

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2002-051**

XXXXXX, XXXXXX X.  
XXX XX XXXX, XXX

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**DECISION OF THE DEPUTY GENERAL COUNSEL  
ACTING UNDER DELEGATED AUTHORITY**

\_\_\_\_\_ I approve the recommended Order of the Board.

\_\_\_\_\_ I disapprove the recommended Order of the Board.

  X   I concur in the relief recommended by the Board.

Date: February 20, 2003

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Rosalind A. Knapp  
Deputy General Counsel  
as designated to act for the  
Secretary of Transportation

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**FINAL DECISION**

**GARMON, Attorney-Advisor:**

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 February 22, 2002 upon receipt of the applicant's request for correction.

This final decision, dated February 6, 2003 is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to correct her military record to show that she was not fit for full duty (NFFD) on October 23, 19XX and reinstated on the temporary disability retirement list (TDRL). Such a correction would set aside the Coast Guard's finding that she was fit for full duty (FFD) and her removal from the TDRL.

**APPLICANT'S ALLEGATIONS**

The applicant alleged that on March 5, 19XX, a Physical Evaluation Board (PEB) diagnosed her with "atypical basilar migraine, that did not exist prior to enlistment ...." She alleged that in the following month, she was placed on the TDRL with a thirty percent disability rating. She alleged that in February 19XX, the Department of Veterans Affairs (DVA) found her to be eighty percent disabled as a result of her condition.

The applicant alleged that when she received her first periodic reevaluation in March 19XX, the examining neurologist concluded that she was NFFD and should remain on the TDRL for further observation. She alleged that a Central Physical Evaluation Board (CPEB), which convened on April 23, 19XX, found her physically and mentally unfit, but erroneously assigned her a zero percent disability rating and recommended her separation with severance pay. She rejected the recommendation of the CPEB and requested a formal hearing before the Formal Physical Evaluation Board (FPEB).

The applicant alleged that the FPEB improperly recommended that she be found FFD. She alleged that on November 5, 19XX, she filed a rebuttal, which argued that the FPEB's decision was contrary to the evidence in the record and "entirely unexplained." She alleged that on December 27, 19XX, the Commander of Coast Guard Personnel Command (CGPC) upheld the recommended findings of the FPEB and that as a result, she was found FFD and unjustly removed from the TDRL.

The applicant alleged that on February 2, 2002, she received notice of CGPC's final decision, which failed to offer any explanation or reasons for its approval of the FPEB's recommendation but extended an offer for her to reenlist. She alleged that because she was NFFD, she rejected the Coast Guard's offer to resume active duty.

#### **SUMMARY OF THE APPLICANT'S RECORD**

On September 26, 19XX, the applicant enlisted in the Coast Guard. She joined a rate and was advanced to petty officer third class (paygrade E-4) in 1997. According to the applicant's military medical records, she began receiving treatment for headaches and/or migraine headaches in July 19XX.

On July 31, 19XX, the applicant received a CT scan at a non-military medical facility due to "headache (sudden) loss of peripheral vision, [and] weakness in both hands." The impression was "[n]ormal non-enhanced CT of the brain." On September 17, 19XX, she was evaluated at a clinic in follow-up to her July 31<sup>st</sup> treatment and was found to be currently asymptomatic and FFD.

On September 18, 19XX, the applicant visited a naval clinic, complaining that she had a migraine headache for nine and one-half hours. She was treated with medication and released. On September 19, 19XX, she was seen for a follow-up visit. At that time, she was found to be asymptomatic and FFD.

On October 5, 19XX, the applicant was hospitalized for two days for acute confusional state. She underwent a CT scan of the brain for "headache, [and] mental status changes." The CT report indicated no evidence of acute abnormality. On October 7, 19XX, she was given a discharge diagnosis of "complicated migraine" and placed on convalescent leave until October 14, 19XX. However, on October 13, 19XX,

the applicant was hospitalized for two days due to “conversion disorder, mixed panic attacks” and complex migraines. A radiological chest examination was performed in response to her complaint of respiratory distress. The report indicated no evidence of acute cardiopulmonary disease.

