

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-095

ANDREWS, Attorney-Advisor:

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was filed on January 4, 2000, and completed on March 20, 2000, upon the BCMR's receipt of the applicant's military and medical records.

This final decision, dated March 7, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant, a former xxxxxxx in the Coast Guard, asked the Board to correct his military record to show that he was medically retired from the Coast Guard with a 50-percent disability rate on xxxxxxx, instead of being separated from the Coast Guard with severance pay due to a 10-percent disability rating.

APPLICANT'S ALLEGATIONS

The applicant alleged that he was unjustly removed from the temporary disability retired list (TDRL) and discharged with severance pay when he should have been medically retired from the Coast Guard. He alleged that a Central Physical Evaluation Board (CPEB) that met on October 14, 1999, wrongly determined that he was only 10-percent disabled, even though his condition has not improved since he was placed on the TDRL with a 50-percent disability rating in 1994. He alleged that he was not given any opportunity to appear before the CPEB or to provide medical evidence for its consideration.

SUMMARY OF THE APPLICANT'S MEDICAL AND MILITARY RECORDS

On November 10, 1980, the applicant enlisted in the Coast Guard after having served three years in the Navy. He served on active duty in the Coast Guard continuously thereafter for nearly 14 years.

The applicant's medical records show that he hurt his neck during a car accident in 1981 and another in 1984. He fell off a ladder in 1990 and hurt his left leg. In March 1992, he reported further injuring his back while attempting to move a safe as he was rearranging the furniture in an office with two other members. After his car was rear-ended in August 1992, he complained of severe pain in his back, neck, and left arm, which was somewhat alleviated by treatment. In September 1993, after another car accident, he suffered further pain and numbness in his left arm and shoulder.

On November 19, 1993, the applicant was evaluated by an Initial Medical Board (IMB). He reported suffering persistent pain and numbness over most of his left side, including his left arm, leg, neck, and back. Two years of pain medications, steroid injections, facet blocks, and physical therapy had apparently provided little relief. Multiple MRIs and EMGs had showed normal or inconclusive results. The IMB found that he suffered from left hemianesthesia (numbness of the left side) and left S1 radiculopathy (nerve root disease in the S1 vertebra). However, he did not have any muscular atrophy, and "multiple services ... have failed to fully explain his pain. He does have the Waddell signs which tend to signify a non-organic functional overlay to his pain."¹ The doctors in the Neurology Department at xxxxxx Medical Center determined that he was not a candidate for surgery. The IMB found that he was unable to perform active duty and recommended that he be evaluated CPEB.

On March 16, 1994, the applicant was examined by a neurologist at xxxxxxx Air Force Base pursuant to his being evaluated by a CPEB. The neurologist reported that the applicant had "significant give-way weakness in the left upper and lower extremities, but at maximal effort, strength was as above [5/5]." The neurologist concluded the following:

Lower Back Pain: this patient has undergone multiple, extensive evaluations at multiple medical facilities. His exam today is consistent with non-organic numbness and weakness of the left upper and lower extremities. There may be a component of real pain, but no spasm was evident on exam and the patient was very dramatic in his reactions to the exam, but was able to dress/undress with relative ease. I believe that the patient would be best served by relying on objective finding to establish the extent of true pathology present. Serial MRI's of the lumbar and cervical spine have been normal – most recently in March 1994.

¹ Waddell signs indicate psychological or other non-physical factors may be causing or increasing a patient's complaints of pain.

The neurologist also reported that previous EMGs were inconclusive, but one EMG apparently showed "slow bilateral median nerve conduction at the wrists, left worse than right; evidence of denervation of selected left shoulder muscles, left upper limb, cervical paraspinals, left leg, and lumbar paraspinals. Impression: left C5, C6 radiculopathy, left L5 radiculopathy." However, the doctor who conducted that EMG provided no details of the test, other than this conclusion, despite three requests for the complete report by the neurologist. Therefore, the neurologist concluded that the findings might be unreliable and that the applicant should undergo a further EMG "to better assess the degree of organic injury" and a psychological assessment.

