

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-124

FINAL DECISION

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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 May 25, 2004, upon receipt of the applicant's completed application and records.

This final decision, dated February 24, 2005, 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 Coast Guard disability rating from 50% to 90%. In subsequent correspondence, he amended his application to request a 100% disability rating.

ALLEGATIONS

The applicant alleged that he should have been received a disability rating higher than 50% from the Coast Guard in 2001 because the Department of Veterans Affairs (DVA) has deemed all of his disabilities to be service connected and has awarded him a 100% service connected disability rating. He further stated that he "seeks an increase of the 50% rating from the USCG Medical Board to 100% under the criteria established under VA Code 8100 [migraines]."

The applicant stated that he had the following medical conditions prior to his retirement from the Coast Guard by reason of physical disability and that the DVA has

deemed each condition to be service connected. (The parenthetical contains the percentage of disability awarded by the DVA for that condition.)

[Hypertension] (10%)
Gastroesophageal Reflux Disease (40%)
Obstructive Sleep Apnea (50%)
Diabetes Mellitus, with Cataract (20%)
Left Upper Extremity, Peripheral Neuropathy associated with Diabetes Mellitus with Cataract (20%)
Right Upper Extremity, Peripheral Neuropathy associated with Diabetes Mellitus with Cataract (20%)
Neurogenic Bladder and Enlarged Prostate (40%)
Bowel Function, Autonomic Neuropathy (10%)
Left lower Extremity, Peripheral Neuropathy associated with Diabetes Mellitus with Cataract (10%)
Right lower Extremity, Peripheral Neuropathy associated with Diabetes Mellitus with Cataract (10%)
Pes Planus (0%)
Sinusitis (0%)
Tension Headaches (30%)
Right Lower Extremity, Peripheral Vascular Disease (0%)
Left Lower Extremity, Peripheral Vascular Disease (0%)
Left Carpal Tunnel Syndrome (10%)

The applicant stated that he is currently taking thirteen different medications, including insulin and that he requires various medical supplies such as syringes, incontinence briefs, and diabetic shoes.

SUMMARY OF THE RECORD

The applicant, who had prior military service, enlisted in the Coast Guard on March 29, 1993. He was retired by reason of physical disability on May 14, 2001, with a 50% disability rating due to Diabetes Mellitus, rated as 40% disabling, Varicose Veins in the right leg with intermittent edema rated as 10% disabling, and Varicose Veins in the left leg with intermittent edema rated as 10% disabling. At the time of his retirement, he had approximately eleven years and nine months of active duty.

The applicant was a chief food service specialist who underwent a medical examination for the purpose of an initial medical board (IMB)¹ on October 30, 2000. The

¹ An IMB is a written report of a medical board convened by appropriate authority to evaluate a member's fitness for duty and to make recommendations consistent with the findings. Article 2.A.24 of the PDES Manual.

IMB determined that the applicant was not fit for duty and diagnosed him as suffering from the following:

- "1. Diabetes Mellitus Type 2 requiring Insulin
- "2. Peripheral Autonomic Diabetic-Neuropathy of the lower extremities moderate to severe
- "3. Incontinence probably secondary to Autonomic Neuropathy of the bladder with decreased bladder compliance
- "4. Hypertension (fair control)
- "5. Chronic elevation of Catecholamines etiology unknown
- "6. Hyperlipidemia
- "7. Gastroesophageal Reflux with Esophagitis and Hiatal Hernia"

The IMB further reported the following:

According to a review of the health record, systems, social, and family histories the evaluatee was seen at the clinic in March 2000 and diagnosed with Diabetes Mellitus. . . . [The applicant] was sent to [an] Internal Medicine specialist since he also had hypertension with fair control (since 1994) and hyperlipidemia (since 1996). He was seen by the Internist from March to June 2000 and was treated with oral hypoglycemia agents. While [he] was receiving treatment with the Internist, he complained of leg pain and his blood sugar, blood pressure and lipids were not very well controlled . . . After he was seen by Bethesda Endocrinology on 24Jul00, [he] was started on Insulin injections . . . and continued with the rest of his medications . . . [The applicant] was evaluated at a diabetics clinic on 24 Aug00. His exam was essentially [within normal limits] including blood pressure . . . [The applicant] has continued with lower extremity pain and burning sensation despite no apparent sensory deficits. The Endocrinologist believes this is an autonomic peripheral neuropathy related to his diabetes. [The applicant] has been seen by a Cardiologist for typical chest pain. He had Nuclear Stress Testing which showed no ischemia or infraction but his blood pressure response was elevated, probably poor control versus deconditioning. The Cardiologist's impression was that this pain was more gastrointestinal in nature since the patient had improvement with Prevacid. [The applicant] was later evaluated by a gastroenterologist and an EGD was done which showed esophagitis with gastroesophageal reflux and a hiatal hernia. [The applicant] was also seen by the urologist for incontinence. A cystoscopy showed mild prostatic obstruction and the cystourethrogram (urodynamic testing) showed diminished capacity for increased bladder filling sensation. The urologist impression is decreased bladder compliance . . . [The applicant was seen by the ophthalmologist [who] found a small

