

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-087

FINAL DECISION

Ulmer, Chair:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on June 9, 2003, upon receipt of the applicant's completed application and records.

This final decision, dated March 25, 2004, 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 his record by increasing his permanent disability rating from 10% to 30% and transferring him to the temporary disability retirement list (TDRL)¹.

The applicant enlisted in the Coast Guard on January 26, 1987. He was discharged on November 28, 2001, with a 10% disability rating due to lumbosacral strain with characteristic pain on motion, for which he received severance pay. At the time of his discharge he had 14 years, 10 months, and three days of active duty.

ALLEGATIONS

¹ The TDRL is a pending list of individuals whose disabilities are not permanent. In order to be placed on the TDRL, the individual must have a disability that renders him or her unfit to perform the duties of his or her office, grade and rank, and the disability must be rated at a minimum of 30%. Temporary Disability retired pay terminates at the end of 5 years. See Chapter 8 of COMDTINST M1850.2C (Physical Disability Evaluations Manual).

The applicant alleged that he should have been discharged with a higher disability rating than the 10% rating he received at the time of discharge. He stated that on May 17, 2002, the Department of Veterans Affairs (DVA) rated his condition as 40% disabling under the Veterans Administration Schedule for Rating Disabilities (VASRD)² code 5293 (Intervertebral Disc Syndrome) based on the same medical evidence the Coast Guard used for its 10% disability rating under VASRD code 5295. He asserted that the Coast Guard should have used VASRD code 5293 to rate his disability rather than 5295.

According to the applicant, his back condition began in 1991 when a condenser fell on his back while working on a Coast Guard cutter. In 1998 he had a spinal fusion to replace a destroyed disc and after a period of limited duty was found fit for full duty by the Central Physical Evaluation Board (CPEB)³ on January 12, 1999. After his return to full duty, he was assigned to a cutter. He stated that during this assignment, the pounding of 15 to 29-foot seas against the cutter caused his back to become very painful. He stated that in 2001 another CPEB determined that he was unfit for duty due to lumbosacral strain with characteristic pain on motion and assigned him a 10% disability rating.

The applicant alleged that he was not properly counseled about his choices with respect to the 2001 CPEB findings. He stated that he did not believe the 10% disability rating was fair and sought advice on how to challenge it. He stated that he was told that he could only challenge it if he came to Washington, D.C., which he was hesitant to do because of the September 11 disaster. He said that he spoke to his assigned military counsel by telephone and was told that "there was no way my percentage disability [rating] would be increased whether I flew to Washington, D.C. or not." The applicant further stated that the lawyer told him that the only way he would get a higher disability rating was "if [he] showed up in a wheel chair and could not walk." He stated that he has subsequently learned that this advice was not accurate and has filed for a correction of his military record. He stated that he would like "a fair chance to be medically retired after almost fifteen years of dedicated service to the U.S. Coast Guard."

² Article 2.C.3.(3)(a) of COMDTINST M1850.2C states that the CPEB, FPEB and PRC will use the DVA Schedule for Rating Disabilities (VASRD), in determining the percentage of disability at the time of evaluation, the code number and the diagnostic nomenclature for each disability.

³ The CPEB is a permanently established administrative body convened to evaluate the following on the basis of records only: a. the fitness for duty of active duty and reserve members; and b. the fitness for duty of members currently on the [TDRL]. Article 4.A.1. of COMDTINST M1850.2C. The CPEB also recommends rating for those disabilities which are unfitting.

SUMMARY OF THE RECORD

The applicant first injured his back in 1991. He had surgery on his back to replace a disc in 1998. A CPEB found him fit for full duty in January 1999.

According to a medical entry, in September 1999, the applicant began to experience back pain again while bending over to get a tool. He sought treatment for the back pain on at least nine occasions from September 1999 until his Physical Disability Evaluation System (PDES)⁴ processing (2001). On several occasions, he was prescribed sick in quarters or light duty, in addition to medications and exercise.

