DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-170

[redacted] E-8 (former)

FINAL DECISION

This proceeding was conducted in accordance with to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 21, 2018, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 4, 2019, 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 is a former master chief who was honorably discharged on August 24, 2015, for weight control failure after he failed three consecutive semiannual weigh-ins in April 2014, October 2014, and April 2015. He asked the Board to correct his record (1) by setting aside his administrative discharge so that he is returned to active duty; (2) by medically retiring him; or (3) by awarding him constructive service credit through September 22, 2017—the date he would have completed twenty years of service—and retiring him.[1]

The applicant, who had almost eighteen years of service on the date of his discharge, stated that that he had "struggled with his weight" since he turned 30 years old in 2006. He had been placed on weight probation several times and repeatedly met the terms of his probationary periods by meeting the weight and/or body fat standards. But as he got older, he

> found it increasing[ly] difficult to maintain my weight and balance my work and home life. A fellow Chief Petty Officer was having issues too and she had passed out in the office and was taken to the hospital because of the drastic measures she was using to comply with the standards. When she returned to work she …. share[d] her story and diagnoses of an eating disorder with us.
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> Afterward she had pulled me aside and told me that in her opinion I had an eating disorder also. I spoke to my supervisor and expressed my concern of being discharged due to a mental condition

[1] The first and third requests for relief appear on the applicant's application form DD 149, but his attorney's brief mentions only the first and second request for relief.

> and he said he would follow up and told me that if the condition could be corrected that I would be retained and it would not affect my ability to serve. I sent an email to the base medical officer telling him about my concern that I felt I had an eating disorder and that while exercising my chest hurt and I was concerned about my health. He scheduled an appointment the next day with me and we sat in his office and he gave me a referral to a cardiologist for a stress test and continued to tell me that "I'm fat and I smoke, if I can make weight so can you[.] [E]at more vegetables". During the medical appointment I re-explained my issues with eating and the doctor said the same basic things to me. I passed my stress test and passed my probation period weigh-in.

The applicant alleged that after he told his doctor, Dr. S, on November 25, 2014, that he thought he might have a "selective eating disorder," Dr. S focused instead on his complaint that he was feeling cardiac discomfort when he was exercising. He argued that after telling Dr. S that he thought he might have a selective eating disorder, the Coast Guard failed to properly evaluate and consider his eating disorder as required by the Medical Manual, COMDTINST M6000.1F. He noted that Chapter 5.A.18.d. of the Medical Manual states the following:

> Eating disorders have a potential to affect fitness for duty, but the diagnosis of an eating disorder does not automatically mean the member is unsuitable for continued service. Individuals suspected of having an eating disorder shall be referred for evaluation by an Armed Forces psychiatrist or Armed Forces clinical psychologist. Treatment may be authorized in accordance with the same criteria as other mental conditions. See Chapter 5-B-1 of this Manual.[2]

The applicant stated that after he failed weight probation in 2015, he advised another doctor, Dr. C, on March 25, 2015, that he had "experienced severe food intolerance to a wide range of food since childhood." Dr. C stated that they would need to send him to specialists to rule out physical conditions that might by causing his symptoms before they would send him to a mental health provider for treatment of an eating disorder. Thereafter, the applicant alleged, he saw three such specialists, including a gastroenterologist, Dr. R, who diagnosed him with an "eating disorder" and "atypical eating disorder." Dr. R's report was sent to the applicant's Base clinic on June 10, 2015, and on June 11, 2015, the applicant "requested a referral to a psychologist," which Dr. C granted. However, the applicant argued, pursuant to the Medical Manual, "such a referral was mandatory and not discretionary on the part of the provider," again citing Chapter 5.A.18.d. of the Medical Manual. Moreover, the applicant stated, he "was not given an appointment to see a military psychiatrist or psychologist before his separation." The applicant alleged that once Dr. C gave him this referral, the Coast Guard "had a legal obligation to hold the proposed separation in abeyance while he was evaluated," but did not do so.

The applicant stated that on July 27, 2015, while three referrals were pending, he was advised that he would be discharged within three weeks. He requested a delay of his discharge to see the specialists and undergo transition training, but his requests were denied. He also asked if he could be retired under TERA (Temporary Early Release Authority), but this request was also

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[2] Chapter 5.B. concerns "Command Directed Mental Health Evaluation of CG Members." Chapter 5.B.1. states that the Boxer Amendment in Section 546 of Public Law 102-484 does not apply to the Coast Guard, but the Coast Guard's policies "meet many of the criteria" of that law. Chapter 5.B.3., which concerns non-emergency command-directed mental health evaluations, states that "[s]igns of mental illness can include changes in behavior, mood, or thinking that interfere with normal functioning. When a CO believes a Service Member has a mental illness that requires a Command Directed Mental Health Evaluation," the CO should speak to the member's health care provider to discuss the request, document the request on a memorandum, counsel the member about the reasons for the evaluation, have the member sign an acknowledgement, and provide an escort to the evaluation.

denied. The applicant claimed that, instead, the Coast Guard rushed his discharge both to deny him the benefit of a psychiatric evaluation and because, if he had reached 18 years of service, he would have had "sanctuary" protection from separation. (But there is no such sanctuary law for Coast Guard members,[3] and even for members of the Army, Navy, and Air Force, the sanctuary law does not prohibit members with more than 18 years of service from being discharged for failing the weight standards.[4])

The applicant stated that his discharge was erroneous because he was "never examined by a military psychiatrist or psychologist in a timely manner as it required for the Commandant's Instruction. I was diagnosed with an eating disorder which was the direct cause of my difficulties on the weight program and the reason for my separation."

The applicant stated that after he was discharged, he kept one of the appointments with a specialist that had been scheduled while he was on active duty and was diagnosed with an "unspecified eating disorder." He alleged that if he had received this diagnosis timely—before his separation—he would have received an abeyance of the weight standards and been referred for evaluation and treatment because of his eating disorder. However, his CO ignored this policy and claimed that members who are diagnosed with an eating disorder are processed for administrative separation for unsuitability due to having a personality disorder. The applicant's attorney stated that he has "seen this scenario played out many, many times [in the military] ... . The Coast Guard has gambled that [the applicant] would neither know of their sleight of hand nor have the wherewithal to fight this matter."

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[3] There is no 18-year "sanctuary" for Coast Guard members—only for members of the Army, Navy, and Air Force. 10 U.S.C. § 1176(a) states the following:

> A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for retirement under section 7314 or 9314 of this title, or of qualifying for transfer to the Fleet Reserve or Fleet Marine Corps Reserve under section 8330 of this title, shall be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be, unless the member is sooner retired or discharged under any other provision of law. [Emphasis added.]