cataract on the left eye, but no retinopathy. The physical exam was [within normal limits] except for a body habitus consistent with generalized obesity, mild varicose veins of the lower extremities, left eye cataract, mild enlarged prostate and blood pressure ranging from 142/90 to 128/96.

The IMB noted in an addendum that the applicant had been diagnosed with sleep apnea. (Subsequently, the director for a sleep disorders center stated that a Nasal CPAP "appears to be an effective mode of therapy for [the applicant]"). It also stated that a neurologic evaluation of the lower extremity pain and an audiologic appointment were pending. The IMB referred the applicant's case to the Central Physical Evaluation Board (CPEB)² for further determination. The applicant did not submit a rebuttal to the IMB.

On December 22, 2000, the applicant's commanding officer (CO) commented on the IMB and agreed that the applicant was not fit for full duty. He stated that he had been informed that neither continued inpatient nor outpatient treatment would rectify the applicant's condition to return him to full duty status and allow availability for worldwide assignment. The CO further stated, "[the applicant] is one of my top Chief Petty Officers. His dedication and faithful years of service entitle him to favorable consideration to receive the maximum allowable percentage of disability permitted under law."

The CPEB met on January 23, 2001, to consider the applicant's case. It determined that the applicant was not fit for duty due to Diabetes Mellitus that required insulin, a restrictive diet, and regulated activity.³ The CPEB gave the applicant a 40% disability rating for this condition under code 7913 (Diabetes Mellitus) of the Veterans Affairs Schedule for Rating Disabilities⁴ (VASRD).

² The CPEB is a permanently established administrative body convened to evaluate, on a record basis, whether active duty, reservists, or temporarily disabled retired members are fit for duty, and if they are not, to determine and rate their disabilities. Article 4.A.1. of the PDES Manual.

³ According to Article 9.B.48 of the PDES Manual, "under Norman circumstances, members whose Diabetes Mellitus requires insulin for control will be found unfit for continued duty and not retained."

⁴ The PDES manual requires the CPEB, FPEB and PRC to use the VASRD in determining the percentage of disability at the time of evaluation. 38 CFR 4.1 states that the rating schedule is primarily guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage rating represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries.

On January 25, 2001, with the advice of counsel, the applicant rejected the CPEB recommendation and demanded a hearing before the Formal Physical Evaluation Board⁵ (FPEB).

On February 27, 2001, the applicant's CO sent a letter of support to the FPEB. He stated that the applicant has been assigned to the dining facility as food service officer, with responsibility for managing one of the largest facilities in the Coast Guard. The CO described the applicant as an outstanding performer, who "even with his present medical situation while suffering constant pain from several chronic debilitating injuries, . . . exceeds all expectations and displays a level of dedication and commitment that is truly inspirational."

The CO further stated that the applicant's supervisor had noticed a decline in the applicant's ability to sit for long periods of time, walk any significant distance or stand for extended periods of time. He attested to the fact that the applicant's diabetic neuropathy appears to cause the applicant severe pain and discomfort on a regular basis.

On March 2, 2001, the FPEB met and considered the applicant's case. It agreed with the CPEB that the applicant was 40% disabled because of Diabetes Mellitus, but it also granted the applicant a 10% disability rating for varicose veins with intermittent edema of the right leg, and a 10% disability rating for varicose veins with intermittent edema of the left leg under VASRD code 7120 (Varicose Veins). Taking the bilateral factor⁶ into consideration, the FPEB gave the applicant a combined disability rating of 52% rounded down to 50%.

On March 2, 2001, the applicant acknowledged receipt of the recommended findings of the FPEB and indicated his intention to submit a rebuttal and not to waive the 15 working day waiting period.