On July 24, 2001, approximately two years after the 1999 CPEB returned the applicant to full duty, a new Initial Medical Board (IMB)⁵ was convened to examine and evaluate his condition. The IMB reported that according to the applicant, he continued to have persistent lower back pain that affected his ability to perform his assigned Coast Guard duties. The IMB further reported:

According to a review of the health record, the [applicant] began complaining of worsening lower back pain and spasms in Sep[te]mber] 99. [He] was evaluated by CDR [H] . . . at ISC Alameda Health Services Division . . . Jul[y] 00 and was diagnosed with chronic lower back pain status post L5-S1 spinal fusion in April 98. [The applicant] was referred to the medical center at Travis AFB for follow-up. He was evaluated by Colonel [S] . . . Weight loss, abdominal strengthening, stretching, and avoidance of heavy lifting was recommended⁶. Captain [S] [United States Air Force] evaluated [the applicant] in November 00 and April 01 . . . where consideration of a medical board was discussed. [The applicant] was evaluated by Ensign [J] PA-C [physician's assistant] initially April 01. He has continued to have persistent lower back pain that is, according to the [applicant], affecting his ability to perform his duties as a member of the Aids to Navigation team. [The applicant] also states he has bilateral

⁴ The PDES exists to ensure equitable application of the provisions of Title 10, United States Code, Chapter 61, which relates to the separation or retirement of military personnel by reason of physical disability. Its components are the Medical Board, Central Physical Evaluation Board, Formal Physical Evaluation Board, Physical Review Counsel, and Physical Disability Appeal Board. See, Chapter 1 of COMDTINST M1850.2C.

⁵ An IMB is a written report of a medical board convened by other than the order of the president of the CPEB to evaluate a member's fitness for duty and to make recommendations consistent with the findings. Article 2.A.24 of COMDTINST M1850.2C.

⁶ Colonel S also noted that the applicant's x-rays showed the lumbar fusion to be intact and the applicant was likely suffering from mechanical back pain.

radicular pain of the lower extremities that does not extend past his knees. [The applicant] had been prescribed . . . Elavil, Neurontin, Flexeril, and Percocet, with limited success. [The applicant] had been placed [in a limited duty status], so that he may avoid activities that aggravate his lower back . . . [with] no climbing, prolonged standing or walking, and no lifting.

[The applicant] initially injured his back approximately 11 years ago. He was diagnosed with symptomatic degenerative disc disease with annular tearing at the L5-S1 level. After intensive physical therapy and activity modification without improvement, [the applicant] underwent an anterior spinal fusion procedure at the L5-S1 level with threaded bone dowels. An [IMB] was convened in Oct[ober] 98 with the recommendation of fit for limited duty for six months.

The 2001 IMB reported that the current physical examination revealed that the applicant was an alert, cooperative patient in no acute distress, with a normal gait. His lower back was tender to palpation at the L5-S1 level, and the applicant had limited range of motion in all planes due to lower back pain. The applicant had no muscle spasms, his musculoskeletal appearance and neurological examination were normal, and his straight leg raise examination was negative. The IMB noted that there were no other disabilities and reported that radiological studies taken in July 2000 showed the bone dowels to be in good position with no abnormality. It also reported that laboratory studies were all within normal limits.

The IMB report stated that the applicant's current treatments consisted of modified activities, 10 mg Flexeril as needed for recurrent lower back spasms, and 200 mg Celebrex daily. The IMB stated that the applicant's prognosis was fair and that he would not return fit for full duty or be fit for worldwide assignment. The IMB recommended referral of the case to the CPEB, with the following diagnosis:

(1) Lumbago . . . and (2) Status post Lumbosacral fusion, anterior technique . . . are correct and the patient is unlikely to return fit for full duty or be qualified for worldwide assignment.

On August 16, 2001, the applicant signed a statement that he did not desire to submit a statement in rebuttal to the findings and recommendations of the medical board.