On October 15, 19XX, a narrative summary was prepared on the applicant’s October 13<sup>th</sup> admission. It noted an admission diagnosis of atrial fibrillation with dissociative episode and a discharge diagnosis of “ Axis I: Conversion disorder with mixed presentation, rule out panic attacks, Axis II: Deferred, Axis III: History of migraine headache and atrial fibrillation.” Her records indicate that she was to return to full duty without physical or geographical limitations.

On October 23, 19XX, the applicant was reassessed and instructed to work for three days per week for no longer than eight hours each day during the following two weeks. On November 3, 19XX, the applicant was seen for a follow-up visit. The medical records indicate that the planned course of treatment included a “neurology appointment and psych testing.” She was found to be FFD and scheduled for a follow-up appointment in two to three weeks.

On November 9, 19XX, the applicant was evaluated by a neurologist for “spells of confusion/sleepiness.” She underwent an EEG, which showed “bilateral generalized slowing ... bilateral encephalopathy, of undetermined etiology.” The November 9<sup>th</sup> health record entry indicates that the applicant reported that “[she] had [an] episode of confusion on 25 Oct[ober 19XX.] She awoke [at 3 a.m.,] she did not think [her] ‘brain was right,’ tried deep breathing [exercises;] next thing she remembers is 12 [hours] later. ... Husband says she ... went to sleep and did not awaken. She was not responsive for 36 [hours], then suddenly came out of it. ...” A repeat EEG and MRI were ordered and the applicant was advised to follow-up when the results were available.

On November 11, 19XX, the applicant underwent an MRI of the brain. On November 16, 19XX, she was seen for a follow-up visit to review the findings of her November 9<sup>th</sup> MRI. The MRI results indicated that her brain was structurally normal and showed no abnormalities. The health record entry indicates that she received a repeat EEG, which again showed a recording that was abnormally slow. The impression of the applicant’s condition included “3 episodes of delirium, no clear etiology ... [which] may still be migraine related.” The neurologist’s recommended plan was to “consider [a] repeat EEG or prolonged EEG study.” He ordered that she follow up in one or two months.

On December 3, 19XX, the applicant was reevaluated by neurology for “spells and abnormal EEG[s].” During this visit, she indicated that she had no repeat episodes of confusion, headaches, or somnolence, and stated that she had been doing well. The neurologist recommended further evaluation and EEG monitoring. On December 8,

19XX, the applicant was evaluated in follow up. She reported that she had had no new episodes and was asymptomatic. She was scheduled for a prolonged EEG and found FFD.

On January 13, 19XX, the applicant was admitted to the hospital for complex migraine and anxiety. She underwent an EEG due to the onset of acute delirium. The impression showed a recording that was "markedly abnormal." She was discharged with a diagnosis of "complex migraine" on the following day, and ordered to follow-up with her treating neurologist in one or two weeks.

On January 25, 19XX, the applicant was seen for an evaluation and assessed with "basilar artery like migraine syndrome." She was advised to return, as needed or sooner, if her symptoms worsened. She was found to be not fit for sea duty.

On January 28, 19XX, the applicant had a follow-up visit with her treating neurologist. She reported that two days before, "she had some anxiety at work and thought she might have a spell, but did not." The impression of her condition was "basilar migraine with prolong[ed] delirium." The neurologist ordered a "SPECT imaging of the brain," which was to be compared to a prior SPECT exam, performed on January 3, 19XX. The applicant was to follow-up when the results were available.

On February 4, 19XX, the applicant was seen on a walk-in appointment for a "real[l]y bad real[l]y fast frontal [headache]." She reported having increased photophobia but no double or blurred vision, nausea, chest pain, or palpitations. She also reported that the headache resolved after thirty minutes. The applicant was assessed with a headache.

On February 9, 19XX, the applicant met with her treating neurologist regarding the results of her follow-up SPECT scan. A comparison to her prior SPECT exam yielded an impression that the "follow up brain SPECT [was] demonstrating marked improvement in cerebral perfusion," therefore, the neurologist found that no PET scan was necessary. According to the February 9<sup>th</sup> health record entry, she reported that on the evening of February 8, 19XX, she experienced "increased heart rate, hyperventilating, and fear about what was happening ...," but her symptoms resolved after one minute. The planned course of treatment included referring her to a PEB and further neurological follow-up in one month.