- 10 U.S.C. § 7314 authorizes the retirement of Army enlisted personnel with 20 to 30 years of active duty.
- 10 U.S.C. § 9314 authorizes the retirement of Air Force enlisted personnel with 20 to 30 years of active duty.
- 10 U.S.C. § 8330 authorizes "retainer pay" and transfer to the Fleet Reserve or Fleet Marine Corps Reserve for Naval or Marine Corps enlisted personnel with at least 20 years of active duty.
- 14 U.S.C. § 2306, which is not mentioned in 10 U.S.C. § 1176, authorizes the retirement of Coast Guard enlisted personnel with 20 or more years of active duty.

[4] *See, e.g.*, OPNAVINST 6110.1J, Enclosure (1), para. 1.a. (stating that failing a body composition assessment (BCA) constitutes an overall failure of the physical fitness assessment (PFA)) and Enclosure (2), para. 2:

> 2. ADSEP [administrative separation]: Mandatory separation processing shall occur for all members who fail three PFA cycles in the most recent 4-year period. …
>
> a. ADSEP for Over 18 Years of Service. Members with over 18 years of service are not exempt from ADSEP. Members with a third PFA failure prior to 30 June 2011 and an approved fleet reserve and retirement date will be allowed to retire (grandfathered in). Those with a third failure subsequent to 30 June 2011 will be processed for ADSEP.

The applicant alleged that after his discharge, he received a 100% disability rating from the VA and he asked how he could have been healthy enough to lose weight in 2015, as his doctors claimed, if he was 100% disabled. The applicant also stated that it took him two years to find a job, and he had to uproot his family and move to another state.

To support his allegations, the applicant submitted copies of some of his medical records, which are included in the Summary of the Record below. He also submitted copies of correspondence between him, his congressman, and the Coast Guard:

- On April 20, 2016, the Coast Guard responded to the congressman's inquiry and advised him that Coast Guard policy requires members who fail three consecutive semiannual weigh-ins to be processed for separation. The Coast Guard stated that after each of the applicant's failed weigh-ins in 2014 and 2015, he

> was properly screened by a Coast Guard Medical Officer who found that he did not have an existing medical condition that would have contributed to the excess weight. Following the failed April 2015 weigh-in, [the applicant] disclosed that he believed he had an eating disorder and was sent for a psychological consultation. Per policy, members who are diagnosed with an eating disorder shall be processed for separation for reason of unsuitability due to having a personality disorder, which covers eating disorders. Additionally, if [he] was diagnosed with an eating disorder while on active duty, he would be able to obtain treatment through the Veterans Affairs system of clinics following his separation. Since [the applicant] was already being separated due to weight issues, a duplicate separation package for unsuitability was not required.
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> [The applicant] was notified of his Command's recommendation for discharge on June 24, 2015 and was separated from the Service on August 24, 2015. This provided two months after the notification to complete an online training version of a Transition Assistance Program course. The Personnel Service Center consistently applies a separated date assignment of at least 20 business days for all administrative separations. If [he] feels that his separation from the Coast Guard was unjust, he may submit a request to have his discharge review by the Board for Correction of Military Records.

- On May 5, 2016, the congressman forwarded the Coast Guard's response to the applicant and stated that he regretted that the matter could not be resolved in the applicant's favor.

- On September 7, 2016, the applicant responded to the congressman. He admitted that he had failed the three weigh-ins but claimed that if he had been properly screened by his doctors, he "would have gotten an exemption to address my eating disorder." He claimed that the Weight and Body Fat Program Manual, COMDTINST M1020.8G, listed eating disorders as one of the circumstances that required an exception "during which a member is not in a probationary status, but still required to be weighed," and referred the reader to Chapter 4.2.2. of COMDTINST M1020.8G. The applicant stated that after he failed the October 2014 weigh-in, he told Dr. S on November 25, 2014, that he thought he had an eating disorder, who told him that he could meet the weight standards if he ate more vegetables. And Dr. S took no further action to see if the applicant had an eating disorder. Later he was told that before being referred for treatment of an eating disorder, they needed to rule out other causes, and he was "referred to a gastroenterologist, an ears, nose and throat

doctor and a psychologist." When he was diagnosed with an eating disorder by Dr. R on June 10, 2015, the diagnosis was

> totally overlooked and unaddressed by any Coast Guard Medical Officer. He also diagnosed that I suffer from heartburn, abdominal pain, and diarrhea. I was also seen by [Dr. L] (psychologist) June 15, 2015.[5] After several appointments ending on August 4, 2015. She submitted her report and stated to my wife and I, "she was not an eating disorder specialist". A Coast Guard Medical Officer reviewed my diagnosis on August 6, 2015. They did not address her findings on any level. [Dr. L] did not address my eating disorder which I repeatedly stressed. At that point, I insisted on seeing someone qualified for my health issues. The earliest appointment I was given was January 6, 2016, after my discharge date. I kept that appointment on my own dime. They made a diagnosis of "unspecified eating disorder".

The applicant wrote that under COMDTINST M1020.8G, members diagnosed with eating disorders are not discharged for unsuitability but are instead processed in accordance with the Medical Manual, COMDTINST M6000.1, which stated that members suspected of having an eating disorder should be referred for evaluation by a psychiatrist or psychologist; that treatment may be authorized; and that enlisted members diagnosed with an "eating disorder NOS [not otherwise specified] "shall be processed in accordance with Chapter 12.B.12. … of the Personnel Manual, COMDTINST M1000.6 (series), if the condition significantly impacts or has the potential to significantly impact performance of duties." The applicant argued that he would not have been discharged for failing the weight standards if his medical concerns had been timely addressed.

The applicant also stated that on June 24, 2015, he was only notified that his CO was submitting a recommendation that he be discharged for failing the weigh-in three times; he was not told that the recommendation had been approved until July 27, 2015.

The applicant told the congressman in the letter that he had received a 100% disability rating from the VA, including 50% for chronic sinusitis; 50% for unspecified anxiety and eating disorders; 10% for a left wrist sprain; 10% for hypertension; 10% for a left ear scar; 10% for tinnitus; 30% for irritable bowel syndrome, gastroesophageal reflux disease, and gastritis; 60% for chronic bronchitis and sleep apnea; 10% for trochanteric pain syndrome (muscle strain) in his right thigh; 10% for allergic rhinitis; 20% for lumbar degenerative disease; and 0% for several other disabilities. He asked how he could have been found fit to lose weight by his Coast Guard doctors with all of these medical disabilities.

- On November 16, 2016, the Coast Guard advised the congressman again, in response to a letter dated November 2, 2016, that if the applicant did not agree with the decision regarding his administrative separation, he could apply to the Board for Correction of Military Records. The letter also states that they had called the applicant to explain the application process.

[5] The applicant did not submit a copy of this medical record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 23, 1997. He attended training and earned the Information Technician (IT) rating. Because the Board does not have the applicant's complete medical records, the Page 7s documenting his weight probationary periods are not in the record unless the applicant submitted them or they were part of his discharge package, which was submitted by the Coast Guard.