On August 16, 2001, the applicant's commanding officer (CO) wrote an endorsement to the IMB, agreeing with it. He stated that the applicant was not fit for full duty and had been performing only administrative duties. He did not believe that the applicant would be capable of completing his duties as engineering petty officer on

the aids to navigation team, which included boat crew/engineer, ATON technician with ability to climb ATON structures for servicing, and engineering petty officer responsibilities. The CO opined that due to the applicant's current condition, his potential for further usefulness was not favorable.

On October 2, 2001, the CPEB found that the applicant was unfit for continued active duty and recommended that the Commandant discharge him with severance pay. The CPEB determined that the applicant was 10% disabled due to "Lumbosacral strain with characteristic pain on motion" (code 5295 under the VASRD).

On October 10, 2001, the applicant accepted the findings of the CPEB and waived his right to a formal hearing before the Formal Physical Evaluation Board (FPEB). On October 25, 2001, the Commandant approved the findings and recommendation of the CPEB and directed the applicant's separation with severance pay. The applicant was separated on November 28, 2001.

DEPARTMENT OF VETERANS AFFAIRS (DVA)

The applicant received a 40% disability rating from the DVA for "status post anterior spinal fusion, L5-S1, lumbar spine." The DVA rating decision offered the following explanation:

The service medical records show that on September 18, 1991, the veteran reported that he bent over and reached for a tool and felt a spasm in his lower back. The pain was noted as a constant numbing sensation that runs down to the back of legs. On April 29, 1998, the veteran had an anterior spinal fusion at L5-S1. After the back surgery the veteran continued to complain of constant low back pain with occasional radicular shooting pain down to both legs and to his knees, including numbness and tingling sensation to his right foot. He was medicated . . . He was diagnosed with chronic low back pain secondary to anterior spinal fusion, L5-S1.

An evaluation of 40 percent is assigned under diagnostic code 5293 from November 29, 2001. An evaluation of 40 percent is assigned for recurring attacks of severe intervertebral disc syndrome with only intermittent relief. The 40 percent evaluation is assigned because the veteran continues to experience recurrent back problems with only intermittent relief. A

higher evaluation of 60 percent is not warranted unless there is pronounced intervertebral disc syndrome with persistent symptoms compatible with sciatic neuropathy, characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc and little intermittent relief.

VIEWS OF THE COAST GUARD

On October 15, 2003, the Board received an advisory opinion from the office of the Judge Advocate General (TJAG). He recommended that the applicant's request for relief be denied for lack of proof of error or injustice. TJAG argued that the applicant has failed to show by a preponderance of the evidence that the Coast Guard committed an error or injustice by rating his disability as 10% disabling. He stated that absent strong evidence to the contrary, it is presumed that Coast Guard officials carried out their duties lawfully, correctly, and in good faith. Arens v. United States, 969 F. 2d 1034, 1037 (D.C. Cir. 1990). He stated that the applicant's mere assertion that he should have received a higher disability rating from the Coast Guard because the DVA rated him higher does not prove that the Coast Guard's rating is erroneous.

TJAG argued that the DVA findings regarding the applicant's disabilities have no bearing or legal effect on the Coast Guard's medical findings. In this regard, TJAG stated that the DVA determines to what extent a veteran's civilian earning capacity has been reduced as a result of physical disabilities. In contrast, the Coast Guard determines if a member is unfit to perform his military duties and then rates the extent to which the unfitting medical condition prevents the member from performing his duties. He further stated as follows:

The procedures and presumptions applicable to the DVA evaluation process are fundamentally different from, and more favorable to the veteran than, those applied under the PDES (Coast Guard's Physical Disability Evaluation System). The DVA is not limited to the time of Applicant's discharge. If a service-connected condition later becomes disabling, the DVA may award compensation on that basis. The DVA's subsequent finding that the Applicant was 40% disabled isn't binding on the Coast Guard nor indicative of differing or conflicting opinions between Coast Guard and DVA medical officials. The sole standard for a disability determination in the Coast Guard is unfitness to perform duty . . . In any event any long-term diminution in the Applicant's earning capacity attributable to his military service is properly a matter of the DVA, not the Coast Guard or the BCMR.

