

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2001-058

FINAL DECISION

ULMER, Chair:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on March 14, 2001, upon receipt of the applicant's complete application for correction of her military record.

This final decision, dated February 14, 2002, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, a retired health service technician first class (HS1; pay grade E-6), asked the Board to correct her record by decreasing her combined 30% physical disability rating to 20% or by increasing it to 40% due to back disease. She stated such a change in her disability rating would result in her receiving more disability income. In a later submission, however, the applicant stated that she misunderstood the Veterans Administration Schedule for Rating Disabilities (VASRD) and clarified her request by asking that her record be corrected to show that she suffered from severe intervertebral disc syndrome (40% disability rating) at the time of her discharge.

Applicant's Contentions

Prior to the applicant's permanent retirement due to physical disability, she spent approximately three years on the temporary disability retired list (TDRL) with a 40% disability rating for severe intervertebral disc syndrome. She alleged that the Coast Guard committed an error by reducing her disability rating for intervertebral disc disease from 40% to 20% when it placed her on the permanent disability retirement list (PDRL). At the time the applicant was placed on the PDRL, the Coast Guard determined that she was 20% disabled due to intervertebral disc syndrome and 10% disabled due to "sciatic nerve, neuralgia, secondary to nerve damage caused by unnatural walking from bone spurs prior to corrective surgery." The applicant's combined disability rating was 30%, and therefore, she was permanently retired from the Coast Guard due to physical disability.

The applicant claimed that the FPEB improperly determined that the sciatica resulted from problems with her feet/walking rather than from the intervertebral disc syndrome. She alleged that the sciatica could not be rated independently of the intervertebral disc disease because to do so would have caused the FPEB to engage in pyramiding.¹ The applicant had argued that if her disability rating were lowered to 20% she would receive severance pay, which would improve her financial situation. As stated above, the applicant clarified her request by asking this Board to find that she suffered from severe intervertebral disc syndrome with a 40% disability rating.

The applicant stated that the FPEB should have maintained the 40% disability rating she had while on the TDRL because her condition had not improved since her placement on that list. She stated that she still has major problems with standing or sitting for long periods of time, has to wear specific shoes, has to be mindful of her sleeping habits, and has to take anti-inflammatory medication everyday.

Issues

The issue in this case is whether the Coast Guard committed an error by excluding sciatica from its rating of the applicant's intervertebral disc syndrome and relating it to her heel spurs/unnatural walking. Another issue is whether the applicant would have met the requirements for a severe (40%) disability rating even if sciatica had been rated as part of the intervertebral disc syndrome.

Discussion

An Initial Medical Board (IMB) was held in the applicant's case on March 2, 1995, to determine the applicant's fitness for duty. The IMB report stated that in June 1994 the applicant reported for treatment of hip pain, previously diagnosed as back strain, resulting from an injury that occurred three years earlier. The report also noted that the applicant had suffered a broken foot in May 1994 and had had a left heel spur and tendon excision (surgery) in December 1994.

According to the IMB, the medical examination of the applicant was not remarkable, except that she was above weight standards due to her inability to exercise. "The MRI of the lumbar spine showed degenerative disease with broad central herniation of a section of [the lumbar spine]." The IMB report stated that there was no specific root compression and there was only minimal intrusion of the spinal canal. The IMB diagnosed the applicant as having "left heel spur and left tendon resection, fourth metatarsal fracture left foot, central disc herniated nucleus pulposus in the lumbar

¹ Pyramiding is the term used to describe the application of more than one VASRD rating to any area or system of the body when the total functional impairment of that area or system is more appropriately reflected under a single code. Pyramiding is not permitted as it results in overrating the disability

region, [and] bilateral lumbar radiculopathy.” It reported that the applicant would be treated with physical therapy, a lumbar corset, a pain clinic, and preventive back care instruction. The IMB found the applicant not fit for duty and referred her case to the Central Physical Evaluation Board (CPEB). The CPEB directed the applicant’s command to hold a Disposition Medical Board (DMB) because the information before the CPEB indicated that the applicant’s case had not resolved itself enough for it to make definite findings about her condition.