On February 11, 19XX, the applicant was evaluated for a second opinion, at her request, on the tentative diagnosis of basilar artery migraines. She was assessed as most likely suffering from "a migraine related event but ... does not seem to have typical symptoms of a basilar artery distribution such as diplopia, dysarthria, or vertigo. Therefore, dysphrenic migraine may be more appropriate." On the same date,

the applicant was evaluated in follow-up. She was assessed with "basilar [headache]," advised to monitor her blood pressure daily, and found fit for light duty.

On March 5, 19XX, the applicant was evaluated by an Initial Medical Board (IMB). The IMB diagnosed the applicant with "atypical basilar migraine, that did not exist prior to enlistment, 346.20." The IMB found that the her condition "interferes with the reasonable performance of assigned duties" and referred her to a PEB. On March 17, 19XX, one of the applicant's treating physicians concurred with the findings of the IMB, stating in an addendum that "[t]he member is unable to perform all of the duties of her rate and rank in the USCG. [It is] therefore recommend[ed] that the member be separated from the USCG due to her medical disability."

On April 5, 19XX, the applicant's Commanding Officer (CO) notified the Commander of CGPC by memorandum that he concurred with the results of the IMB. In that memorandum, the CO stated that "[the applicant's] ability to function in the workplace is seriously compromised by her condition. While she is a very willing and capable worker, her reliability is questionable. ... [She] will never be fit for full duty. ... I believe that she will never be fit for unrestricted, world wide assignment. ..." On April 22, 19XX, the CPEB assigned the applicant a thirty percent disability rating and recommended that she be placed on the TDRL.

On July 4, 19XX, the applicant was placed on the TDRL and retired honorably from the Coast Guard for a "temporary disability." She was assigned an RE-2 reenlist code (ineligible for reenlistment) and an SFK separation code, which denotes a "mandatory retirement required by law due to temporary physical disability."

Based on its examination of the applicant on July 21, 19XX and her military medical records, in March 19XX, the DVA found the applicant to be eighty percent disabled by her migraine headache condition. The DVA report, in part, indicated the following:

Since the disability at issue does not have its own evaluation criteria assigned in VA regulations, a closely related disease or injury was used for this purpose. An evaluation of 80 percent is granted if the record shows an average of at least one major seizure in three months over the last year, or more than ten minor seizures weekly. \*\*\* Since the veteran's headache and period of delirium range from 8 to 36 hours they are better represented in the schedule of disability ratings as grand mal seizures.

On March 26, 19XX, the applicant was evaluated for her first periodic physical reevaluation on the TDRL. The evaluation summary states that the applicant reported that since July 19XX, "she has done well with only occasional mild headache," and that because she desired to become pregnant, she was tapered off her medication .... "without having any recurrence of her symptoms ...." The summary also indicates that she was "currently 11 weeks pregnant," and on no course of treatment due to the same.

She reported having no spells of confusion or loss of consciousness. The IMB ordered no laboratory studies or radiologic tests and assessed her then present status as “[having] no recurrence of her acute confusional states associated with the basilar migraine that she experienced in the past. She has been asymptomatic.” The IMB stated that her condition continues to interfere with performing her duties and would prevent her from reentering the Coast Guard at the time of the examination. The applicant was diagnosed with “atypical basilar migraine headache, resulting in acute confusional state, 346.20, [that] did not exist prior to enlistment.”

On April 23, 19XX, the CPEB determined that the applicant suffered from “migraine[s]: with less frequent attacks.” The CPEB found that she was mentally and physically unfit under Veterans Administration Schedule for Rating Disabilities (VASRD) code number 8100, and that “substantial evidence demonstrates that [the] evaluatee cannot perform regularly or customarily assigned duties.” The CPEB rated her disability at zero percent and recommended that she be separated from the Coast Guard with severance pay.

The applicant timely rejected the recommended findings of the CPEB and requested an appearance before the FPEB.<sup>1</sup> In a two-session FPEB hearing, held on July 10, 19XX and October 23, 19XX, testimony and exhibits were entered in the record. During the second session, the applicant testified about her October 2, 19XX emergency room visit due to a migraine headache from which she stated she suffered for thirty hours. The applicant testified that she was treated with medication and released on the same evening. Moreover, testimony from the March 19XX TDRL examining physician was admitted in the record, via letter, which, in part, stated the following:

... [the examining TDRL physician does] not feel that [the applicant] is fit for full duty. Although she has not had any basilar migraines since she was taken off her medications, it is unclear at this point what the risk of relapse is [sic]. ... she should be continued on the TDRL for another eighteen-month period. ... the longer she goes without a basilar migraine the less likely her recurrence will be.