On May 11, 1994, the applicant underwent a psychological assessment by two clinical psychologists for the Air Force. They found that he suffered from chronic pain due to "intervertebral disc syndrome—cervical—mild [and] lumbosacral strain with characteristic pain on motion" and from "psychological factors affecting physical condition."

In July 1994, the applicant again underwent thorough testing after complaining of severe pain in his left shoulder and arm. A neurologist diagnosed him with C5-C7 radiculopathy with radiographic evidence of C5-C7 neural foraminal narrowing and electrodiagnostic evidence of C5-C6 radiculopathy; myofascial pain syndrome with trigger points in left trapezius and left sternocleidomastoid muscles with referred pain; and degenerative changes in the cervical spine. This is the last medical record in his military medical file. All subsequent medical records appear in his files from the Department of Veterans Affairs (DVA).

On September 7, 1994, the president of a Formal Physical Evaluation Board (FPEB) sent the applicant a letter informing him that he had been found 40 percent disabled by severe, recurring attacks of intervertebral disc syndrome and 20 percent disabled by lumbosacral strain with muscle spasms on extreme bending forward and with loss of lateral spine motion. His combined, total disability was found to be 50 percent. The FPEB determined that the disabilities might be permanent, and the applicant was placed on the TDRL.

On October 12, 1994, the applicant was placed on the TDRL, having performed almost 14 years of active duty in the Coast Guard; 3 years of active duty in the Navy; and 17 years, 9 months, and 20 days of total active and inactive military service.

In December 1994, the applicant applied to the DVA for benefits and was awarded a 40-percent combined disability rating on June 20, 1995. The combined rating was based on degenerative changes of the cervical spine, C5-C6-C7 (20 percent); degenerative changes of the lumbosacral spine (20 percent); and hypertension (10 percent). The applicant appealed his disability rating, but it was confirmed on November 24,

1995. However, since then, he has reapplied to the DVA several times, and his combined disability rating has risen to 50 percent due to a new 10-percent disability rating for arthritis in his right ankle, which he had fractured while in the service, and an increase in his hypertension disability rating to 20 percent.

Following further medical examinations, the applicant's case was reviewed by a CPEB that met on March 7, 1997. On April 7, 1997, his appointed counsel sent him a letter informing him that the CPEB had found him to be only 10 percent disabled by "lumbosacral strain: with characteristic pain on motion" and had recommended that he be separated with severance pay. The letter stated that he had 15 days from the date of notification to accept or reject the CPEB's findings by returning an enclosed form, CG-4809. If he accepted them, he would be separated with severance pay. If he rejected them, he would receive orders to appear before a Formal Physical Evaluation Board at Coast Guard Headquarters within three weeks, and he would be assigned counsel to assist him. The letter also stated that failure to respond within 15 days "may result in your being deemed to have accepted the findings and recommended disposition, regardless of any opposite intent or untimely filed rejection."

On April 15, 1997, the applicant rejected the findings and recommendation of the CPEB. Because of this rejection, no further action was taken, and he was retained on the TDRL.

The applicant's DVA files indicate that he underwent several medical tests in 1999 pursuant to his pending removal from the TDRL. The tests showed two "minor abnormalities": focal spondylosis at C5-C6 and C6-C7 and mild compression at L1.

On October 14, 1999, a CPEB reviewed the applicant's record, found him to be 10 percent disabled, and recommended that he be discharged with severance pay. The CPEB found that he was 10 percent disabled by "intervertebral disc syndrome, cervical: mild" and zero percent disabled by "lumbosacral strain: with slight subjective symptoms only."

On October 25, 1999, the applicant's counsel for the medical board process, who was the Chief of the Physical Disability Evaluation System (PDES) DES Legal Division, sent the applicant a letter notifying him that the CPEB had found him 10 percent disabled and recommended that he be separated with severance pay. The letter stated that he had 15 days from the date of notification to accept or reject the CPEB's findings by returning an enclosed form, CG-4809. If he accepted them, he would be separated with severance pay. If he rejected them, he would receive orders to appear before an FPEB at Coast Guard Headquarters within three weeks, and he would be assigned counsel to assist him. The letter also asked the applicant to telephone the Chief of the PDES Legal Division within three days of receiving the letter. A cover letter on this package signed by the Commander of CGPC on October 18, 1999, informed the applicant that if he did

not respond within 15 days, he might "forfeit important rights in the disability evaluation process."