Last, TJAG stated that the applicant was afforded all of his due process rights with respect to the processing of his case through the physical disability evaluation system.

TJAG attached comments from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. CGPC stated that input was obtained from the Assistant Senior Medical Officer and submitted an unsigned statement purportedly from this individual. CGPC summarized the medical officer's input as follows:

In my opinion [the applicant's] rating was consistent with our rating for the [applicant] who had back surgery to remove the herniated disc and with minimal residual objective findings. His physical exam on July 24 01 noted normal gait, no muscle spasm, normal musculoskeletal appearance of his lower extremity, normal neurological exam, straight leg raise examination was negative, some tenderness on L5-S1 level and had limited range of motion due to pain. We do use code 5295 . . . if herniated disc is still present, pre or post operative.

CGPC asserted that the CPEB was conducted in accordance with regulations and the applicant was provided with all of his due process rights. He also stated that the Physical Evaluation Branch found that the use of VASRD 5295 by the Coast Guard was an appropriate exercise in judgment because medical evidence showed that the applicant no longer suffered from a herniated disc. CGPC did not submit a signed statement from the individual offering this input.

CGPC argued that the evidence does not support the applicant's allegation that he received poor advice from his counsel. In this regard, he stated that the applicant's appointed counsel, with years of experience in advising members in the PDES process, provided the applicant a blunt, realistic appraisal of the possible outcome of his case if he did not accept the CPEB findings and recommendation. He stated that the applicant exercised his right to accept or reject the lawyer's advice.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On October 30, 2003, a copy of the Coast Guard views was mailed to the applicant with an invitation for him to submit a response. He did not submit a response.

APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be “unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay” may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, “at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.” Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that “[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it.”

Veterans Affairs Schedule for Rating Disabilities (38 C.F.R. part 4)

VASRD code 5293 is for intervertebral disc syndrome. For a 60% disability rating the condition is pronounced, "with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent relief." For a 40% disability rating, the condition is severe, with recurring attacks and with intermittent relief. For a 20% disability rating, the condition is moderate with recurring attacks. A 10% disability rating is awarded for a mild condition, and a 0% disability rating is awarded for a post-operative condition that is cured.

VASRD Code 5295 is for lumbosacral strain. For a 40% disability rating the condition must be severe, "with listing of whole spine to opposite side, positive Goldthwaite's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion." A 20% disability rating is awarded for lumbosacral strain that includes muscle spasms on extreme forward bending, loss of lateral spine motion, unilateral, or in a standing position. A 10% disability rating is awarded for lumbosacral strain with characteristic pain on motion, and a 0% disability rating is awarded when only slight subjective symptoms are present.

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. The applicant requested an oral hearing. The Chair, under section 52.31 of title 33, Code of Federal Regulations, recommended disposition on the merits without a hearing. The Board concurred in that recommendation.

3. The applicant has submitted insufficient evidence to prove that the Coast Guard committed an error or injustice by rating his disability under VASRD code 5295 rather than VASRD code 5293. Nor has he submitted sufficient evidence to prove that his 10% disability rating from the Coast Guard should have been higher.

4. The Coast Guard diagnosed the applicant's permanent disability as lumbosacral strain with characteristic pain on motion under VASRD code 5295 and rated his condition as 10% disabling. In contrast, the DVA rated the applicant as being 40% disabled for intervertebral disc syndrome⁷ under VASRD code 5293. The fact that the DVA used a different code to rate the applicant's disability does not establish that the Coast Guard committed an error in using code 5295. Nothing in the Physical Disability Evaluations System (PDES) Manual requires the Coast Guard and the DVA to agree on a common VASRD code with which to rate a disability. Article 9.A.14 of COMDTINST M1850.2C (Physical Disability Evaluation System (PDES) Manual) instructs participants in the PDES to use great care in selecting a member's VASRD code number and in its citation on the rating sheet. There is nothing in the record that indicates such care was not exercised by the CPEB.