On March 29, 2001, the recorder for the FPEB noted that the "the period during which rebuttal may be filed has elapsed and no rebuttal has been received."

On April 10, 2001, the Chief Counsel (now the Judge Advocate General (JAG)) approved the PDES proceedings, and on April 16, 2001, the Chief of the Administrative

⁵ The FPEB is a fact-finding body that holds an administrative hearing to evaluate a member's fitness for duty and to make recommendations consistent with the findings. Article 5.A.1. of the PDES Manual.

⁶ Article 9.A.12. of the PDES Manual explains that the bilateral factor is used when a partial disability results from injury or disease of both arms, or both legs, or of paired skeletal muscles. In this regard, the rating for the disabilities of the right and left sides will be combined as usual, and 10 percent of this value will be added (not combined) before proceeding with further combinations, converting to degree of disability.

Division approved the PDES proceedings and directed that the applicant be retired from the Coast Guard due to a physical disability effective May 15, 2001.

DEPARTMENT OF VETERANS AFFAIRS (DVA)

In March 2002, the applicant received a combined 90% disability rating from the DVA for the conditions described by the applicant under the allegations portion of this decision, except for a 0% disability rating for tension headaches and no rating at all for carpal tunnel syndrome. Subsequently, the applicant asked the DVA for increased compensation. On December 4, 2003, the DAV increased the applicant's disability rating to 100% because it granted him a 30% disability rating for tension headaches (originally rated at 0% disabling) and a 10% disability rating for carpal tunnel syndrome.

VIEWS OF THE COAST GUARD

On September 16, 2004, the Board received an advisory opinion from the office of the JAG. He recommended that the applicant's request for relief be denied because the applicant had not shown that the Coast Guard committed an error or injustice.

The JAG argued that the applicant failed to show by a preponderance of the evidence that the Coast Guard committed an error or injustice by rating his disabilities as 50% 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 DVA 100% disability rating over a year after the applicant's retirement is not persuasive evidence of error by the Coast Guard in light of the different standard employed by the DVA.

The JAG 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, the JAG 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 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

finding that the Applicant was 100% disabled is not relevant to the Coast Guard's finding that he was 50% disabled based solely on the conditions that rendered him unfit for continued service at the time of his retirement. 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, the JAG 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 (PDES). He noted that the applicant, with the advice of counsel, waived his opportunity to challenge the Coast Guard's rating of his disability before the Physical Review Council (PRC).⁷

The JAG attached comments from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. CGPC stated that his review of the evidence in the case did not reveal an error or injustice by the Coast Guard. He stated that the medical record indicated that the FPEB's findings were reasonable. He further stated that the applicant was afforded his full due process rights within the PDES process.

CGPC also stated that it is possible that the applicant's condition changed or worsened after his separation, but regardless of this possibility, the Military Services and the DVA's disability evaluation system are different and serve different purposes. He stated that the military services first determine unfitness for duty and then rate only the extent that the unfitting medical condition or conditions prevent the member from performing their duties, but DVA ratings are based on an evaluation of the whole person, including the evaluation of the evaluatee's temporary employability status and earning capacity. He asserted that the BCMR should evaluate the DVA rating decision in light of the understanding that DVA ratings are not determinative of the issues involved in military disability rating determinations.

The advisory opinion also included a statement from a chief warrant officer - W2 (CWO2) who is the administrative officer for the Physical Disability Evaluation Branch. He stated the following:

[The applicant] was rated 50% [disabled] for sleep apnea. His sleep studies show that he had a mild sleep apnea and his March 9, 2001, follow-up . . . said that his nasal CPAP worked incredibly well and

⁷ Article 1.C.4. of the PDES Manual states that the PRC reviews CPEBs and FPEBs in which the evaluatees rebut the findings or recommended disposition.

controlled his sleep apnea. Hence, according to the Medical Manual 3F he is fit to be retained in [Coast Guard].

In regard to his Diabetes Mellitus he is a type II but needed insulin to better control his blood sugar. His diabetes is complicated with peripheral Autonomic Neuropathy which affected his lower extremities and bladder. Better control of his blood sugar, has improve his bladder problem. The bilateral lower extremities neuropathy was noted as an impairment at the time when he was separated, but the Board considered his Varicose Veins to be more disabling hence they rated Varicose Veins instead (cook who stands on feet for prolong period of time).

The remainder of the diagnoses . . . met retention standard 3F of Medical Manual.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On September 30, 2004, a copy of the Coast Guard views was sent to the applicant for a response. The BCMR did not receive 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.”