On April 15, 2011, the applicant went to the clinic for a Command Weight Referral. A corpsman noted that he was 5'10" tall and weighed 209 pounds, which was 23 pounds over the maximum allowed weight (MAW) for his height. He also noted that the applicant's body fat percentage was 7% above the allowed maximum for his age. The corpsman noted that the applicant "has no underlying conditions that would prevent [him] from losing the weight. Member denies any muscular injuries. No [past medical history] of diabetes, cardiac conditions, or respiratory illnesses. PT has been counseled on safe ways to lose weight. If PT desires to see a nutritionist [he] must follow up with their PCM [primary care manager] once the boat reaches homeport." The doctor noted that the applicant "admits his exercise regimen and eating habits could improve. He is motivated to begin a regular exercise routine and change his eating habits and start losing the wt. He denies CP [chest pain], SOB [shortness of breath], numbness, or tingling when exercising or working out. He has not family [history of] sudden death, athletic related deaths, or heart attacks under the age of 50." The doctor reported that the applicant's obesity was presumably due to "inactivity combined with poor dietary habits. We discussed at length mechanisms of wt gain and approaches to stabilizing or losing wt through caloric restriction and increased exercise." The doctor noted that the applicant was about to transfer to another location and advised him to follow up with his new primary care manager to get a referral to a nutritionist. She noted that the applicant had asked about cholesterol and glucose tests, and that the results of those and a thyroid test would be emailed to him.

On December 8, 2011, the applicant underwent a periodic health assessment (PHA). A corpsman noted that he weighed 220 pounds.

On December 21, 2012, the applicant underwent a PHA. A corpsman noted that he weighed 218 pounds.

On September 5, 2013, the applicant went to the clinic for a PHA. A corpsman noted that he weighed 205 pounds.

On a Page 7 dated April 25, 2014, the applicant was advised that he was being put on weight probation again because at 226 pounds, he was 29 pounds over his MAW and had 26% body fat. He was told that he had to lose 29 pounds or drop to 24% body fat by June 17, 2015. He was told to complete a personal wellness profile with a detailed fitness plan; exercise for at least one hour three days per week; and undergo a monthly fitness assessment. He was assigned a Unit Health Promotion Coordinator to consult and told that "compliance is a condition of continued service." He was also told the following:

> This non-compliant semiannual weigh-in is considered your third strike. If you fail to reach compliance by the end of this probationary period, you will be recommended for separation … This is

> your third documented time on weight probation during your current enlistment that began on 28 FEB 2005 and ends on 28 FEB 2017. If you are placed on weight probation a fourth time during this enlistment, you will become ineligible for reenlistment.

On June 5, 2014, a doctor certified on a Command Weight Referral form that the applicant had no medical diagnoses or medications that could be contributing to his excess weight and no medical or physical condition that could limit his participation in physical activity.

On a Page 7 dated October 17, 2014, the applicant was advised that he was being put on weight probation again because at 231 pounds, he was 34 pounds overweight and had 26% body fat. He was told that he had to lose 34 pounds or drop to 24% body fat by June 17, 2015. He was told to complete a personal wellness profile with a detailed fitness plan; exercise for at least one hour three days per week; and undergo a monthly fitness assessment. He acknowledged that the Coast Guard Weight and Body Fat Program Manual was available to him to review, that he had been assigned a Unit Health Promotion Coordinator to consult, and that "compliance is a condition of continued service." He was also received the same warning that he had received on the Page 7 dated April 25, 2014:

> This non-compliant semiannual weigh-in is considered your third strike. If you fail to reach compliance by the end of this probationary period, you will be recommended for separation … This is your third documented time on weight probation during your current enlistment that began on 28 FEB 2005 and ends on 28 FEB 2017. If you are placed on weight probation a fourth time during this enlistment, you will become ineligible for reenlistment.

On October 30, 2014, Dr. C certified on a Command Weight Referral form that the applicant had no medical diagnoses or medications that could be contributing to his excess weight and no medical or physical condition that could limit his participation in physical activity.

On November 25, 2014, the applicant wrote an email to Dr. S, in which he stated that his weight probationary period was ending and although he was exercising he was getting pain in his chest and was frightened, his blood pressure was increasing, and he was having trouble sleeping with the CPAP machine. He wrote, "Also doing some research, I think I may have selective eating disorder. I am within a ½ inch to making weight but I cannot seem to lose anything. I have an appointment with you on the first of Dec, however that is the final day for me to weigh in. I have been told my command has reached out to you, any advice would be appreciated." Dr. S replied the same day and said the following:

> Not sure what to tell you about your weight issues but if you have chest pain while exercising you have to stop doing the triggers until I see you. I will be off starting tomorrow afternoon and solidly booked. We will do a full assessment once we see you and I hope you pass your BF% during the next measurement (that might take some stress from you). Let me know [of] any changes in your status. If during the holidays your chest pain increases or gets worse go to the nearest ER (hopefully that won't be the case). We will work with you to see what the problem seems to be with your weight and we will have a close look at your BP and your cardiovascular status.

On December 1, 2014, the applicant did not show up for an appointment with Dr. S.

On December 2, 2014, the applicant again failed to show up for an appointment with the doctor.

On December 9, 2014, the applicant underwent a PHA with Dr. S. A corpsman noted that he weighed 205 pounds and was not taking any medications. Dr. S noted that the applicant

> has had problems with his weight for years. He had been on [weight] probation 4 times. He believes he has a selective eating disorder as he just eats like 15 type of food and all "bad". He has [obstructive sleep apnea] on cpap (does not tolerate it well). States for around 2 years he has had chest pain associated with exercise that lasts for 45' post exercise, no [shortness of breath], no epiphoras, no [family history] or early cad. This chest pain makes him scare[d] of doing exercise and has impaired his ability to exercise. Never brought those [symptoms] to our attention.

The applicant told Dr. S that he had the most stressful job in the Coast Guard but was able to handle it. He had stopped or minimized exercise because of his chest pains. He acknowledged that he "eats 'junk'" and stated that he sometimes supplemented his diet with protein. Dr. S referred him for an electrocardiogram and ordered many laboratory tests pursuant to the PHA. Dr. S noted that the applicant had "considerable abdominal obesity" and counseled him about engaging in better eating habits.

Dr. S diagnosed the applicant with "atypical chest pain" and referred him to a cardiologist for a "full work-up." He also noted that the applicant was obese, but he did not diagnose the applicant with an eating disorder or write that the diagnosis needed to be "ruled out." Instead, he offered to contact a Coast Guard Health Promotion Manager on the applicant's behalf to help him "achieve that goal on weight loss and better eating habits. He agreed and gave me permission to engage her." Dr. S released the applicant without limitations but told him to stop exercising until he saw the cardiologist. (The applicant did not submit a cardiologist's report.)

On February 2, 2015, the applicant went to the clinic for a follow up on his PHA. A corpsman noted that he weighed 222 pounds. Dr. C discussed some of the laboratory tests and hyperlipidemia with him, as well as diet, exercise, and weight loss. She released him without limitations.