A DMB was held on October 19, 1995. As part of the evaluative process, a neurosurgical report was obtained. It noted that on _____, the applicant underwent surgery, a lumbar partial hemilaminectomy and diskectomy. “The [applicant] was seen in followup on 31 August and indicated . . . minimal low back pain and leg pain. The [applicant] had greater complaints of ankle and lower calf discomfort bilaterally when standing. The symptoms were not considered contributory to the disc herniation or surgical procedure.” The report stated that the physical examination of the applicant showed “negative straight leg rais[ing] and normal gait. There was 5/5 motor strength. She had a normal sensory examination. She had a well-healed incision.” It was the opinion of the doctors submitting this report that the applicant had made an excellent recovery from the surgical procedure and that it was likely she would make a full recovery with physical therapy.

The DMB, itself, stated the physical examination of the applicant showed decreased range of motion in the hips, decreased lumbar range of motion, normal sensory testing of the bilateral lower extremities, and pain to palpation of the right heel. According to the DMB, the applicant was not fit for full duty and suffered from bilateral hip pain, degenerative disc disease, bilateral lumbar radiculopathy, and a small right calcaneal spur. It stated that the surgery on the applicant’s back for a herniated nucleus pulposus, the surgery on the left heel spur, and the healing of the fourth metatarsal fracture left foot, were inactive and not included in the diagnosis of the DMB.

On December 12, 1995, the applicant’s medical board physician added an addendum to the DMB. He stated that the applicant demonstrated a limited range of movement and decreased strength to a small degree in the lumbar region. He wrote the following:

[The applicant] also reports intermittent left hip pain in the anterior iliac region which is aggravated by prolonged standing, prolonged sitting and extended periods of sleep. She also complains of hip pain if placed in [a] situation where she must do any heavy lifting (greater than 20 lbs). Upon detailed evaluation of her medical record, I note that she has complained of this same hip pain since her original back injury in 1990. At no point prior to her first complaints of back pain has she ever reported any anterior hip pain on the left side. With this information, the consults and evaluations by neurosurgery and MRI results, I suspect her pain generates from the irritation of the sciatic nerve root at the L5-S1 level, where the

nerve is routed anteriorly through the pelvis on the left side, at the site of the femoral head. This pain has only partially improved since corrective surgery for a herniated disc . . . in July 1995. Due to the prolonged duration of time between her original injury [1991] and re-injury [1994] before corrective surgery, this is most likely neuritis from sciatica irritation at the level of the degenerative disc disease. [The applicant's] last MRI (March 1995) demonstrates impingement on this nerve at the thecal sac . . .

On February 9, 1996, the CPEB recommended that the applicant be placed on the TDRL with a 40% disability for severe intervertebral disc syndrome. The applicant was placed on the TDRL effective April 1, 1996.

On _____, the applicant had her first periodic examination since being placed on the TDRL.² The doctor who performed this examination noted that the applicant was employed as an accounting assistant and she reported that she had lost one to two days every two to three months due to her back pain. He stated that the applicant complained of back stiffness with increasing pain and radiation to the left hip area and leg involvement with prolonged standing and sitting. The doctor stated that the applicant had no new symptoms since being placed on the TDRL. He stated that the applicant suffered from

spasms in the left lumbar area with a tightness to direct palpation. She has limited forward flexion to beyond ninety degrees and extension to beyond ten degrees. She has a negative straight leg-raising test bilaterally and her sensation and motor testing is intact to the lower extremities. Reflexes are at 3 and symmetric on the Achilles and Patellar tendons bilaterally. She has down going toes and there is no clonus bilaterally. Radiographs of her back demonstrate a decreased disc space, increased sclerosis at the L5/S1 interval. There was no evidence of osteoarthritis or bony abnormalities in her back. Repeat x-ray of her pelvis given her complaint of left hip pain was performed and the left hip joint was well maintained with no evidence of osteophytes or decreased joint space.

The doctor performing the TDRL examination stated that the applicant remained unfit for military service and should be retained on the TDRL or permanently retired from the Coast Guard.

On January 21, 1999, the CPEB met and found the applicant to be unfit for military duty. It recommended that the applicant be permanently retired with a

² Section 8-C. of COMDTINST M1850.2C requires each individual on the TDRL to be periodically examined by one or more medical officers to determine whether there has been any significant change in the conditions that caused the temporary retirement.

combined disability rating of 30%, which included 20% for moderate intervertebral disc syndrome and 10% for mild paralysis of the sciatic nerve.