On October 23, 19XX, the FPEB determined that the applicant was physically FFD. On November 5, 19XX, she submitted a rebuttal, indicating her disagreement with the findings and recommendation of the FPEB. On January 11, 2002, the Commander of CGPC approved the FPEB’s findings and recommendations. He ordered that the applicant be offered a chance to reenlist or be discharged and removed from the TDRL. The applicant declined to reenlist and was honorably discharged by reason of “convenience of the government” on March 1, 2002. At the time of her separation, the

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<sup>1</sup> Because the record contains evidence that a hearing before the FPEB was held in the applicant’s case, the Board assumes that the applicant timely rejected the CPEB’s findings. The Board notes that the entire PDES file could not be located by the Coast Guard in the applicant’s case.

applicant was serving in the grade of E-4 and was credited with 4 years, 9 months, and 9 days of active duty service.

*Supplemental Submissions to the Record Received on January 7, 2003*

On December 2, 2002, the applicant was hospitalized for "altered mental status." She was principally diagnosed with "basilar migraine," and secondarily diagnosed with "dysarthria, aphasia, numbness of arms, fingers and face, atrial fibrillation, and anxiety/panic disorder." She was treated with medication while in the emergency room and after admission.

Once admitted, the applicant received a neurological consultation, which listed an impression of "[a]bnormal EEG because of the presence of moderate to marked focal slowing over the left central temporal head region, frequently sharp in configuration. This indicates the presence of localized cerebral involvement. Moderate diffuse slowing was also evident, indicating generalized cerebral involvement." She was discharged on December 3, 2002 with prescribed medications and "no activity restriction."

**VIEWS OF THE COAST GUARD**

On July 22, 2002, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief because she "provided no evidence that she was entitled to a physical disability retirement or an extension of time on the TDRL."

The Chief Counsel stated that the Coast Guard committed no error in conducting its periodic examination of the applicant on April 23, 19XX. He stated that under 10 U.S.C. § 1210 (a) and the Physical Disability Evaluation System (PDES), at least once every 18 months, a member on the TDRL must undergo periodic physical examinations as part of the routine CPEB review process. He argued that insofar as the record indicates that the applicant was examined 18 months after her placement on the TDRL, she was timely examined in accordance with the PDES time requirements.

The Chief Counsel alleged that the applicant failed to demonstrate any injustice in the findings of either the CPEB in April 19XX or the FPEB in October 19XX. He argued that she provided no evidence that she suffered from any migraine headaches for the duration of time that she was on the TDRL. He contended that the applicant also failed to present any evidence that suffering from migraine headaches would entitle her to a permanent retirement. The Chief Counsel argued that in order to have remained on the TDRL until her next scheduled examination or the expiration of the statutory five year TDRL period, the applicant would need to show that her condition had deteriorated during the course of time that she spent on the TDRL. He reasoned that because her condition did not deteriorate while she was on the TDRL, she was

removed therefrom. Moreover, the Chief Counsel argued, the evidence used to establish her condition came from medical records dated nearly two years before she was placed on the TDRL.

The Chief Counsel alleged that the applicant failed to disprove the finding of her fitness for duty. He stated that “[t]he sole basis for a physical disability determination in the Coast Guard is unfitness to perform duty.” Article 1.A of COMDTINST M1850.2B; Article 2.A.38. of COMDTINST M1850.2C; 10 U.S.C. § 1201 (disability retirement must be based on unfitness to perform duties because of physical disability). He argued that the applicant failed to provide any evidence that her condition caused her to be unable to fulfill her duties while on active duty. The Chief Counsel contended that the Coast Guard’s failure to rate the applicant’s migraine condition was not error because she provided no evidence that the condition continued to exist.