On November 30, 1999, the applicant signed the CG-4809, rejecting the findings and recommendations of the CPEB. The same day, the form was signed by the Chief of the PDES Legal Division, and the applicant was assigned counsel.

On December 1, 1999, CGPC sent the applicant a letter informing him that the findings of the CPEB had been approved on November 30, 1999. The letter informed him that as a result of the approval, he had been discharged effective as of xxxxxxxx, 1999, and would receive severance pay.

VIEWS OF THE COAST GUARD

On November 15, 2000, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief.

The Chief Counsel stated that relief should be denied because the applicant failed to respond to the notification of the findings and recommendations of the CPEB in a timely manner. He alleged that the CPEB's report and form CG-4809 were sent to the applicant on October 25, 1999, by certified mail with a return receipt and that the receipt was signed and returned to CGPC on October 30, 1999. (He provided the BCMR with a photocopy of that receipt.) Therefore, the Chief Counsel argued, the applicant had 15 working days from October 30, 1999, to respond and should have responded by November 22, 1999.

The Chief Counsel submitted an affidavit by the applicant's counsel indicating that he telephoned the applicant on November 11, 1999, to counsel the applicant about returning the CG-4809. During that telephone call, according to the affidavit, the applicant indicated his desire to reject the CPEB's recommendation, but his CG-4809 was not received in time. The Chief Counsel stated that the applicant's oral telephone statement to his counsel "was ineffective as a means to reject the CPEB's findings."

The Chief Counsel further stated that the applicant faxed his form CG-4809, rejecting the findings and recommendations of the CPEB, to his counsel on November 30, 1999, the same day that the CPEB's recommendation was approved by CGPC. The Chief Counsel alleged that the applicant faxed his CG-4809 to his counsel that day only because his counsel telephoned him and faxed him a duplicate CG-4809 to return. The Chief Counsel argued that the applicant's late rejection of the CPEB's report was "ineffective as a matter of regulation because it was delivered eight calendar days after the expiration of the 15 working day period."

The Chief Counsel argued that the applicant was not denied due process. In the absence of such error, he argued, the applicant "must prove that the process that lead to the denial of a hearing before the FPEB ... 'shocks the sense of justice.'" *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("Injustice" is treatment by the military authority that shocks the sense of justice, but is not technically illegal). The Chief Counsel alleged that the applicant has not proved that he has suffered an injustice that "shocks the senses." He alleged that the applicant had been evaluated by a CPEB twice before, in 1994 and 1997, and both times had properly signed and returned a CG-4809, indicating his intention. Therefore, the Chief Counsel argued, the applicant was familiar with the process and the need to respond within 15 days.

Finally, the Chief Counsel argued that the applicant has failed to prove that the CPEB acted arbitrarily and capriciously in finding him 10 percent disabled.

SUMMARY OF THE AFFIDAVIT OF THE APPLICANT'S COUNSEL

On November 7, 2000, the applicant's counsel, who has been Chief of the PDES Legal Division since 1995, signed an affidavit concerning his communications with the applicant. He stated that he received the CPEB's report on or about October 18, 1999, and was required to forward it to the applicant within five working days. He forwarded the report to the applicant in a certified letter, return receipt requested, on October 25, 1999. When he called the applicant on or about November 11, 1999, "to ascertain his decision to accept or reject his CPEB findings," the applicant told him that "he was rejecting the findings and requesting a formal board." The counsel stated that he telephoned the applicant a second time, about seven to ten days later, to inform him that his CG-4809 had not been received. During the second call, the counsel stated, the applicant told him that he had mailed his CG-4809 to the counsel soon after the first telephone call. The counsel stated that he still did not receive the applicant's CG-4809 and so called him a third time on November 30, 1999. On that day, he stated, he faxed the applicant another CG-4809 for immediate return by fax, and advised the applicant to make a note on the date line that he had originally signed the form on November 11, 1999. Thus, the counsel stated, within 15 working days of the day the applicant was notified of the CPEB's findings, he verbally indicated his intention to reject the findings and also claimed that he had mailed off the CG-4809, formally rejecting the findings. However, the CG-4809 allegedly mailed by the applicant within the prescribed 15 days was never received.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 17, 2000, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. In response, the applicant called the BCMR on November 22, 2000, and stated that he would need an extension to consult with his attorney. The applicant was informed that his request for an extension