On March 25, 2015, the applicant made an appointment at the clinic for "eating issues" and to follow up on the laboratory results of his recent periodic health assessment. He also asked for nutritional advice. A corpsman noted that he weighed 228 pounds. According to Dr. C, the applicant complained of

> the inability to eat a wide variety of foods without associated nausea, bloating, and discomfort. Foods that he either cannot tolerate or does not tolerate well consist of all fruits and vegetables and foods containing gluten. He recently switched to gluten free products whenever possible which seems to have improved his [symptoms]. Foods he eats most of the time and tolerates well are most meats, rice, and potatoes. He does eat pasta products, but these normally cause him some discomfort. He states that he has been like this since he was 10 years old. He is concerned about a possible psychological component to this issue, primarily OCD [obsessive-compulsive disorder]. However, he denies any mental or emotional stressors that could be associated or have triggered this behavior. He denies experiencing the need to perform repetitive behaviors or behaviors that cause him the inability to function at work or home. He states that his filing system is intense but that's about it. Pt is currently asymptomatic and denies any additional [symptoms] to include vomiting, diarrhea, constipation, urinary dysfunction, or blood in his urine or stool.

Dr. C noted that the lab results showed that the applicant had had hyperlipidemia since 2012, had borderline high blood pressure, was overweight, and was on weight probation. She also noted that he had "been counseled about the importance of dietary modifications and exercise in the past." Regarding his complaint of food intolerance, Dr. C noted that the applicant thought that his food intolerance was preventing him from losing weight and stated that it had never been evaluated before. She discussed the importance of diet and exercise in maintaining a healthy weight and referred him to a GI specialist. She also counseled him about strategies to lose weight, about the importance of losing weight in connection with his cardiovascular health and blood pressure, and about using the blood pressure cuff on his CPAP machine. Dr. C released the applicant without limitations.

On April 30, 2015, the applicant underwent a semiannual weigh-in. His height was recorded as 5'11", which made his maximum allowable weight 197 pounds. He weighed 224 pounds and so he was 27 pounds over the maximum. Based on his age, his maximum allowed body fat percentage was 24%, and his body fat was measured at 27%. Following the weigh-in, the applicant was issued two Page 7s (CG-3307). The first placed him on weight probation. The second advised him that that because he had not achieved either his maximum allowed weight or his maximum allowed body fat percentage, he had failed the semiannual weigh-in for the third consecutive time and would be recommended for separation.

On May 27, 2015, Dr. C certified on a Command Weight Referral form that the applicant had no medical diagnoses or medications that could be contributing to his excess weight and no medical or physical condition that could limit his participation in physical activity.

On June 4, 2015, Dr. C noted that the applicant had called the clinic complaining of

> extreme fatigue following a severe episode of gastric reflux last night. He is currently being evaluated by a GI specialist for a possible gluten allergy. The GI provider has instructed the member to eat foods containing gluten as part of the evaluation process. Pt has been having increased discomfort since re-introducing foods containing gluten back into his diet and thinks that his reaction last night was likely caused by eating gluten containing foods. He self treated the pain, but was unable to get the pain under control for a majority of the night. As a result, he only got 1½ hours of sleep and is feeling extremely fatigued. He is extremely concerned about his ability to drive and safely make it to work due to his level of fatigue. He stated his abdominal pain has subsided to a much more manageable level and that he should be fine to go to work tomorrow. … Pt advised to [follow up] with his GI provider … Pt placed NFFD [not fit for duty status] x 24 hours.

On June 10, 2015, the applicant's command received a letter from a gastroenterologist, Dr. R, who wrote that he had seen the applicant on May 26, 2015, and that the applicant "appears to have the following condition(s): Heartburn, Abdominal pain, Diarrhea, Eating disorder, [and] Atypical eating disorder …." Dr. R wrote that he had ordered certain laboratory tests and given the applicant a prescription for medication for heartburn.

On June 11, 2015, the applicant was seen by Dr. C for a follow-up "from referrals" and a Command Weight Referral. A corpsman noted that he weighed 225 pounds. Dr. C noted that the applicant would be undergoing surgery to repair a deviated septum and that he had asked "for a referral to a psychologist to address his food aversion issues. He states that he can only tolerate 4 foods (hamburgers, chicken, rice, and potatoes) and is concerned that this may be related to a

psychological problem as the issue has been longstanding. Pt denies eating any other foods or taking a multivitamin." Dr. C also noted that the applicant complained of sleep apnea and asked whether either that condition or his upcoming surgery on his deviated septum would make him eligible for an abeyance of the weight standards. He told her that he had been diagnosed with sleep apnea in 2013 but had "been unable to utilize his CPAP machine as his ENT [ear, nose, throat] issues make wearing the fact mask or nasal prongs intolerable due to his stated inability to breath with these appliances on."

Pursuant to the Command Weight Referral, Dr. C advised the applicant that none of his medical conditions qualified him for an abeyance of the weight standards. She told him that "his current medical issues, including sleep apnea, would likely be improved if he lost weight." She

> strongly encouraged [him] to make the required lifestyle modifications needed to safely lose weight and regain a healthy body weight as his current weight puts him at an increased risk of heart disease, stroke, type 2 diabetes, HTN [hypertension], Hyperlipidemia, etc. [The applicant] verbalized understanding but was resistant to making any changes in his diet. He stated that he will increase his activity level once he has been cleared by the cardiologist he is current[ly] seeing for the evaluation of Atypical Chest Pain.

Regarding the applicant's complaint of food intolerance, Dr. C noted that he had "requested a referral to a psychologist to address his concerns about his long-standing intolerance issue as the intolerance is extensive and does not seem to relate to a physiologic condition. Referral provided." Dr. C released the applicant without limitations.

On June 24, 2015, the applicant's commanding officer (CO) issued him a "Notification of Intent to Discharge." The CO stated that that he had "initiated action to discharge" him pursuant to Article 1.B.12.a.10. of the Military Separations Manual, COMDTINST M1000.4, and that the basis for the recommendation was the applicant's failure to comply with the maximum allowable weight or body fat standards in COMDTINST M1020.8. He advised the applicant that he had a right to submit a statement on his behalf within five working days. The applicant acknowledged this notification and submitted a statement objecting to the discharge.

On July 1, 2015, the applicant's CO submitted a recommendation to the Personnel Service Center (PSC) that the applicant be honorably discharged for failing to comply with the weight/ body fat standards. He forwarded the applicant's notification, statement, and documentation of his weight probationary periods.

On July 22, 2015, PSC issued orders for the applicant to be honorably discharged for weight control failure on August 24, 2015. PSC noted that if he met the weight standard within 24 months he could request to reenlist at his former rate.

On August 14, 2015, the applicant went to the clinic for part 1 of a pre-separation physical examination. A list of his prior medical conditions and treatments included esophageal reflux, hypertension, hyperlipidemia, obstructive sleep apnea, chest pain, obesity, intestinal malabsorption, malaise, fatigue, unspecified counseling, exercise counseling, stress education, and dietary surveillance and counseling. He was released without limitations and told that he could return to the clinic for part 2.