The Chief Counsel stated that the applicant alleged that the Coast Guard failed to provide her with an adequate explanation for the FPEB finding of FFD. With respect to the required findings of the FPEB, he pointed out that “[w]hen the basis for its findings and recommended disposition is not readily apparent from the documents of record, ... the board will prepare an amplifying statement, setting forth the basis for its findings and recommend disposition.” Chapter 2.B.3.d. of the PDES Manual. He argued that the FPEB’s findings made it “readily apparent” that it found the applicant FFD, which required no further “amplifying statements.”

The Chief Counsel stated that the DVA found the applicant’s migraines to be service-connected and rated her condition at eighty percent. He argued that the applicant failed to prove that the FPEB’s findings were in error or unjust simply because the DVA determined that the applicant’s condition warranted a eighty percent disability rating. He contended that the DVA rating is not the authority for determining the fitness to perform the duties of the applicant’s rate and specialty, as the DVA operates under its own policies and regulations.

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

On July 30, 2002, the Chair sent a copy of the views of the Coast Guard to the applicant and invited her to respond within 15 days. She was granted a two-week extension and responded on August 24, 2002.

The applicant stated that the Coast Guard never responded to her February 5, 2002 request for copies of “any existing document that states the rationale for the decision in [the applicant’s] physical evaluation board case, analyzes the evidence, or addresses the points made in [her] November 5, 19XX rebuttal to the board’s recommended findings.”

The applicant argued that the Coast Guard's advisory opinion was a document crafted to rationalize the conclusory and deficient decision of the FPEB in this case. She argued that it is the FPEB's responsibility to render an explanation for its decisions, and as such, she urged the Board to require the FPEB to properly perform its duty. She alleged that the CGPC memorandum submitted in attachment to the advisory opinion fails to analyze the record made during the FPEB hearing or examine the applicant's November 5, 19XX rebuttal to the that hearing.

The applicant further alleged that in paragraph 60 of the CGPC memorandum, an unnamed medical officer is purportedly quoted as stating, upon his/her assessment of the applicant's case, that the applicant meets accession and retention standards. The applicant contended that because no documents were submitted in support of paragraph 60 and she was never furnished a copy of this assessment, the Board should disregard paragraph 60 and its related conclusion in paragraph 5.

The applicant argued that the Coast Guard's conduct of treating her as FFD is irresponsible and only serves to deny her severance pay and penalize her for not accepting the insufficient rating applied to her case by the CPEB. She questioned CGPC's rationale for objecting to her Navy physician's recommendation that she stay on the TDRL, as this physician holds clinical familiarity with her case. She contended that the record in this case shows an apparent level of arbitrariness on the part of the Coast Guard in that it found her FFD while the DVA rated her eighty percent disabled and her treating physician recommended her retention on the TDRL.

## **APPLICABLE LAW**

### ***Medical Manual (COMDTINST M6000.1B)***

Article 3.F.1.c. of the Medical Manual states the following:

Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) which 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. Members considered temporarily or permanently unfit for duty shall be referred to an Initial Medical Board for appropriated disposition.

### ***Provisions of the PDES Manual (COMDTINST M1850.2C)***

The PDES Manual governs the separation of members due to physical disability. Article 1.A. states that the PDES was "enacted primarily for the purpose of maintaining a vital and fit military organization with full consciousness of the necessity for the maximum use of available work force. These laws provide benefits for eligible service members whose military service is terminated due to a service-connected disability, and

they prevent the arbitrary separation from the service of those individuals who incur a disabling injury or disease, yet remain fit for duty.”

Article 2.A.50. of the PDES Manual defines being “unfit for continued duty” as the “status of an individual member who is physically and/or mentally unable to perform the duties of office, grade, rank, or rating because of physical disability incurred while entitled to basic pay. ...”

Article 2.C.2. of the PDES Manual, entitled “Fit for Duty/Unfit for Continued Duty” states the following:

- a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. In addition, before separation or permanent retirement may be ordered:

- (1) There must be findings that the disability:

- (a) is of a permanent nature and stable, and

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

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- e. An evaluatee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found “unfit for continued duty” even though the member is currently physically capable of performing all assigned duties. ...”

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- i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the [Department of Veterans Affairs] does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render the member unfit for military duty.

...

Article 2.C.3. of the PDES Manual, entitled “Required Findings by the CPEB, FPEB, and PRC” states the following:

- a. Evaluatee on Active Duty for More than 30 Days (Other than a Ready Reservist on active duty under an involuntary recall due to delinquency in drill). In these cases the board shall make one of the following findings:

- (1) Fit for Duty. If the board finds the active duty evaluatee “Fit for Duty,” it shall make no other findings.