On March 3, 1999, the applicant rejected the CPEB findings and demanded a hearing before the Formal Physical Evaluation Board (FPEB). She submitted a rebuttal to the CPEB wherein she asserted that the CPEB should have had a current MRI before deciding her case. She questioned how a clinician could fully and thoroughly assess neurological symptoms associated with the back without the benefit of an MRI. She complained that the Coast Guard did not diagnose her back problem earlier. She stated that she has pain on a daily basis and that it will always be with her.

On April 29, 1999, the FPEB met and determined that the applicant was unfit for duty with a 30% combined disability rating. It described the applicant's disability as follows: "Intervertebral Disc Syndrome: Moderate. 2. Sciatica nerve neuralgia, secondary to nerve damage caused by unnatural walking from bone spurs prior to corrective surgery."

The applicant rejected the findings of the FPEB and submitted a rebuttal. The applicant challenged the finding by the FPEB that her sciatic pain resulted from unnatural walking. She insisted that it resulted from her back problem.

The applicant submitted a June 4, 1999, MRI report of her back that contained the following impression: "There remains a small amount of interior protruding disk posteriorly to the left touching the left S1 nerve root and thecal sac, but not significantly displacing them. These changes are superimposed upon grade 1 retrolithesis and mild disk osteophyte complex along the interspace."

The applicant also submitted an EMG report dated May 5, 1999, in which she sought confirmation of the 20% disability rating for her back. The doctor who performed this evaluation stated that she did not have a problem with the 20% partial permanent impairment rating for moderate intervertebral disc disease. This doctor's impression of the applicant's condition with respect to her back was "[d]egenerative disc disease of the lumbosacral spine . . . associated with sciatica which certainly could be referred pain." The doctor reported the following findings:

PHYSICAL EXAMINATION: Alert, cooperative female in no acute distress. Mental status, speech, and affect are normal. Cranial nerves, motor sensory analysis, sensory, and cerebellar testing are normal. Gait, stance, and Romberg testing are normal. She is able to tandem, toe and heel walk without difficulty. Deep tendon reflexes 2+ bilaterally including the ankles and plantar response flexor.

The FPEB informed the applicant on June 28, 1999, that it would not act on her rebuttal because it did not satisfy the requirements of COMDTINST M1850.2C. The

applicant was told that the FPEB findings would be reviewed by the Physical Review Counsel (PRC). (It appears that the review by the PRC never occurred).

Views of the Coast Guard

On October 2, 2001, the Board received an advisory opinion form the Chief Counsel of the Coast Guard recommending that the applicant's request be denied for lack of proof of error or injustice.

With respect to the applicant's contention that the sciatica is secondary to the back injury and not the foot, the Chief Counsel stated the applicant's record supports the FPEB's finding that the sciatica is related to the foot problem. He stated that the medical entry dated June 6, 1999 supports the FPEB. The Chief Counsel stated that this entry noted that the applicant suffered from pain in her left heel for 18 months. The source of the pain was diagnosed to be heel spurs. The Chief Counsel stated that the applicant's mere disagreement with the FPEB's analysis and conclusion in not clear evidence of error or injustice.

The Chief of the Coast Guard Personnel Command (CGPC), in a memorandum attached to the advisory opinion, stated that highly qualified and experienced medical officers thoroughly reviewed and rated the applicant's disability. He stated that the applicant's medical examination of November 9, 1998 supported the finding that her sciatica was related to heel spurs. In this regard CGPC stated the following: "[The medical report] noted that applicant suffered from 'back stiffness with increasing back pain with radiation to the left hip area and leg involvement with prolonged standing greater than one hour.' This evidence suggests that her sciatica was related to bone spurs and or standing/walking."

The Chief Counsel stated that rating the applicant's sciatica as not belonging to the same system of the body as the back problem was not pyramiding. He stated that both the CPEB and FPEB concluded that the sciatica was not a part of the "same area or system of the body" as the intervertebral disc syndrome. The Chief Counsel stated that the applicant "has not presented clear evidence showing that the Coast Guard committed error or injustice" in this regard.

Applicant's Response to the Coast Guard Views

On September 24, 2001, the Board received the applicant's response to the views of the Coast Guard. She disagreed with them.