On August 24, 2015, the applicant was honorably discharged from the Coast Guard due to "weight control failure."

APPLICABLE LAW AND POLICY

Military Separations Manual, COMDTINST M1000.4

Article 1.B.12.a.(10) the Military Separations Manual in effect in 2015 authorizes the discharge of members for obesity without an administrative separation board 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 Health Promotions Manual, COMDTINST M6200.1

Chapter 4.C.7. of the Coast Guard Health Promotion Manual 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.

Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8H

Responsibilities: Article 1.A.3. of the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8H, which was published in September 2012 and still in effect in 2014 and 2015, states that the standards therein 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 6 shows that members' maximum allowed weights vary by height, and members' maximum allowed body fat percentages vary by gender and age.

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 1.B.9. states that Commandant (CG-111) is responsible for ensuring that Regional Health Promotion Managers (HPMs) and Unit Health Program Coordinators (UHPCs) "provide each member on probation with advisory reference material on nutrition, weight control, and exercise."

Non-Compliance: Article 3.A. states that members who are non-compliant with the weight and body fat standards may not be promoted; may not be assigned to a command cadre or other high-visibility billets; may not be transferred to another unit without special authorization; and may not be assigned to attend (or may be disenrolled from) training courses, such as "A" School (to earn a rating), Chief Petty Officer Academy, or Senior Enlisted Leadership Course.

Article 3.B. states that non-compliance with the standards must be documented on a Page 7, unless the member has an authorized abeyance or exemption pursuant to Article 5.

Article 3.C.1. states that non-compliant members must contact their Unit Health Program Coordinator and their regional Health Program Manager; 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).

Probation: Article 3.D. provides the terms for weight probation when members are non-compliant and have no abeyance or exemption pursuant to Article 5. Article 3.D.1. states that the probationary period begins immediately upon a non-compliant weigh-in. Article 3.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 week or one percent body fat per month, whichever is greater. However, if the calculated probationary period exceeds eight months or 35 weeks, the member must be processed for immediate separation. Article 3.D.8.b. states that if a member is non-compliant at the end of a probationary period, the member must be processed for separation.

Article 3.D.3. states that "[m]embers who are non-compliant for a third consecutive time within a 14-month period are ineligible for probation and will be processed for separation" and "[m]embers receiving a third strike as explained in paragraph 4.A.5. of this Manual" are also ineligible for weight probation.

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 half-way towards compliance at the midpoint of their probationary period may be recommended for separation.)"

Article 3.D.6. states the following about semiannual weigh-ins when the member is already on weight probation (from the prior weigh-in):

> a. Members on probation will be required to complete semiannual weigh-ins. A form CG-3307 entry documenting the non-compliant weigh-in is required, along with an update to DA. There will be no change to the member's current probation period.
>
> b. Failed semiannual weigh-ins while on probation count as a consecutive strike toward the three-strike rule to prevent a pattern of non-compliance.

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

Separation: 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. Separation In Lieu of Probation. Members who exceed their BMI screening weight and maximum allowable body fat percentage to such an extent that they would be placed in a probationary period greater than eight months by body fat calculations and more than 35 weeks by weight calculations (Members who exceed these standards are required to complete a form CG-6050, prior to being recommended for separation).
>
> 2. Failure to Progress During Probation. Members who fail to demonstrate reasonable and consistent progress during probation (example: a member who is not halfway towards compliance at the mid-point of their probationary period).
>
> 3. Non-Compliant at End of Probation. Members who fail to comply with their weight or body fat by the end of their probation.
>
> 4. Third Probationary Period in 14 Months. Members who have been placed on weight probation for the third time in a 14-month period (The 14-month period begins on the date the member is placed on probationary status).
>
> 5. Three Consecutive Failed Semiannual Weigh-Ins. Members who fail to maintain compliance with weight and body fat standards three consecutive semiannual weigh-ins (Apr-Oct-Apr or Oct-Apr-Oct), also known as the three-strike rule.
>
> a. A failed semiannual weigh-in that occurs while a member is on probation does count as a strike for the purposes of this policy.
>
> b. Failed compliance noted during a weigh-in for any other purpose (i.e., to attend a service school requiring demonstrated compliance) does not count as a strike.
>
> c. A member who fails a third consecutive semiannual weigh-in while on probation will be processed for separation regardless of the current probationary period. [Emphasis in original.]

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.E. states that non-compliant members who are already eligible to retire may request retirement in lieu of discharge but, once approved, the retirement "cannot be cancelled even if the member becomes compliant with Coast Guard Weight and Body Fat Standards prior to retirement."

Article 4.F. provides that members with less than 20 years of service who already have an approved retirement date are still subject to separation in lieu of retirement due to non-compliance with the standards.

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.

Abeyances: Article 5.A. provides the rules for medical abeyances of the weight standards, which may be granted by PSC. 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. states the following:

> a. Medical abeyance requests will only be granted for cases involving diagnosed physiological medical conditions or use of prescription medications (which are not disqualifying for continued service) that contribute to the member's inability to maintain compliance with weight standards.
>
> b. Abeyance 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.

Article 5.A.3.c. states that are hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids are examples of the sort of physiological medical conditions and medications that warrant an abeyance of the weight standards, while conditions like depression, broken bones, lower back pain, and pulled muscles do not.

Exemptions: Article 5.B. provides exemptions from compliance with the weight and body fat standards during pregnancy, the six-month period after birth, and the year after birth if the member is nursing. Article 5.C. provides that, to encourage members to quit smoking, members addicted to tobacco may request a one-time six-month exemption from compliance as long as they are compliant on the day they request the exemption.

Eating Disorders: Article 5.D. states that members who are diagnosed by a qualified medical professional with an eating disorder shall be processed in accordance with the Medical Manual.

Coast Guard Medical Manual, COMDTINST M6000.1F

Chapter 5.A.18. of the Coast Guard Medical Manual in effect in 2014 and 2015 states the following about eating disorders:

> Disorders Usually First Evident in Infancy, Childhood, or Adolescence. Except as indicated in parentheses, these disorders are disqualifying for appointment, enlistment, or induction under Chapter 3-D-30 of this manual, or if identified on active duty shall be processed in accordance with Military Separations, COMDTINST M1000.4 (series), if the condition significantly impacts, or has the potential to significantly impact performance of duties (health, mission, and safety).
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> • • •
>
> Eating Disorders: Eating disorders have a potential to affect fitness for duty, but the diagnosis of an eating disorder does not automatically mean the member is unsuitable for continued service. Individuals suspected of having an eating disorder shall be referred for evaluation by an Armed Forces psychiatrist or Armed Forces clinical psychologist. Treatment may be authorized in accordance with the same criteria as other mental conditions. See Chapter 5-B-1 of this Manual.[6]
>
> (1) 307.1 Anorexia nervosa. (Shall be processed through Physical Disability Evaluation System, COMDTINST M1850.2 (series)).
>
> (2) 307.50 Eating disorder NOS [not otherwise specified]. Shall be processed in accordance with Military Separations, M1000.4 (series), if the condition significantly impacts or has the potential to significantly impact performance of duties (health, mission, and safety).
>
> (3) 307.51 Bulimia nervosa. (Shall be processed through Physical Disability Evaluation System, COMDTINST M1850.2 (series)).
>
> (4) 307.52 Pica.
>
> (5) 307.53 Rumination disorder.