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- (3) Unfit for Continued Duty by Reason of Condition or Defect Not a Physical Disability. If the board finds the evaluatee unfit for continued duty by reason of physical disability, the board shall make the finding “Unfit for Continued Duty.” The board shall then make the following findings:

- (a) propose ratings for those disabilities which are themselves physically unfitting or which relate to or contribute to the conditions(s) that cause the evaluatee to be unfit for continued duty. ... In making this professional judgment, board members will only rate those disabilities which make an evaluatee unfit for military service or which contribute to his or her inability to perform military duty. ... In accordance with the current VASRD, the percentage of disability existing at the time of evaluation, the code number and diagnostic nomenclature for each disability, and the combined percentage of disability will be provided.

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- c. Evaluatee on the TDRL. When the case of an evaluatee on the TDRL appears before the board, the board shall make independent findings and recommended disposition, based on the evaluatee’s current status and level of disability. The following policies apply to members on the TDRL:
  - (1) An evaluatee will be continued on the TDRL when an intermediate (not final) periodic examination indicates that his or her condition has not stabilized and that he or she remains unfit for continued duty.
  - (2) In all other TDRL cases, the provisions of paragraph 2.C.3.a. [above] shall apply, ....
- d. Amplifying Statements. When the basis for its findings and recommended disposition is not readily apparent from the documents of record, ... , the board will prepare an amplifying statement, setting forth the basis for its findings and recommended disposition. ...

Article 5.C.1.e. of the PDES Manual, entitled “Procedure During Formal Hearing; Evidence,” states that “[f]indings and recommended disposition of the board can only be based upon evidence of record.”

Article 5.C.11.b. of the PDES Manual entitled “Required Findings and Recommended Disposition of the FPEB,” states that “[w]hen a member on the TDRL appears before the FPEB, the FPEB’s required findings and recommended disposition are to be in accordance with paragraph 2.C.3.c.”

Article 9.A.8.a. of the PDES Manual, entitled “Zero Percent Ratings and Minimum Ratings,” provides the following:

Occasionally a medical condition which causes or contributes to unfitness for military service is of such mild degree that it does not meet the criteria even for the lowest rating provided in the VASRD under the applicable diagnostic code. A zero percent rating may be applied in such cases .... It should be noted that a zero percent rating is a valid disability rating and receives the same compensation as prescribed by law for ratings of less than 30 percent. It does not mean that a disability does not exist. ...

## FINDINGS AND CONCLUSIONS

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

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

2. The applicant requested an oral hearing before the Board. The Chair, 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 applicant alleged that the FPEB improperly recommended that she be found FFD without any explanation for such finding. When the FPEB evaluates the fitness for duty of a member on the TDRL, the regulations mandate that the FPEB make independent findings and a recommended disposition based on the member's current status and level of disability. PDES Manual, Article 2.C.3.c. The regulations also provide that, where the FPEB recommends a finding of FFD, no other findings shall be made. PDES Manual, Article 2.C.3.a.(1). However, "[w]hen the basis for [the FPEB's] findings and recommendation disposition is not readily apparent from the documents of record," the FPEB must furnish a statement of reasons for the findings and recommendation. PDES Manual, Article 2.C.3.d. The threshold question before the Board is therefore, whether facts and evidence in the applicant's record made the finding of FFD apparent from the record so as to relieve the FPEB of the duty to provide a statement of reasons for its recommendation.

4. The record of evidence before the FPEB included, among other information, (a) medical records from the applicant's initial physical upon reporting to recruit processing in 19XX; (b) evaluations and opinions by physicians who interviewed and examined the applicant, while treating her condition; (c) medical records and charts from her hospitalizations; (d) the report of the IMB and her subsequent placement on the TDRL; (e) the approval of the applicant's CO in separating her from active duty in 19XX; (f) the report dated March 19XX from the DVA; (g) the recommendation of the March 26, 19XX Medical Board from the applicant's periodic examination; (h) the final opinion upon CPEB review; and (i) testimony from the applicant and her treating neurologist, and numerous exhibits admitted during the FPEB panel hearing.