The applicant stated that she believes she has severe intervertebral disc syndrome, because she has very little relief of pain. She restated her position that the sciatica is related to her back condition. In support of this contention she relied on the results of an MRI taken on June 4, 1999, which are discussed above. A medical report dated February 10, 1998, noted that the applicant has persistent low-back pain after

surgery. It noted that the applicant's back pain radiates into the left thigh and anterior thigh, occasionally on the front right side. It also noted that applicant has had heel surgery for spurs with good relief of the pain.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. There is some medical evidence in the record that the applicant's sciatica is related to her back problem rather than the heel spur/unnatural walking. However, the Board will not disturb the finding of the FPEB, unless the applicant demonstrates by a preponderance of the evidence that she suffered from severe intervertebral disc syndrome, which equates to a 40% disability rating, at the time of her discharge from the Coast Guard.

3. The applicant has failed to submit sufficient evidence establishing that the Coast Guard committed an error by finding that she suffered from moderate intervertebral disc syndrome with a 20% disability rating. The disability ratings for active duty personnel are judgments made by Coast Guard medical professionals based on guidance provided by the VASRD. According to the VASRD, a 20% disability for intervertebral disc syndrome is characterized by "recurring attacks [of pain]." The next higher rating for the applicant's condition would be a 40% disability rating. There is no 30% rating for this condition.

4. There is sufficient evidence in the record supporting the finding of the FPEB with respect to the applicant's back. The November 1998 periodic examination stated that the applicant had no new symptoms since being placed on the TDRL in 1996, although the doctor noted that she complained about back stiffness with increasing pain that radiated to the left hip and leg. The report also noted that the applicant was employed as an accounting assistant and had lost approximately one to two days of work every two to three months because of the back pain. This description of the applicant's situation indicates that the applicant's back pain was of the moderate level. It does not support her claim that her pain occurred with such frequency that it could be described as "recurring attacks with intermittent relief [Severe]." According to the VASRD a 40% disability rating for intervertebral disc syndrome should include "recurring attacks [of pain and muscle spasms] with intermittent relief."

5. Moreover, in rebutting the FPEB, the applicant submitted a report of an EMG evaluation that she obtained, wherein she sought confirmation of the 20% disability rating given to her by the FPEB. The doctor who performed the EMG evaluation diagnosed the applicant as suffering from "degenerative disc disease of the lumbosacral

spine . . . associated with sciatica.” The doctor stated that she did not have a problem with the 20% disability rating assigned by the FPEB. The EMG doctor reported the applicant’s physical examination as showing an alert, cooperative female in no acute distress. It further reported “[c]ranial nerves, motor sensory analysis, sensory, and cerebellar testing are normal. Gait, stance, and Remberg testing are normal. She is able to tandem, toe and heel walk without difficulty. Deep tendon reflexes 2+ bilaterally including the ankles and plantar response flexor.” The EMG did not state that the applicant suffered from severe intervertebral disc syndrome.

6. The EMG report, as well as the TDRL examination, noted the applicant’s pain in the back and hip, but this information did not cause any change in the FPEB’s determination of the applicant’s disability rating related to her back. The Board does not find sufficient evidence in the record to show by a preponderance of the evidence that the FPEB’s determination was in error or unjust.

7. Even if the FPEB erred by finding that the sciatica resulted from unnatural walking rather than from the intervertebral disc syndrome, the applicant has failed to demonstrate that she would have received a higher rating for her back had sciatic been considered in that rating. Her back and hip pain was considered by the FPEB in reaching the 20% given to the applicant for the back disease. The FPEB’s finding that the sciatica resulted from unnatural walking permitted it to grant a separate disability rating for this condition, which gave the applicant a combined rating of 30%, enabling her to retire from the Coast Guard. If the FPEB had found that the sciatica resulted from the applicant’s back condition, it would have been necessary to include it as part of the 20% disability rating for the back condition. The applicant would not have been retired with a 20% disability rating.

8. The Coast Guard pointed out that the applicant’s case was not referred to the PRC, as the FPEB indicated. However, the applicant did not raise this as an issue and the Board will not address it in this decision.

9. Accordingly, the applicant's application should be denied

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of
denied.

for correction of his military record is

Coleman R. Sachs

Jacqueline L. Sullivan

Nilza F. Velázquez