must be submitted in writing. On November 27, 2000, the BCMR received a letter from the applicant in which he disagreed with the recommendation of the Chief Counsel. The applicant insisted that he had mailed his CG-4809 to his counsel within the prescribed 15 working days. He failed to request an extension.

On November 27, 2000, the BCMR wrote to the applicant's attorney, informing her of the applicant's phone call and enclosing a copy of the Chief Counsel's advisory opinion. The Chairman granted the applicant a 30-day extension on the basis of his phone call. However, no further responses have been received by the BCMR.

APPLICABLE PROVISIONS OF THE PDES MANUAL

Chapter 8 of the PDES Manual governs the disposition of members on the TDRL. Paragraph A.6. provides that a member cannot stay on the TDRL, entitled to temporary disability retired pay, for more than five years. Paragraph C states that members shall be periodically examined while on the TDRL to determine if their conditions have changed. In addition, they must be examined at least once during their final year on the TDRL. The examining physicians must prepare reports, including narrative summaries, laboratory studies, and clinical evaluations. The report must be forwarded to the Coast Guard Personnel Command (CGPC) for consideration by the CPEB. Paragraph E provides that after the member's final examination while on the TDRL, a CPEB will consider his case and make recommendations in accordance with Paragraph C.3.c. of Chapter 2. Thereafter, the procedures prescribed in Chapter 4 must be followed.

Paragraph C.3.c. of Chapter 2 of the PDES Manual requires the CPEB that reviews the case of a member on the TDRL to make findings as to his fitness for duty and his degree of disability for each permanent ratable, service-connected medical condition.

Chapter 4 of the PDES Manual contains the procedures for CPEBs. Paragraph A.13.a. provides that the Chief Counsel's office must appoint counsel to advise each member undergoing review by a CPEB. Paragraph A.13.b. provides that the counsel must contact the member within five working days of receiving the CPEB report and must advise the member "of the disability process and of the evaluee's rights in light of the CPEB's findings and recommended disposition. ... Upon completion of counseling, the designated counsel will forward the CPEB's Findings and Recommended Disposition, CG-4809, to the evaluee for signature and subsequent return."

Paragraph A.14. of Chapter 4 provides that a member found unfit for duty by a CPEB may accept the findings or reject them and demand a formal hearing by an FPEB. If the member fails to do so within 15 working days from the date of written notification of the CPEB's findings, "the conclusive presumption is that the evaluee is accepting the

CPEB findings and recommended disposition and the case will be forwarded to [the Office of the Chief Counsel] for legal review."

Paragraph C of Chapter 4 provides that a CPEB's recommended findings must be reviewed by a Physical Review Counsel and forwarded to the Chief Counsel's office for a legal review. Finally, they are forwarded to CGPC for final action.

