not the conditions rendered the veteran unfit for duty at the time of his discharge. In this case, after examining the applicant's right knee in 2015, the VA initially rated it as 10% disabling and assigned him another 10% rating for scar pain. He also received numerous ratings for other service-connected conditions. On appeal, the VA raised the rating for his knee condition to 100% for the year following his discharge—presumably because he was in physical therapy and did not yet have a job. But the VA lowered his knee rating to 30% thereafter and explained that it did so because a 30% rating is the minimum rating authorized following a prosthetic replacement. The VA also later raised the rating for his scar pain to 20%. As stated in Chapter 2.C.2.i of the PDES Manual, however, "[t]he 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. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments

that are not unfitting at the time of separation but which could affect potential civilian employment." Therefore, the fact that the applicant incurred numerous service-connected medical conditions while on active duty that the VA has rated does not show that the Coast Guard erred by failing to process the applicant for a disability retirement. His VA ratings are not determinative of his fitness for duty in July 2014,[12] and the preponderance of the evidence shows that his knee condition was not permanently unfitting for the duties of a yeoman in July 2014.

13. The preponderance of the evidence shows that except for his obesity, in July 2014 the applicant was physically fit to continue serving on active duty despite various impairments and his knee prosthesis even though he had not yet completed physical therapy following his surgery. The record shows that he was separated only because he had failed weight probation and not because of his knee condition or any of his other medical conditions.

14. After the applicant failed weight probation at the end of February 2014, his command initiated his separation as required by Article 4.A.3. of COMDTINST M1020.8H but recommended that PSC opt to retain the applicant because he had lowered his body fat percentage to 26% on March 31, 2014. Article 4.C.5. states that a member who comes into compliance with the standards after failing probation is still subject to discharge, but PSC may elect to "suspend the execution of the discharge based upon service needs, the member's history of compliance, and the member's past performance." In the applicant's case, PSC did not opt to suspend the execution of the discharge. A handwritten note indicates that one of the facts considered was the frequency with which the applicant had been non-compliant with the weight standards. In addition, although the applicant told PSC in his written statement that he had changed his lifestyle, his medical records show that he did not maintain his compliance after March 31, 2014, as he began gaining weight again. Based on the frequency with which the applicant had been failing to maintain compliance with the weight standards, the Board cannot conclude that Commander, PSC abused his discretion in refusing to suspend the applicant's discharge for weight control failure.

15. The applicant has not proven by a preponderance of the evidence that his separation for weight control failure was erroneous or unjust. The record shows that PSC acted in accordance with COMDTINST M1020.8H, and the policies therein are applicable to all members—regardless of their years of service. The Board is not persuaded that the Coast Guard is not entitled to enforce its weight and body fat policies for members with more than 17 years of service, and enforcement of those policies is not "treatment by military authorities that shocks the sense of justice."[13]

16. Accordingly, the applicant's request for relief should be denied.

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[12] *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.").

[13] *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (stating that for the purposes of the BCMRs, "injustice" is "treatment by the military authorities that shocks the sense of justice but is not technically illegal").

ORDER

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

[redacted]

July 6, 2018