VIEWS OF THE COAST GUARD

On February 25, 2019, a judge advocate (JAG) of the Coast Guard recommended that the Board deny the requested relief. She adopted the facts and analysis provided in a memorandum submitted by Commander, PSC, who also recommended denying relief.

PSC first noted that under Article 4.A.5. of COMDTINST M1020.8H in 2015, a member who is not in compliance with the weight or body fat standards at three consecutive semiannual weigh-ins must be processed for separation. And under Chapter 3.D.6.b., if a member already on weight probation (from the prior weigh-in) fails a weigh-in, that failed weigh-in still "count[s] as a consecutive strike toward the three-strike rule to prevent a pattern of non-compliance."

PSC then stated that the applicant failed three consecutive weigh-ins and, each time, a doctor noted that he did not have any medical conditions that were contributing to his excess weight and that it was safe for him to lose weight through diet and exercise. In addition, PSC stated, the applicant made no progress between those weigh-ins while on probation.

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[6] Chapter 5.B.1. of the Medical Manual concerns "command-directed mental health evaluations" for which members are escorted to the clinic or hospital for evaluation.

PSC stated that the applicant was not diagnosed with an eating disorder until after he failed his third consecutive weigh-in—his third strike—which required separation. The medical records show that he then sought a referral to a psychologist for his "food aversion issue" and asked about getting an abeyance because of his sleep apnea and his upcoming surgery on his deviated septum. He was referred to a psychologist—as well as other specialists—and he was told that he did not have a medical condition that qualified for an abeyance. PSC noted that there is no evidence that the applicant's command forwarded a request for an abeyance to PSC on his behalf.

PSC concluded that the applicant's claim that he was not timely referred to a psychologist is incorrect and that he was properly discharged after his "third strike." PSC argued that even if he had an eating disorder, that would not be grounds for retaining him in the service because an eating disorder that affects a member's fitness for duty is also grounds for separation.

The JAG provided an analysis stating that the Coast Guard "properly provided applicant with all requisite medical treatment including a referral for psychological treatment as appropriate." She noted that although all of the medical records are not available, those that the applicant submitted show that between November 25, 2014, and June 11, 2015, he visited his primary care physician at least five times (December 9, 2014, and February 2, March 25, June 4, and June 11, 2015) and was referred to his HPM for dietary and exercise counseling; a cardiologist; an ENT specialist; a gastroenterologist; and a psychotherapist. The JAG stated that these doctors "repeatedly and consistently considered, addressed, and provided treatment to Applicant as they deemed appropriate based upon the medical concerns and information available to them."

In response to the applicant's allegation that because he told his doctor in November 2014 that he believed he had an eating disorder, policy required that he receive an immediate referral to a psychiatrist or psychologist, the JAG stated that a "self-proclaimed eating disorder is not equivalent to what the medical providers believed or suspected" and doctors generally "rule out factors in an attempt to make a diagnosis. While this diagnostic process relies upon information provided by the patient, such information is not determinative." The JAG noted that when the applicant first claimed to have an eating disorder in November 2014, he had failed two successive weigh-ins and admitted to unhealthy eating habits (about 15 types of "bad" food) and exercise habits. Therefore, the JAG argued, it was not an error for Dr. S to conclude that the applicant did not have an eating disorder and to conclude instead that he had "unhealthy dietary and exercise habits that required the assistance of an HPM." Therefore, Dr. S referred him to the HPM. The JAG further noted that in March 2015, the applicant told Dr. C that he had a "physical aversion to certain foods" (nausea, bloating, and discomfort), but she found that his symptoms did not "seem to be conforming to a recognizable pattern" and so referred him to a gastroenterologist, Dr. R, "to address any physiological issues. These two referrals confirm that Applicant's medical providers did not support his self-proclaimed diagnosis and instead pursued the medical course of treatment they felt appropriate."

The JAG stated that after these doctors were "unable to account for physiological reasons as to why Applicant had a food aversion," he was referred to a psychotherapist at a TRICARE facility on June 11, 2015, which met the requires of the Coast Guard's policy. However, the JAG noted, "[t]here are no records that Applicant, in fact, attempted to see a military psychiatrist or military clinical psychologist after the 11 June 2015 referral." The applicant noted that there is

also no evidence that the applicant had claimed to have an eating disorder during his monthly meetings with HPMs or UHPCs during his probationary periods, even though one of their roles is to "assist members who may have an eating disorder" and to provide nutritional counseling. Nor did the applicant submit evidence showing that he was actually diagnosed with an eating disorder after his separation.

Regarding the applicant's claim that he was entitled to an abeyance of the weight and body fat standards while he was evaluated by a psychologist or psychiatrist, the JAG noted that the applicant cited no policy supporting this claim and that Article 5.A.1. of the manual states that "[a]waiting a medical diagnosis or abeyance decision does not constitute reason to waive or delay weight screening, documentation, and/or probation procedures." Moreover, the JAG noted, there is no evidence that the applicant ever followed the procedures for requesting an abeyance in Article 5.A.4. of the manual.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 8, 2019, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that after he met with Dr. S in December 2015, the doctor "ignored the symptoms that Applicant expressed to the Gastroenterologist [in May 2014], who concluded that he did in fact have an eating disorder." He also claimed that although Dr. C received the gastroenterologist's report stating that he "appears to have an eating disorder and atypical eating disorder" and referred him for psychotherapy, Dr. C failed to inform him of the diagnosis.

The applicant also argued that none of the specialists he was referred to complied with the manual by consulting a psychiatrist or psychologist. The applicant stated that when he did see the psychotherapist before his discharge, she told him that she had

> little experience in eating disorders, and would get [him] a referral to an eating disorder specialist. The Applicant saw [the psychotherapist] for other issues and then was given a referral to a psychiatrist that [sic] also concluded that he did in fact have an eating disorder. After his discharge the Applicant was sent to see a psychiatrist that [sic] also concluded that he did suffer from an eating disorder.

The applicant claimed that he "found it almost impossible to get the care he needed." And the care he received "was not timely, was not thorough, and … was not correct." He noted again that he has a 100% disability rating from the VA and claimed that it "is very difficult to comprehend how the medical personnel in the Coast Guard could conclude the 'Applicant does not have any medical conditions that contributing [sic] to his excess weight'." He stated that their conclusion was erroneous.

The applicant stated that he did not receive appropriate or timely medical care because he "requested medical treatment in an email to [Dr. S] and was not given the referral until after his third failure and after repeatedly requesting treatment for an eating disorder." He alleged that "there were other diagnoses of an eating disorder that were ignored" and that "[n]o further action was taken to comply with COMDTINST after the TRICARE physician made his diagnosis."

