

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-072

XXXXXX, XXXXXX X.
XXX XX XXXX, XXX

**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.

I concur in the relief recommended by the Board.

Date: February 26, 2003

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 March 26, 2002 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated January 16, 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 increase his disability rating from thirty percent disabled to fifty percent disabled, with entitlement to a corresponding adjustment in the disability compensation he has received.

APPLICANT'S ALLEGATIONS

The applicant stated that on March 8, 19XX, he was found unfit for duty under the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) code number 9434, major depressive disorder, and was permanently retired with a thirty percent disability rating. He alleged that the finding that he was thirty percent disabled is in error because the Formal Physical Evaluation Board (FPEB) did not apply the guidelines under the Department of Defense (DOD) Instruction 1332.39. Specifically, the applicant contended that under the DOD instruction, the record demonstrates that his disability met the definition of "considerable," which corresponds to at least a fifty percent disability rating.

The applicant argued that because he has had (a) multiple hospitalizations; (b) constant medication; (c) an inability to work; (d) suicidal ideations; (e) social maladaptation; and (f) a five-year history of depression, “[e]very indicia for a fifty percent rating was met in [his] case.” The applicant asserted that the correction would award him the proper percentage of disability and any lesser percentage is simply unsupportable.

SUMMARY OF THE APPLICANT’S RECORD

On February 9, 19XX, the applicant enlisted in the Coast Guard. His record contains a medical report of his pre-enlistment medical examination, dated January 15, 19XX. It indicated that the applicant had no disqualifying defects and that he satisfied the physical standards under the Coast Guard Medical Manual for his original enlistment.

According to his military medical records, beginning in August 19XX, the applicant was evaluated, hospitalized, and treated on several occasions for anxiety, depression, and suicidal ideation. During the course of his medical treatment, examining physicians and medical personnel primarily assessed the applicant as suffering from major depressive disorder (MDD) and obsessive/compulsive disorder (OCD).

On December 11, 19XX, the applicant was examined for the purpose of his referral to an Initial Medical Board (IMB). During this evaluation, the applicant was diagnosed with “major depression, obsessive/compulsive disorder, migraines, and hearing loss.” Moreover, the applicant was found to be “not qualified for retention and to perform the duties of his rank at sea and foreign shores.” However, for reasons not explained in the medical record, the applicant’s IMB was not completed until approximately nine months later.

The IMB narrative medical summary, dated September 15, 19XX, contains the following history of the applicant’s medical condition:

[When the cutter to which the applicant was assigned began to develop some minor problems, the applicant] became increasingly depressed, anxious, unable to eat for several days, and unable to sleep due to his concerns about the condition of the ship. He related his feeling to the [Commanding Officer] that he could no longer remain on board and was evaluated at [a local clinic and referred to a different facility] for further evaluation and treatment. He was seen on an outpatient basis. He reported that “It got to me, I can’t do it anymore.” He felt that he was not trained enough to handle the problems of [the cutter] and to troubleshoot each problem as it arose This situation was compounded by multiple psychological stressors which included being away from his wife and

child for months, financial difficulties, relational problems with his previous wife and his first child, bereavement issues and relational problems with other family members. Over the previous six months he reported increasing depressive symptoms, decreased appetite, fatigue and decreased energy, poor sleep, feelings of worthlessness and guilt, difficulty concentrating and completing tasks, isolat[ion] and disinterest in activities with others, ruminating over past events, and fleeting thoughts of suicide. ... Further evaluation at this juncture revealed significant partner relational problems and obsessive/compulsive traits. His long term functioning is characterized by preoccupation of orderliness, perfectionism, and control as manifested by his preoccupation with details, rules and perfection which interfere with completion of tasks, resultant rigidity and reluctance to delegate tasks. These finding[s] correlate well with his stellar 13 year performance record. ...

The IMB narrative summary also indicated that the applicant's prognosis was "reasonably good" and that he was expected to "remain fit for duty." He was found Fit for Duty (FFD) and diagnosed as follows:

Axis I:	1. Major Depressive Disorder, single episode, in partial remission	296.25
	2. Partner Relational Problem	V61.1
Axis II:	Obsessive-compulsive traits	
Axis III:	1. Chronic prostatitis	
	2. Sexual dysfunction secondary to prostatitis	

On October 12, 19XX, the IMB recommended that the applicant's case be referred to the Central Physical Evaluation Board (CPEB) for a determination of his fitness for duty. The CPEB found the applicant FFD. On October 29, 19XX, the applicant was notified of the FFD finding and indicated that he did not wish to submit a rebuttal statement. However, by letter dated November 16, 19XX, the applicant rejected the findings of the CPEB. He submitted a rebuttal statement, which argued that his health had not improved enough to allow his return to full duty status.