5. The Board finds that the evidence presented to the FPEB fails to clearly indicate that the applicant was reasonably fit to perform the duties required for her rating, grade and rank. COMDTINST M6000.1B, Article 3.F.1.c. As a result, the Board finds that the basis for the FPEB's recommended finding of FFD is not "readily apparent" from the record. The record shows that prior to her placement on the TDRL in 19XX, the applicant's physical evaluations most often showed her to be FFD. However, the FFD findings were made nearly two years prior to 19XX, and are not materially relevant in the FPEB's assessment of the applicant's then "current status and level of disability" in 19XX. PDES Manual, Articles 2.C.3.c. and 5.C.1.e. Furthermore, during her March 26, 19XX periodic examination, the applicant stated that "since her discharge ..., she has done well with only occasional mild headache." The periodic examination report indicates that no laboratory studies or radiological tests were completed because she was pregnant. Although the applicant stated that she had been asymptomatic, no laboratory or radiological studies were performed to confirm her statements in March 19XX or in July 19XX, when she appeared before the FPEB but was no longer pregnant. Consequently, the applicant has proven by a preponderance of the evidence that the FPEB was required to provide an amplifying statement for its finding of FFD. PDES Manual, Article 2.C.3.d.

6. Based on the medical evidence in the record and the lack of explanation by the FPEB, the Board finds that the FPEB's recommended finding of FFD is not supported by a preponderance of the evidence.<sup>2</sup> The record establishes that the applicant suffered from atypical basilar migraines. The medical evaluations and assessments consistently cited the applicant's condition as being migraine-related. When the applicant underwent her March 19XX TDRL periodic examination, the Medical Board concluded that "her condition continues to interfere with performing her duties," and that "the risk of having a basilar migraine would prevent her from reentering the Coast Guard at [the current time]." Furthermore, the CPEB findings, which provided favorable support to the Medical Board recommendation, concluded that the applicant was both mentally and physically unfit and recommended her separation from the Coast Guard. In addition, prior to the FPEB hearing, the DVA determined that the applicant's condition was service-connected and warranted a disability rating under VASRD Code 8100.<sup>3</sup>

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<sup>2</sup> On July 26, 2002, the Board requested an independent medical advisory opinion from the Coast Guard, which would evaluate the medical evidence in the record and would offer an opinion whether the FPEB's finding of FFD is supported by substantial medical evidence. The Coast Guard responded that it was unable to provide a medical advisory opinion in this case because the PDES process does not include obtaining a third-party physician consultation.

<sup>3</sup> The DVA examined the applicant and found her to be 80 percent disabled by her migraine headache condition. However, having a ratable disability under the DVA system does not entitle a member of the Coast Guard to a physical disability retirement or to a medical board. Title 10 U.S.C. § 1201(a) provides the minimum statutory requirements a member of the Coast Guard must meet before the Secretary may

7. On the other hand, the TDRL periodic examination showed that the applicant had “no recurrence of her acute confusional states associated with the basilar migraine she experienced in the past,” and was “asymptomatic” for the duration of time she spent on the TDRL. Based on these findings, the Chief Counsel argued that the applicant failed to demonstrate that her condition continued to exist. Instead of finding that the applicant’s condition failed to exist, the March 19XX TDRL medical board diagnosed her with basilar migraines and recommended (via testimony by letter before the FPEB) that the applicant remain on the TDRL for further observation. Moreover, the CPEB clearly found that the applicant’s disability existed and rendered her unfit when it rated the applicant’s condition at zero percent. PDES Manual, Article 9.A.8.a. Therefore, the fact that she was asymptomatic over the course of several months fails to demonstrate that the applicant was FFD in the Coast Guard, particularly in light of the medical evidence to the contrary. The Board finds by a preponderance of the evidence that the Coast Guard committed an error and/or injustice in finding the applicant FFD. Insofar as the Board has the duty to grant “thorough and fitting relief,” Sanders v. United States, 207 Ct. Cl. 962, 963 (1975), the applicant should be found NFFD.