5. The rating of the applicant's disability under different codes by the Coast Guard and the DVA only shows that there were two different professional opinions as to which code best described the applicant's permanent disability. The applicant has not presented any medical opinions or pointed to anything in the record, other than the DVA rating decision itself, to prove that the Coast Guard's judgment in this matter was flawed. Even if the applicant could prove that the Coast Guard should have rated his disability under VASRD code 5293, he has not provided persuasive evidence that a Coast Guard rating under that code would have been higher than 10%. The disability ratings under 5293 in 2001 were 0%, 10%, 20%, 40%, or 60%.

6. The Board, having determined that the applicant failed to prove that the use of VASRD code 5295 to rate his disability was erroneous, must now determine if the 10% disability rating under this code is in error or unjust. The 2001 IMB reported that the applicant's medical examination showed a limited range of motion due to lower back pain but no muscle spasms, and his straight leg raising was negative. The examination also revealed no abnormal musculoskeletal appearance, and the neurological examination was normal. Radiological studies taken in July 2000 showed the bone dowels to be in good position with no abnormality. The record supports the

⁷ For a 40% rating under code 9293 in 2001, the intervertebral disc syndrome must have been severe with recurring attacks and with intermittent relief.

applicant's 10% disability rating for lumbosacral strain with characteristic pain on motion at the time of discharge. According to the VASRD, to qualify for the higher 20% disability rating under code 5295, the applicant must have exhibited muscle spasms on extreme bending and/or loss of lateral spine motion. For a 40% rating he must have exhibited one or some of the following: "listing of the whole spine to the opposite side, positive Goldthwaite's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion." Nothing in the IMB report supports a 20% or 40% disability rating under code 5295. The DVA rating decision contained no objective findings that contradict the findings of the IMB and CPEB. Therefore, the applicant has not presented sufficient evidence to show that the Coast Guard committed an error by assigning him a 10% disability rating at the time of his discharge.

7. Moreover, error is not established because the Coast Guard rated the applicant differently than the DVA. This Board has consistently held that a higher disability rating from the DVA does not alone establish that the Coast Guard committed an error or injustice by assigning a lower disability rating. In Lord v. United States, 2 Cl. Ct. 749, 754 (1983), the Court of Federal Claims stated "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The Veterans Administration determines to what extent a veteran's earning capacity has been reduced as a result of 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 a physical disability. [Citation omitted.] Accordingly, Veterans' Administration ratings are not determinative of issues involved in military disability retirement cases."

8. Importantly, the Board finds that the applicant, after consultation with a lawyer assigned to counsel him on whether to accept or reject the CPEB's recommendation, signed a statement accepting the CPEB's finding that he was unfit for continued active duty and should be discharged with severance pay due to physical disability rated at 10% disabling. The applicant also waived his right to a formal hearing before the FPEB, where his objection to the CPEB findings could have been addressed prior to his discharge. The applicant alleged that his lawyer erroneously counseled him that it would be fruitless to challenge the 10% disability rating and he relied on that advice. There is no other evidence in the record of what the lawyer told the applicant, but it is clear that the applicant accepted the findings of the CPEB and waived his right to an FPEB. Absent persuasive proof of error or injustice, the Board will not disturb findings rendered by the Coast Guard.

9. The applicant received all due process to which he was entitled under the Physical Disability Evaluation System and has failed to prove that the Coast Guard committed an error or injustice in his case.

10. Since the applicant failed to prove he should have had a higher rating, the issue with respect to placing him on the TDRL is moot. For placement on the TDRL, a member must have at least a 30% disability rating. The applicant's disability rating is 10%.

11. Accordingly, the applicant's request for relief should be denied

ORDER

The application of formerXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Philip B. Busch

Marc J. Weinberger

George A. Weller