On November 19, 19XX, the applicant's officer-in-charge submitted a letter in support of the applicant's rebuttal statement, stating that he "would not want [the applicant] working for [him] nor would [he] recommend [the applicant] to any other command in his current condition." Moreover, by letter dated November 30, 19XX, the applicant's Group Commander strongly recommended the applicant's separation following consideration by the CPEB and indicated that he concurred with the findings of the applicant's December 11, 19XX medical evaluation.

In a letter dated December 15, 19XX, the applicant's Group Commander renewed his recommendation for the applicant's separation based upon his recent seven-day hospitalization, beginning December 3, 19XX, and an incident on the evening of December 14, 19XX when the applicant suffered a suicidal state of mind. The

applicant's Group Commander additionally recommended an accelerated CPEB because he believed the foregoing to suggest that the applicant's psychological condition was deteriorating.

On December 15, 19XX, the CPEB determined that the applicant's case was not sufficiently resolved to make final and fair findings or recommendations based upon the information available to the board. The CPEB ordered a Disposition Medical Board (DMB) to be convened in accordance with the Physical Disability Evaluation System (PDES), COMDTINST M1850.2C.

On December 17, 19XX, the applicant was admitted to a medical facility for three days for his fifth psychiatric hospitalization for treatment of depression and related symptoms. The applicant was given a final diagnosis upon his discharge on December 20, 19XX, as follows:

- Axis I Major depressive disorder
History of obsessive-compulsive disorder
- Axis II Deferred
- Axis III History of prostatitis
- Axis IV Questionable
- Axis V Global Assessment of Functioning was at 35 at the time of admission and Global Assessment of Functioning is 65 to 70 at the time of discharge.

As part of his planned treatment, the applicant was prescribed medication, and arrangements were made for him to follow-up with his treating physician.

On February 3, 19XX, a narrative summary of the applicant's reevaluation was completed. In that report, the applicant's condition was assessed as follows:

Since the Initial Medical Board was completed on September 15, 19XX, [the applicant's] medical condition has deteriorated considerably. Despite outpatient psychiatric treatment, [his] apparent recovery arrested and over the next two months he began to exhibit increased symptoms of Major Depression once again. [The applicant] ... was subsequently hospitalized ... on 11/26/XX. There he was started on Depakote ... as an adjunct to the Effexor XR for mood stabilization. A longer hospitalization period was felt necessary for him to stabilize so he was transferred ... on 12/3/XX. While [at the new facility] he quickly advanced to ward status and participated actively within the therapeutic milieu. He resolved his suicidal ideation and agreed with the disposition plans that he return to his station He was discharged ... on 12/10/XX with the recommendation that he remain on limited duty and with the diagnosis of Major Depressive Disorder, severe, chronic without psychotic features and Obsessive-compulsive traits. ...

In the following week, [the applicant] decompensated again to the point of having suicidal ideation. This episode was exacerbated by several factors. He was now cast in a new work environment with unfamiliar coworkers and supervisors, he was further

isolated from his family without a place to live (having been given temporary quarters within the station) or a form of transportation (his wife had their only automobile) and he still had the legal charges pending as well as a state family youth services reviewing his case. His work environment deteriorated as he perceived that his supervisor ... was reprimanding him wrongly for the legal charges pending against him which he adamantly contested and for other minor disagreements. With the resurfacing of his suicidal ideation he was hospitalized on 12/17/XX During this hospitalization he was started on Risperdal ...(a major tranquilizer) and Celexa ...(an antidepressant) along with the Depakote and Effexor which he had been taking. He quickly stabilized ... and was discharged on 12/20/XX... with a diagnosis of Major Depressive Disorder. ...

After assessment, with input from his wife, USCG Work-Life, and a state xxxx Services, and review of the events which led to his difficulties in November, it was concluded that [the applicant] was not a threat or danger to his children or his wife. The restraining order was dropped which allowed him to return to live with his family. This was mutually agreed upon and so [upon his discharge] he returned to live at home. Since that date [the applicant] has been placed on convalescent leave awaiting the outcome of this board. On 1/4/XX he was cleared of all the legal charges against him in the preliminary hearing. He has subsequently had no further domestic problems at home.