The applicant also complained that "[w]hile insinuating [s]he did not have a complete set of medical records, [the JAG] nonetheless *states there are no records* of Applicant attempting to see a military psychiatrist. Without a complete record [the JAG] has no basis for such a statement." (Emphasis in original.)

The applicant also stated that he was in fact diagnosed with an eating disorder and an atypical eating disorder by the gastroenterologist, Dr. R. He also repeated his allegation that he was diagnosed with an "unspecified eating disorder" in January 2016, and he claimed that he submitted a faxed document showing this diagnosis with his original application. (The application does not include any document dated in January 2016, and the list of enclosures on the attorney's brief does not mention one.)

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 within three years of the applicant's discharge.[7]

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[8]

3. The applicant alleged that his discharge for weight control failure was erroneous and unjust because he had an eating disorder and was not timely referred for evaluation by a psychologist or psychiatrist in accordance with Chapter 5.A.18. of the Medical Manual. 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, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[9] 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."[10]

4. The record shows that by mid November 2014, the applicant had been on weight probation four times and, each time, was able to lose his excess weight and/or body fat through diet and exercise. Although he must have consulted doctors and HPMs about his diet many times during those probationary periods before November 2014, there is no evidence showing that he had ever claimed to have numerous food aversions, an eating disorder, or adverse physical symptoms from eating fruits and vegetables. However, after failing two consecutive weigh-ins in

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[7] 10 U.S.C. § 1552(b).

[8] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

[9] 33 C.F.R. § 52.24(b).

[10] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

2014, the applicant was at risk of discharge under the "three-strike" rule should he fail the next weigh-in in April 2015.[11]

5. On November 25, 2014, the applicant emailed Dr. S and said that he was getting pain in his chest when he exercised, which frightened him. He also wrote, "doing some research, I think I may have selective eating disorder." The record shows that the applicant missed appointments at the clinic on December 1 and 2, 2014, but during a Periodic Health Assessment on December 9, 2014, he and Dr. S discussed his eating and weight control problems. Dr. S noted that the applicant said he thought he had selective eating disorder because he ate "junk" and ate only "like 15 types of food and all 'bad'." According to Dr. S's notes, the applicant did not report having an inability to eat healthy food or any adverse reactions to eating healthy food. Based on the applicant's medical history and description of eating "junk" and 15 "bad" types of food, Dr. S did not diagnose the applicant with an eating disorder or even note the need to "rule out" an eating disorder. Therefore, the preponderance of the evidence shows that Dr. S did not suspect that the applicant had an eating disorder. And so in December 2014, the Coast Guard was not required to refer the applicant to a psychologist or psychiatrist pursuant to Chapter 5.A.18. of the Medical Manual, as he alleged. Instead, Dr. S reasonably concluded based on the applicant's description of his eating habits and prior ability to lose weight through diet and exercise that the applicant needed more counseling about diet and exercise and referred him to an HPM. He also referred the applicant to a cardiologist because of his chest pain. Dr. S's decision not to diagnose the applicant with an eating disorder or to determine that there was a need to rule out an eating disorder—which was based on the applicant's own description of his eating habits on December 9, 2014—is entitled to the presumption of regularity, which the applicant has not overcome. Even assuming that the applicant was subsequently, accurately diagnosed with an eating disorder in 2016, as he alleged, the Board finds that he has not proven by a preponderance of the evidence that Dr. S (or the applicant's command) committed an error or injustice by not suspecting in December 2014 that he had an eating disorder or by not referring him to a psychologist or psychiatrist even though the applicant told Dr. S that he thought he might have an eating disorder.

6. According to the applicant's submissions, he saw Dr. C, a new primary care doctor, on February 2, 2015, and they discussed test results, hyperlipidemia, diet, exercise, and weight loss. Neither the corpsman nor Dr. C reported any complaint about an eating disorder, food aversions, or other psychological issues at this appointment. When the applicant saw Dr. C again on March 25, 2015—about one month before his next semiannual weigh-in—he weighed 228 pounds, which was 31 pounds over his maximum allowed weight. At this appointment, the applicant's description of his eating habits and issues changed significantly from what he had told Dr. S in December 2014. The applicant told Dr. C that he was unable to tolerate eating fruit, vegetables, or foods containing gluten. He claimed that he suffered from nausea, bloating, and discomfort if he ate such foods, and so he ate mostly meat, rice, and potatoes. He also told her that he thought that there might be a "psychological component to this issue, primarily OCD." But, she noted, he "denie[d] any mental or emotional stressors that could be associated or have triggered this behavior. He denie[d] experiencing the need to perform repetitive behaviors or behaviors that cause him the inability to function at work or home." Given that the applicant told Dr. C that he avoided eating fruit, vegetables, and foods containing gluten because he suffered physical symptoms—nausea, bloating, and discomfort—when he ate them, the Board finds that he has not proven by a

[11] COMDTINST M1020.8H, Article 4.A.5.

preponderance of the evidence that Dr. C committed an error or injustice on March 25, 2015, by referring him to a gastroenterologist, instead of suspecting that he had an eating disorder and referring him to a psychiatrist or psychologist pursuant to Chapter 5.A.18. of the Medical Manual.

7. After the applicant failed to meet the Coast Guard's weight and body fat standards at a third consecutive semiannual weigh-in on April 30, 2015, because he was 27 pounds over the maximum allowed weight for his height, his command was required to process him for separation under the "three-strikes rule."[12] Following each of the three weigh-ins, the applicant's doctors had certified that he had no medical diagnoses or medications that could be contributing to his excess weight and no medical or physical condition that would limit his participation in physical activity, so it was safe and possible for him to lose the weight through diet and exercise—as he had during four prior weight probationary periods. The applicant argued that instead of being discharged, he should have received an abeyance of the weight standards because the gastroenterologist had reported on June 10, 2015, that he "appears to have … Eating disorder[,] Atypical eating disorder." Given his medical specialty (gastroenterology vs. psychology or psychiatry) and his use of the word "appears," the gastroenterologist's report does not clearly constitute a diagnosis of a psychological eating disorder, but it was enough to make Dr. C suspect that the applicant might have an eating disorder and so on June 11, 2015, she timely referred him to a psychologist as required by Chapter 5.A.18. of the Medical Manual.

8. Although there is no clear diagnosis of an eating disorder in the record for 2014 or 2015, even assuming the applicant did have an eating disorder in 2014 and 2015, that would not have been grounds for either an exemption from or an abeyance of the Coast Guard's weight and body fat standards. Article 5 of COMDTINST M1020.8H provides exemptions only for periods of pregnancy, post-pregnancy recovery, nursing, and tobacco cessation. Regarding abeyances, Article 5.A.3.a. of the manual states, "Medical abeyance requests will only be granted for cases involving diagnosed physiological medical conditions or use of prescription medications … that contribute to the member's inability to maintain compliance with weight standards." (Emphasis added.) And the examples provided are medical conditions and medications that physiologically cause weight gain: hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids. Eating disorders are psychological conditions[13]—not physiological conditions—and, like depression, they do not qualify a member for an abeyance of the weight standards.[14] Therefore, assuming *arguendo* that the applicant had an eating disorder in 2014 and 2015, he has not proven by a preponderance of the evidence that he was eligible for an exemption from or abeyance of the weight

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[12] COMDTINST M1020.8H, Article 4.A.5.