8. Moreover, because the FPEB’s recommended finding of FFD is not supported by a preponderance of the evidence, such error was prejudicial and should be reversed. The applicant was offered the opportunity to reenlist in the Coast Guard on active duty, when the preponderance of the evidence in the record indicates that she was NFFD. Had the applicant reenlisted, such action would have worked to prejudice the Coast Guard, the applicant, and those members with whom she would work. The applicant’s supplemental medical records from December 2 and 3, 2002, demonstrate that she was physically impaired when she experienced this migraine headache that required immediate medical care. Furthermore, the latest hospitalization supports the TDRL physician’s opinion that “the risk of having a basilar migraine would prevent [the applicant] from reentering the U.S. Coast Guard....” In view of the applicant’s medical records, it is not clear that the FPEB either qualitatively nor quantitatively analyzed her prospective performance of the duties of her rank, grade, or rating to determine whether her migraine condition was expected to interfere with the performance of her duties. PDES Manual, Article 2.C.2.e.

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award him or her a physical disability retirement. The Coast Guard’s regulations create additional requirements that must be met before members are entitled to a physical disability retirement. Pursuant to Article 2.C.2.i of the PDES Manual, the fact that the applicant’s conditions are ratable disabilities under the DVA rating systems does not prove that she would have been found unfit for duty by a medical board. The Court of Federal Claims has held that “[d]isability ratings by the [DVA] and by the Armed Forces are made for different purposes. The [DVA] determines to what extent a veteran’s earning capacity has been reduced as a result of specific injuries or combination of injuries .... The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability .... Accordingly, [DVA] ratings are not determinative of issues involved in military disability retirement cases.” Lord v. United States, 2 Cl. Ct. 749, 754 (1983).

9. The applicant alleged that the Coast Guard erred in removing her from the TDRL because, in connection with her periodic examination in March 19XX, the Medical Board recommended that she be retained on the TDRL for further observation. According to Article 2.C.3.c.1. of the PDES Manual, a member will be continued on the TDRL, if the periodic examination indicates that the member's "condition has not stabilized and that he or she remains unfit for continued duty." The record indicates that the Medical Board recommended that "the member [be] referred to the Physical Evaluation Board for final adjudication," (emphasis supplied), which the Board interprets to mean that her case was ready for processing through the Physical Disability Evaluation System. The Board finds that in referring the applicant's case to the CPEB, the Medical Board found that her condition was "stabilized" to the point that a permanent rating on the degree of the severity of her migraines could be determined. Although the Medical Board recommended that the applicant remain on the TDRL, nothing in the report indicates that her condition was of such instability to preclude a final determination for disability rating purposes. Therefore, the Board finds that she has failed to prove by a preponderance of the evidence that the Coast Guard erred in not retaining her on the TDRL.

10. VASRD Code 8100 provides for the rating of migraine headaches. It notes that ratings range from zero to fifty percent, with a fifty percent rating assigned to individuals with "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability" and zero percent to those "with less frequent attacks." The evidence shows that the applicant's medical condition met the requirements for referral to the CPEB. While finding the applicant mentally and physically unfit for military service, the CPEB did not find evidence that the applicant suffered from migraines of sufficient frequency to warrant a higher disability rating. The headaches were reported by the March 19XX Medical Board as being "only occasional." Therefore, the Board finds by a preponderance of the evidence that the applicant was appropriately evaluated and rated by the CPEB, and that there was no error or injustice which occurred in that rating process which warrants granting the applicant a higher disability rating.

11. Accordingly, the applicant's request for relief should be, in part, granted.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

## ORDER

The application of XXX XXXXXX X. XXXXXX, XXX XX XXXX, USCG, for the correction of her military record is granted, in part, as follows:

The applicant's record shall be corrected to show that on October 23, 19XX, she was found unfit to perform the duties of her office, rank, grade, and rating by reason of a physical disability and rated at zero percent disabled in accordance with the Department of Veterans Affairs (DVA) Schedule for Rating Disabilities (VASRD).

Her record shall show that she was honorably discharged from the Coast Guard with entitlement to severance pay.

Her DD form 214 shall be corrected to show that the authority for her discharge shall be Article 12-B-15 of the Personnel Manual; her narrative reason for separation shall be "Physical Disability"; her separation code shall be JFL; and her reenlistment code shall be RE-3P.

The Coast Guard shall pay the applicant any sum she may be due as a result of this correction.

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Terence W. Carlson

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Charles Medalen

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Dorothy J. Ulmer