On 1/13/XX [the applicant's] Celexa was discontinued in favor of increasing his dosage of Effexor XR The Depakote was also discontinued due to persistent side effects of feeling tired and "blunted all the time". [Changes to medications were well tolerated by the applicant and he] has remained stable to the present day.... However, he continues to express irritability and anxiousness about his inability to return to work, his chronic sense of inadequacy, worthlessness and unhappiness, his financial stressors, and the relational problems that exist [among certain family members]. His most recent Mental Status Exam is essentially unremarkable except for mild anxiousness in his mood and sad appearance. His affect was appropriate to content but with a limited range. He was goal-directed, logical, sequential and coherent. No psychotic symptoms were present. Cognitive exam was intact with good insight and judgment. He expressed motivation to resolve his health problems but had little confidence in his doing so and a low self-esteem.

With consideration given to this update, it is the opinion of this board that the diagnosis given in the original board be amended to:

- Axis I: Major Depressive Disorder, recurrent, without psychotic features 296.33
- Axis II: Obsessive-compulsive traits
- Axis III: 1. Chronic prostatitis
2. Sexual dysfunction secondary to prostatitis

The prognosis [for the applicant's] continued military duty is poor. His depressive symptomatology has remained resistive to multiple therapeutic modalities and it can be expected that he will continue to manifest these symptoms. He has shown recurrent, severe decompensations with suicidal ideation in response to psyc[h]osocial stressors. Fortunately, he has always been able to show the good judgment and insight to not act on those impulses but to seek out and obtain aid in overcoming the stressor that are precipitating his emotional responses. Due to this member['s] strengths of high

intelligence, introspectiveness, and maturity his capacity for adjustment during periods of remission in the past have been excellent, unfortunately, he can no longer identify any time periods where he is not overwhelmed by his depressive symptoms which then impair his productivity. His rigidity and preoccupation with orderliness and control reinforce his difficulties especially in new environments but once acclimated and accepted into that new culture he has the capacity to be a valuable worker focused on his work load and able to attain an acceptable level of productivity. Further psychopharmacologic and [cognitive] therapies will be necessary to assist him toward the resolution of these difficulties. I recommend that [the applicant] be discharged from the USCG due to his disqualifying disorder.

The CPEB, which convened on February 8, 19XX, found him not fit to perform the duties of his grade or rate under VASRD code number 9434, assigned him a thirty percent disability rating, and recommended that he be temporarily retired. On February 18, 19XX, the applicant rejected the CPEB's recommended findings and requested an appearance before the Formal Physical Evaluation Board (FPEB).

On March 9, 19XX, the applicant appeared before the FPEB, which found him unfit for duty due to a "major depressive disorder: occupational and social impairment with decrease in work efficiency." The FPEB rated the applicant's disability at thirty percent under VASRD code number 9434, with a recommended disposition that the applicant be permanently retired. On March 16, 19XX, the applicant timely submitted a rebuttal, which indicated his non-concurrence with the rated percentage of disability.

On March 23, 19XX, the FPEB notified the applicant that his rebuttal failed to support a change to the FPEB's findings and recommended disposition of his case. On April 10, 19XX, the Physical Review Council (PRC) reviewed the applicant's case and concurred with the findings and recommended disposition of the FPEB. On April 12, 19XX, the Commander of the Coast Guard Personnel Command (CGPC) approved the findings and recommendations of the FPEB. On May 11, 19XX, the applicant was retired from the Coast Guard, by reason of thirty percent permanent physical disability. At the time of his retirement, the applicant was serving in the grade of E-7 and was credited with 13 years, 3 months, and 2 days of active duty service.

VIEWS OF THE COAST GUARD

On October 15, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion to which he attached a memorandum on the case prepared by CGPC. In concurring with CGPC's analysis, the Chief Counsel recommended that the Board deny the applicant's request for relief.

The Chief Counsel argued that the applicant's allegation of Coast Guard error for its failure to apply the guidelines found in DOD Instruction 1332.39 is without merit, as that instruction has "no bearing" on the Coast Guard's medical findings. He argued

that the Coast Guard PDES relies solely on the rating formula contained in the VASRD for determining disability percentages.

The Chief Counsel alleged that the applicant failed to provide any persuasive evidence that the PDES committed error in rating his medical condition. He argued that the applicant's allegation of error is unsupported by the record. He contended that the DOD Instruction 1332.39 serves only to supplement the terminology used in the VASRD's rating formula. The Chief Counsel argued that the Coast Guard does not consult or rely on DOD Instruction 1332.39 but rather relies solely on the rating formula contained in the VASRD.