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.
2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The preponderance of the evidence indicates that the Coast Guard committed no error with respect to the applicant's processing under the PDES. After being placed on the TDRL in October 1994, he underwent periodic examinations at his local DVA hospital. Tests in 1997 and 1999 showed only mild abnormalities in the cervical and lumbar regions of his spine. At the end of his five years on the TDRL, a CPEB reviewed his case and concluded that he was only 10 percent disabled by intervertebral disc syndrome. The applicant was timely notified, on Saturday, October 30, 1999, of the findings and recommendations of the CPEB that reviewed his case on October 14, 1999. The letter notifying him of those findings and recommendations included information concerning his legal rights and a form CG-4809 for his response. He was also informed of the necessity of returning the CG-4809 within 15 working days of notification—by Monday, November 22, 1999—if he wished to reject the CPEB findings and have his case heard by an FPEB.
4. The record indicates that the applicant's counsel properly informed him of his rights and warned him of the possibility that he might lose his entitlement to disability benefits if he failed to respond timely in the notification letter the applicant received on October 30, 1999. The record also indicates that the counsel telephoned him twice within the 15-working-day period to inform him that his rejection had not been received. However, no CG-4809 signed within the 15-working-day period was ever received by the Coast Guard. The counsel apparently telephoned the applicant again on November 30, 1999, and faxed him another CG-4809, which was returned by fax the same day. However, under Chapter 4.A.14. of the PDES Manual, the applicant's failure

to respond timely was conclusively presumed to signify his acquiescence in the CPEB's findings and recommended disposition, and final action was taken to approve them that same day.

5. The applicant alleged that he did mail the CG-4809, rejecting the CPEB's findings and recommended disposition, during the 15-working-day period. In his affidavit, the applicant's counsel stated that the second time he called him, near the end of the period, the applicant told him that he had already returned the form by mail after the first phone call. However, that rejection form was never received in the mail by the applicant's counsel.

6. Although the applicant has not proved that the Coast Guard erred in processing his case under the PDES, the Board is also authorized to remedy injustices in military records and must consider whether his 10-percent disability rating, discharge with separation pay, and the Coast Guard's refusal to grant him a hearing by an FPEB, despite his untimely rejection of the CPEB's findings, "shocks the sense of justice." *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("Injustice" is treatment by the military authority that shocks the sense of justice, but is not technically illegal).

7. Under Chapter 4.A.14. of the PDES Manual, the Coast Guard's failure to receive the applicant's timely rejection of the CPEB findings created a conclusive presumption that it was not mailed within the prescribed period. The Coast Guard committed no error in acting on that presumption and approving the CPEB's report. To overcome this presumption, the applicant must prove by a preponderance of the evidence that he did mail his rejection on time. In *BMC Bankcorp v. Internal Revenue Serv.*, 1994 U.S. Dist. LEXIS 8404 (June 6, 1994), the court found that, although the plaintiff used ordinary mail to mail a claim to the IRS for 1988 and so had no receipt for his timely filing, circumstances proved that he had mailed his claim on time because the IRS did receive his claims for 1989 and 1990, which he mailed the same day, within the statutory period. In this case, the record indicates that the applicant told his counsel during their second phone call that he had already mailed his rejection. The Chief Counsel stated that the applicant should have returned his rejection in time because he was familiar with the process. The Board finds that this same familiarity lends considerable credence to the applicant's claim that he did mail his rejection on time even though it was never received by his counsel. Moreover, the Board notes that the applicant not only timely appealed his CPEB findings in 1994 and 1997, but also timely appealed disability rating decisions by the DVA. Therefore, the Board is persuaded that the applicant did mail his rejection on time but naively trusted the regular mail and the in-house mail distribution system at the Coast Guard to deliver it.

8. The applicant served on active duty for more than 16 years and has more than 17 years of total honorable military service. His current DVA combined disability rating for his back problems, arthritic ankle, and hypertension is 50 percent. His record

indicates that he suffers from chronic back pain because of a service-connected disability. Therefore, the Board finds that depriving the applicant of a hearing by an FPEB because he naively trusted the regular mail to deliver his rejection and separating him with severance pay and a 10-percent disability rating constituted an injustice that "shocks the sense of justice" even though the Coast Guard committed no errors in processing him under the PDES.

9. Accordingly, the applicant's request should be granted in part by granting him a hearing by an FPEB.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former XXXXXXXXX, USCG, for correction of his military record is hereby granted as follows: His record shall be corrected to show that he timely rejected the findings and recommended disposition of the CPEB that met on October 14, 1999, and is entitled to a hearing by an FPEB in accordance with the provisions of the PDES Manual, COMDTINST M1850.2 (series).

Christopher A. Cook

Michael K. Nolan

L. L. Sutter