[13] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5th Ed. (DSM-5) (American Psychiatric Association, 2013), pp. 329-354 (providing diagnostic criteria for feeding and eating disorders).

[14] COMDTINST M1020.8H, Article 5.A.3.c. (noting that depression does not qualify a member for an abeyance); Article 5.D. (providing no exemptions or abeyances for eating disorders); [redacted] BCMR Docket No. 2008-103, which denied retirement to a veteran who was discharged for obesity after more than 19 years of military service although he had been diagnosed with a compulsive overeating disorder); BCMR Docket No. 2017-250 (denying relief to a veteran who was discharged for obesity after more than 17 years of military service although he had been diagnosed with an eating disorder); BCMR Docket No. 2011-238 (denying relief to a veteran who was discharged for obesity after more than 19 years of military service although she had been diagnosed with a compulsive overeating disorder); *see also* cases in which the Board denied relief to veterans discharged for obesity after many years of active duty although they had medical conditions that affected their ability to exercise, such as sleep apnea, hernias, herniated discs, and knee injuries: BCMR Docket Nos. 2015-172, 2015-161, 2015-107, 2014-156, 2014-126, and 2014-038.

standards. The applicant has not shown that he was erroneously or unjustly denied an exemption from or an abeyance of the weight standards in 2014 or 2015.

9. The applicant claimed that the Coast Guard rushed his discharge because, if he had reached 18 years of service, he would have had "sanctuary" protection from separation. However, as noted above, there is no such sanctuary law for Coast Guard members,[15] and even for members of the Army, Navy, and Air Force, the law does not prohibit members with more than 18 years of service from being discharged for failing the weight standards.[16]

10. The applicant alleged that because he had medical referrals pending at the time of his separation, the Coast Guard was legally obligated to delay his separation while he was evaluated. He cited no law or policy supporting this claim, and the Board knows of none. The applicant has not proven by a preponderance of the evidence that his discharge under the "three-strike" rule was erroneous or unjust because he had medical referrals pending.

11. The applicant alleged that he should have been medically separated because the VA subsequently awarded him a 100% disability rating. However, there is no evidence that the applicant was "unfit for duty" in 2015, and only members who are considered permanently unfit for duty are referred to a medical board for evaluation and processing under the Physical Disability Evaluation System (PDES).[17] The applicant's doctors repeatedly released him "without limitations" in 2015. The PHA that he underwent on December 9, 2014, was "good for 12 months" as

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[15] There is no 18-year "sanctuary" for Coast Guard members—only for members of the Army, Navy, and Air Force. 10 U.S.C. § 1176(a) states the following:

> A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for retirement under section 7314 or 9314 of this title, or of qualifying for transfer to the Fleet Reserve or Fleet Marine Corps Reserve under section 8330 of this title, shall be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be, unless the member is sooner retired or discharged under any other provision of law. [Emphasis added.]

- 10 U.S.C. § 7314 authorizes the retirement of Army enlisted personnel with 20 to 30 years of active duty.
- 10 U.S.C. § 9314 authorizes the retirement of Air Force enlisted personnel with 20 to 30 years of active duty.
- 10 U.S.C. § 8330 authorizes "retainer pay" and transfer to the Fleet Reserve or Fleet Marine Corps Reserve for Naval or Marine Corps enlisted personnel with at least 20 years of active duty.
- 14 U.S.C. § 2306, which is not mentioned in 10 U.S.C. § 1176, authorizes the retirement of Coast Guard enlisted personnel with 20 or more years of active duty.

[16] *See, e.g.*, OPNAVINST 6110.1J, Enclosure (1), para. 1.a. (stating that failing a body composition assessment (BCA) constitutes an overall failure of the physical fitness assessment (PFA)) and Enclosure (2), para. 2:

> 2. ADSEP [administrative separation]: Mandatory separation processing shall occur for all members who fail three PFA cycles in the most recent 4-year period. …
>
> a. ADSEP for Over 18 Years of Service. Members with over 18 years of service are not exempt from ADSEP. Members with a third PFA failure prior to 30 June 2011 and an approved fleet reserve and retirement date will be allowed to retire (grandfathered in). Those with a third failure subsequent to 30 June 2011 will be processed for ADSEP.

[17] Chapter 3.F.1.c. of the Medical Manual states that 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."

a pre-separation physical examination, and none of his doctors placed him in not fit for duty (NFFD) status except for once, for 24 hours on June 4, 2015, because of gastric reflux and exhaustion. Members who are being separated for administrative reasons—including obesity—and who have continued to perform their duties despite medical impairments are presumed "fit for duty" and may not be processed under the PDES for a medical separation unless they are physically unable to perform their duties adequately or unless an "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."[18] Therefore, the applicant has not proven by a preponderance of the evidence that he was unfit for duty and entitled to PDES processing in 2015.

12. The applicant complained that he found it impossible to receive the medical treatment he needed, but as explained in findings 4 through 7, above, the preponderance of the evidence shows that he was timely referred to a psychologist on June 11, 2015, in accordance with Chapter 5.B.18.d. of the Medical Manual, when Dr. C suspected that he might have an eating disorder based on the gastroenterologist's report that he "appeared" to have one. By the time his doctors found reason to suspect that he might have an eating disorder, however, the applicant's administrative discharge under the "three-strike" rule was required by policy because he had failed the weigh-ins in April and October 2014 and April 2015. And members who, like the applicant, fail to comply with the weight standards during three consecutive semiannual weigh-ins as a result of overeating and/or an unspecified eating disorder are administratively separated in accordance with Article 1.B.12.a.(10) of the Military Separations Manual, Chapter 5.B.18.d.(2) of the Medical Manual, and Article 4.A. of the Weight and Body Fat Standards Program Manual. If they regain compliance with the standards within two years of discharge, they may request to reenlist.[19]

13. The applicant has not proven by a preponderance of the evidence that his administrative separation for weight control failure was erroneous or unjust. The record shows that his doctors, his command, and PSC acted in accordance with Chapter 5.B.18.d. of the Medical Manual, Article 4.A. of the Weight and Body Fat Standards Program Manual, and Article 1.B.12.a.(10) of the Military Separations Manual. 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,"[20] even if a member has an eating disorder.

14. The Board finds no grounds for voiding the applicant's administrative discharge for weight control failure; for medically retiring him; or for awarding him constructive service credit and retiring him. Accordingly, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[18] PDES Manual, COMDTINST M1850.2D, Article 2.C.2.b.
[19] COMDTINST M1020.8H, Article 4.G.4.
[20] *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.

October 4, 2019

[redacted]