The Chief Counsel argued that the DVA's subsequent finding that the applicant was one hundred percent disabled is not binding on the Coast Guard, nor indicative of differing or conflicting medical opinions. He stated that DVA ratings are not determinative in military disability cases. Lord v. United States, 2 Ct. Cl. 749, 754 (1983). He argued that a DVA rating determines to what extent a veteran's earning capacity has been reduced. He further argued that an armed forces rating, on the other hand, determines to what extent a member has been rendered unfit to perform the duties of his grade or rating because of physical disability. Id. Therefore, he argued, the procedures and presumptions under the DVA evaluation process are fundamentally different and are not binding on the Coast Guard, according to the PDES. As a result, he argued, the applicant has failed to prove by a preponderance of the evidence that the findings of the PDES were in error or unjust.

The Chief Counsel argued that the evidence of record supports the thirty percent disability rating assigned to the applicant. He contended that any long-term diminution in the applicant's earning capacity is properly a matter for the DVA, not the BCMR or the Coast Guard. He stated that in the absence of strong evidence to the contrary, Coast Guard officials are presumed to carry out their duties lawfully, correctly, and in good faith. Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). He argued that because the sole basis for a physical disability determination in the Coast Guard continues to be unfitness to perform duty, the applicant has failed to show that the Coast Guard committed error or injustice by rating him with a thirty percent disability.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 21, 2002, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. On November 8, 2001, the applicant provided his response to the Board.

The applicant argued that the Coast Guard's claim that it looks to the DOD Instruction for guidance while it concurrently adheres to the rating formula in the

VASRD yields an oxymoronic interpretation of its regulations, which may lead to abuse.

The applicant acknowledged that a DVA disability rating is not the equivalent of a disability rating by the Coast Guard. He argued that despite the difference between the purposes for the two ratings, “the severity of the depression from a clinical perspective is the same under the VASRD for both the Coast Guard and the [DVA].” He contended that by definition, the applicant’s condition warrants a fifty percent rating.

The applicant argued that the advisory opinion fails to support the Coast Guard’s contentions that “the evidence in the record supports the thirty percent disability rating.” He contended that the Coast Guard relies upon the presumption that officials carried out their duties correctly in assigning the applicant a thirty percent disability rating to avoid substantiating the rating in the applicant’s case.

The applicant argued that the CGPC memorandum submitted as an attachment to the advisory opinion reveals that the DOD instruction is not referred to at all for guidance. He argued that the Coast Guard consequently appears to be unaware of the application of its regulations.

The applicant questioned the suggestion that the Coast Guard’s rating of the applicant at thirty percent disabled worked to the applicant’s favor. He argued that because the advisory opinion fails to analyze or outline the factors which require a thirty percent rating, the Coast Guard has failed to rebut that he has demonstrated that the diagnostic criteria necessary to satisfy a fifty percent disability rating exist in his case.

APPLICABLE LAW

Provisions of the PDES Manual (COMDTINST M1850.2B)

The PDES Manual governs the separation of members due to a physical disability. Article 2.C.3. requires the CPEB, FPEB, and PRC to use the VASRD in determining the percentage of disability, the diagnostic code number, and the diagnostic nomenclature for each disability. Article 2.C.3.(3)(a), entitled “Unfit for Continued Duty by Reason of a Physical Disability,” provides the following:

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 condition(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. ...

***Department of Veterans Affairs Schedule for Rating Disabilities (VASRD),
38 CFR, Part 4***

Title 38, part 4.130, entitled "Schedule of ratings – mental disorder" provides that "[t]he nomenclature employed in this portion of the rating schedule is based upon the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition of the American Psychiatric Association (DSM-IV). ..." This CFR part also sets forth, *inter alia*, the general rating formula for "major depressive disorder," as follows:

- 50% Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.

- 30% Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

Provisions of DOD Instruction 1332.39

The purpose of DOD Instruction 1332.39 is to implement policy, assign responsibilities, and prescribe procedures, under the authority of DOD Directive 1332.18, "Separation or Retirement for Physical Disability," for rating disabilities of Service members determined to be physically unfit and eligible for disability separation or retirement under Title 10 of the United States Code. "The Instruction applies to the Office of the Secretary of Defense (OSD) and the Military Departments." Under 10 U.S.C. 101, "military departments" are defined as Departments of the Army, Navy and Air Force. The definition does not include the Department of Transportation.