Physical Disability Evaluation System (PDES) Manual (COMDTINST M1850.2C)

Article 2.B.c.2. states that 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.

Article 2.C.2.i states in pertinent part that "a member may have physical impairment ratable in accordance with the VSARD, such impairments do not necessarily render him or her unfit for military duty."

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 mistakenly believed that a DVA determined service connected disability required the Coast Guard to find such service connected disability unfitting for continued military service. According to Article 2.A.47. of the PDES Manual, service-connected means that a disability was incurred or aggravated in the line of duty in the military. However, Article 2.A.50. defines unfit for continued duty as the status of a member who is unable to perform the duties of office, grade, rank, or rating because of a physical disability. Article 2.C.2.f.i. makes it clear that a member may have physical impairments ratable in accordance with the VASRD, but such impairments may not necessarily render the member unfit for military duty. Taking into consideration the three provisions just discussed, it is the applicant's burden to prove that conditions other than those identified as disabling by the FPEB caused him to be unfit for military duty, i.e. unable to perform the duties of his office, grade, rank, or rating.

3. The applicant has not pointed to any specific medical evidence in his record or to any other evidence that proves that any of his other conditions caused him to be unfit for duty. While the applicant suffered from numerous conditions, it appears that only the Diabetes Mellitus requiring insulin and the lower extremity pain and edema rated by the Coast Guard under VASRD code 7120 (Varicose Veins) caused the applicant to be unfit to perform the duties of his office and rate. Even if the applicant's lower extremity conditions should have been rated as Neuropathy resulting from Diabetes Mellitus (as done by the DVA) rather than Varicose Veins, there is no evidence that the disability rating for Neuropathy in each leg would have been more than the 10% awarded by the Coast Guard for Varicose Veins.

4. Article 2.C.2.a. states that the sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of one's rank or rating. In this regard, the CO's statement is critical in

determining how the applicant's conditions affected his ability to do his job. The CO's statement that the applicant was unable to sit for long periods of time, walk any significant distance or stand for extended time supports the findings by the FPEB that the applicant's Diabetes Mellitus and Varicose Veins (leg pain and edema) caused the applicant to be unable to adequately perform his duties. There is no indication in the record that any of the applicant's other conditions caused him to be unable to perform the duties of his rate and rank, although each may be service connected for the purposes of the DVA.

5. In addition, the applicant has submitted insufficient evidence to prove that the Coast Guard committed an error or injustice by only rating his disability as 50% disabling. The only evidence submitted by the applicant to prove error by the Coast Guard is the higher DVA rating. However, a higher DVA rating does not establish error by the Coast Guard. 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."

6. Last, the applicant suggests that he should have a higher disability rating from the Coast Guard because in December 2003 the DVA rated his tension headaches as 30% disabling, and his carpal tunnel syndrome as 10% disabling. However, the applicant points to no evidence in the record, and the Board finds none, that the tension headaches or the carpal tunnel syndrome caused the applicant to be unable to perform the duties of his rate at the time of his 2001 retirement by reason of physical disability. As stated above, a member may have impairments that do not render the member unfit for military duty. The applicant failed to point to the evidence establishing the alleged error, even after receiving the advisory opinion. Insufficient evidence exists in the record to prove that the Coast Guard committed an error by assigning the applicant a 50% disability rating.

7. The applicant received all of the due process to which he was entitled under the PDES. The Board notes that the applicant failed to submit a rebuttal objecting to the FPEB findings and recommendations, after indicating that he would do so. An objection or rebuttal by the applicant would have led to a review by the Physical Review Counsel (PRC) because Article 6.B.1. of the PDES Manual states that the PRC

reviews every FPEB in which the evaluatee rebuts the findings and recommended disposition.

8. In passing, the Board notes that the applicant is receiving 100% disability compensation from the DVA and if he were found to be 100% disabled from the Coast Guard, he would be required to choose between compensation from the DVA or from the Coast Guard. He could not receive both. DVA compensation is tax-free where disability retirement from the Coast Guard is not. In light of this finding, even if the Board were incorrect in its findings in this case, the applicant would not be harmed.

9. Accordingly, the applicant has failed to prove an error or injustice in this case and his request for relief should be denied.

ORDER

The application of _____ USCG (Ret.), for correction of his military record is denied.

Harold C. Davis, MD

Audrey Roh

Marc J. Weinberger