Attachment 1 to Enclosure 2 of DOD Instruction 1332.39 provides instructions for specific VASRD codes. According to Article E2.A1.5.1.5., entitled "VASRD Classification," the VASRD uses specific terms to classify and rate a member's level of

social and industrial impairment. The 9000 Series VASRD Code, such as VASRD diagnostic code number 9434, are further characterized by the following factors:

Article E2.A1.5.1.5.3.	Considerable at 50 percent
Article E2.A1.5.1.5.3.1.	Nearly always mentally competent to handle financial affairs and to participate in PEB proceedings
Article E2.A1.5.1.5.3.2.	Overtly displays some signs or symptoms of mental illness such as: autism, ambivalence, inappropriate affect, dissociative thinking, delusions, hallucinations, hyperactivity, depression, lack of insight, poor judgment, bizarre behavior, disorientation, emotional lability, memory defects, unfounded somatic complaints, phobias, compulsions, decreasing IQ, and personality changes.
Article E2.A1.5.1.5.3.3.	Requires constant medications or psychotherapy.
Article E2.A1.5.1.5.3.4.	Suffers extreme job instability (not due to substance abuse, economic conditions, personality disorders, etc.).
Article E2.A1.5.1.5.3.5.	Suffers significant industrially related social maladjustment (not due to substance abuse, economic conditions, personality disorders, etc.).
Article E2.A1.5.1.5.3.6.	May demonstrate a significant requirement for hospitalization.

Article E2.A1.5.1.4.4.	Definite at 30 percent
Article E2.A1.5.1.4.4.1.	Does not demonstrate a significant requirement for hospitalization.
Article E2.A1.5.1.4.4.2.	Displays some signs or symptoms of mental illness on examination.
Article E2.A1.5.1.4.4.3.	Usually requires medication and/or frequent psychotherapy.
Article E2.A1.5.1.4.4.4.	May experience some job instability.
Article E2.A1.5.1.4.4.5.	Evidences borderline social adjustment.

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 alleged that the Coast Guard failed to properly evaluate his case at the time he was permanently retired by assigning him a thirty percent disability rating for major depressive disorder. In February 19XX, the applicant's case was referred to a CPEB. The CPEB reviewed the applicant's medical records, which documented that between 19XX and 19XX, he had multiple medical evaluations, which included at least sixty clinic visits and five hospitalizations for depression, anxiety and/or suicidal ideation. The FPEB and the PRC concurred in the rating and recommended findings of the CPEB. Upon the approval of the Commander of CGPC,

the applicant was permanently retired on May 11, 19XX, with a thirty percent disability rating.

3. The applicant has shown by a preponderance of the evidence that the Coast Guard committed an error in assigning him a thirty percent disability rating for major depressive disorder. According to the PDES, the VASRD is the standard by which the CPEB, FPEB and PRC make proposed ratings for disabilities that cause the evaluatee to be unfit. PDES Manual, Article 2.C.3.(3)(a). Under 38 CFR 4.130 (VASRD), a fifty percent disability rating for major depressive disorder is applicable when a member's "occupational and social impairment with reduced reliability and productivity [are] due to such symptoms as: ... disturbances of motivation and mood; [and] difficulty in establishing and maintaining effective work and social relationships."

4. On February 3, 19XX, a medical update report, in follow-up to the initial IMB, was completed in the applicant's case. The Board is persuaded that the descriptions of the applicant's symptoms and the status of his disability in the update report clearly meet the VASRD standard for his disability to be rated at fifty percent, instead of thirty percent. According to the VASRD, a thirty percent disability rating for major depressive disorder is characterized by "occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks ... due to such symptoms as: depressed mood, [and] anxiety" The examining physician for the updated IMB reported that "[the applicant] can no longer identify any time periods where he is not overwhelmed by his depressive symptoms which then impair his productivity." The Board finds that the applicant's social and occupational impairment clearly exceeds the thirty percent VASRD standard and is consistent with the "reduced reliability and productivity" for a fifty percent disability rating. Furthermore, the Board notes that, while not a medical finding, the applicant's officer-in-charge submitted a letter during the CPEB process, which stated that he "would not want [the applicant] working for [him] nor would [he] recommend [the applicant] to any other command in his current condition."

5. According to the IMB update report, the examining physician also indicated that "[the applicant] continues to express irritability and anxiousness about ... his chronic sense of inadequacy, worthlessness and unhappiness ... and the relational problems that exist [among certain family members]." Based on the foregoing description pertaining to the applicant's condition, the Board finds that the applicant suffered from both "disturbances of motivation and mood" and "difficulty in establishing and maintaining effective ... social relationships," as listed under the VASRD rating for fifty percent. Moreover, although portions of the IMB update report indicate that the applicant was "logical, sequential and coherent" and cognitively displayed "good insight and judgment," his doctors indicated such evidence is reflective of the applicant's ability to mentally compensate for his major depression, because of his "strengths of high intelligence, introspectiveness, and maturity ...," as

cited in the IMB medical update report. Thus, contrary to the Coast Guard's contention that the medical evidence supports the thirty percent disability rating, the Board finds that evidence in the medical record demonstrates that the applicant is entitled to a fifty percent rating for major depressive disorder.

6. The applicant contended that the Coast Guard erred in not using DOD Instruction 1332.39 in rating his disability at the time he was permanently retired. However, under the facts presented, the applicant's contentions are unsupported by evidence showing that the Coast Guard was required to adhere to the DOD Instruction in rating his disability. As stated by the Chief Counsel, DOD Instruction 1332.39 may be used as guidance to supplement the terminology used in the VASRD's rating formula when processing members under the PDES. Moreover, as set forth in the Instruction's applicability, the Instruction applies to the Office of the Secretary of Defense and the Military Departments therein. The Board therefore finds no evidence that DOD Instruction 1332.39 is binding on the Coast Guard's disability percentage determination. However, to the extent that the Coast Guard uses DOD Instruction 1339.32 to "supplement the terminology" for impairment, the applicant's medical record establishes that he has suffered "recurrent, severe decompensations with suicidal ideation" and requires "further psychopharmacologic and [cognitive] therapies." Consequently, the applicant has persuaded the Board that he should have been awarded a fifty percent disability rating under the applicable language of Article E2.A1.5.1.5.3. of the Instruction.

7. On February 27, 19XX, the DVA determined that the applicant was one-hundred percent disabled based on medical examinations held in May and June of 19XX and an examination of the same medical records considered by the Coast Guard. According to the DVA medical report: "An evaluation of 100 percent is assigned whenever there is evidence of total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communications; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance or minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name." Although, the DVA report indicated that the applicant displayed "no disorganization of thinking," it also specified that he "showed no lightening of affect at any point ..." The examining physician indicated in the DVA report that the applicant's diagnoses made during his time of service in the Coast Guard were minimized "possibly in reply to [the applicant's] own request to continue his career and his reluctance to have to leave duty with the Coast Guard." The examining physician concluded that the applicant's global assessment functioning should be placed at 20, "indicating that only with the current medication is his suicidal ideation in remission," and that without such medication, "he would be at some danger of hurting himself and [that] there has been a gross impairment of his ability to function as a result of his recurrent major depression."

8. The applicant was examined by the DVA approximately three to four months after the IMB update was completed by the Coast Guard. While the IMB update report failed to indicate that the applicant was in persistent danger of hurting himself, the examining physician recognized that the applicant's "depressive symptomatology has remained resistive to multiple therapeutic modalities and it can be expected that he will continue to manifest these symptoms. ...[and that he] has shown recurrent, severe decompensations with suicidal ideations in response to psychosocial stressors" The DVA is chartered to provide medical care for veterans once they leave active duty. The applicant's medical records indicated that his occupational and social impairments due to the symptoms of his major depression were severe enough to adversely affect his civilian employment, as they similarly affected his Coast Guard duties.

9. The receipt of a higher disability rating from the DVA does not prove that the Coast Guard committed an error or injustice by assigning a lower rating in the spring of 2000. According to the PDES, DVA disability findings are not binding on the Coast Guard. PDES Manual, Article 9.A.1.b. The Court of Federal Claims has stated 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 the specific injuries or combination of injuries. [citation omitted]. 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 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). However, in the applicant's case, the timing and circumstances surrounding the one-hundred percent DVA disability rating are more consistent with a finding that the applicant's condition warranted a fifty percent Coast Guard disability rating at the time he was permanently retired than with a finding of a lower disability rating.

10. Therefore, in view of the fact the applicant has otherwise demonstrated by a preponderance of the evidence that he is entitled to a fifty percent rating for major depressive disorder, the applicant's request should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXX XXXXXX X. XXXXXX, XXX XX XXXX, USCG, for the correction of his military record is granted.

His record shall be corrected to show that he was retired by reason of fifty percent permanent physical disability, instead of thirty percent.

The Coast Guard shall pay him any sum he may be due as a result of this correction.

Barbara Betsock

Harold C. Davis, M.D.

Cynthia B. Walters