

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-001

FINAL DECISION

AUTHOR: Andrews, J.

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 October 1, 2004, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated June 9, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he was medically retired, rather than discharged, from the Coast Guard because of his physical disability on May 23, 2003. He stated that after the Coast Guard discharged him with severance pay and a 10% disability rating, the Department of Veterans' Affairs (DVA) awarded him a 60% rating for his service-connected disability.

SUMMARY OF THE RECORD

On March 23, 1999, the applicant enlisted in the Coast Guard. During his pre-enlistment physical examination on February 2, 1999, the examining physician noted that the applicant had moderate but asymptomatic pes planus (flat feet) and asymptomatic bilateral bunions.¹ The examining physician also noted that the applicant had

¹ A bunion is an abnormal bony prominence on the head of the first metatarsal bone (the end closest to the big toe), which may cause a displacement of the toe. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29TH ED. (2000), p. 252.

received an insurance settlement for a back injury following a motor vehicle accident in 1998. His medical records indicate that he was treated for lower back pain in 1998, but xrays and a CT scan of the back showed no evidence of disc herniation, and the applicant denied any ongoing pain during his pre-enlistment physical examination.

The applicant's performance record includes several negative administrative entries about poor performance, including one about a dishonest attempt to remove negative entries from his unit record and to trick his Personnel Reporting Unit to follow suit with the PERSRU copy of his record. He was counseled about his lack of initiative and effort several times, and he was not recommended for advancement in 2001 and 2002.

On April 27, 2001, a podiatrist reported to the applicant's command that the applicant "has severe hallux valgus with bunion deformity on both feet. He has both a hypermobile and elevated first ray which is placing pressure on the second metatarsal head of both feet. He also has plantar fasciitis which is due to his tight gastrocnemius muscle and severe pronated [flat]foot." The podiatrist stated that the applicant needed surgery and that the recovery period would be long.

On June 6, 2001, the applicant underwent a bunionectomy, gastrocnemius recession, and first metatarsal osteotomy on his right foot. On November 26, 2001, he underwent the same or similar procedures on his left foot and removal of the surgical screw from his right foot.

In March and April 2002, the applicant reported to his physical therapist that his feet became very sore when he had to stand for long periods at work or when playing golf. On April 19, 2002, a podiatrist noted that the applicant continued to have pain and a limited range of motion in his foot following his surgeries and that he should be referred to a medical board for evaluation.

On June 3, 2002, the applicant's physical therapist noted that the applicant could stand for between 20 and 40 minutes with foot pain that the applicant rated at about 3 or 4 on a scale of 10 and that, if he stood for a longer period, the pain would worsen. On June 21, 2002, the applicant's podiatrist reported that despite surgery and the use of orthotic footwear, the applicant would "probably always have an achy foot when he's on his feet for long periods of time, standing on a steel [boat] deck."

On July 1, 2002, an Initial Medical Board (IMB) found that the applicant suffered from "status post lapidus bunionectomy right and left foot for hallux abductovalgus," "plantar fasciitis, bilateral," and "pes planus" and that each of these conditions existed prior to his enlistment but was aggravated by his military service. The IMB reported that the applicant had not been fit for full duty since the first foot surgery in June 2001. It described his condition as "right antalgic [modified to reduce pain] gait, bilat[eral]

healed scars in both feet, bilat[eral] limited range of motion MTP joint with hardware on left 1st metatarsal cuneiform, neurovascular exam intact." The IMB found that the applicant was not expected ever to be fit for full, unrestricted duty due to "status post lapidus bunionectomy right and left foot for hallux abductovalgus," "plantar fasciitis, bilateral," and "pes planus" and recommended that his case be referred to a Central Physical Evaluation Board (CPEB).

On July 21, 2002, the applicant's physical therapist noted that despite a year of physical therapy, the applicant "continue[d] to complain of aching in both feet, though symptoms are improved with his recent job change, which requires less time spent on his feet. Prognosis for further symptom relief and recovery in both feet is poor." She further stated that the applicant had "achieved maximal benefit from therapy" and that his prognosis would depend upon his future activities, such as his career choice, as "a job which requires prolonged standing will ensure no improvement in [his] symptoms and perhaps worsen the situation." None of the physical therapist's many reports in the record mention any complaint about back, arm, wrist, or hand pain.

On August 20, 2002, the applicant was advised of the IMB's findings and recommendation. He indicated that he would rebut them. On September 4, 2002, he submitted a rebuttal in which he stated that he felt his "back condition is adjunct to the bilateral foot problems being reviewed" and that therefore his back condition should also be evaluated by the CPEB.

On September 5, 2002, the applicant's commanding officer (CO) forwarded the report of the IMB to the Coast Guard Personnel Command (CGPC). He stated that he concurred with the IMB's findings because the applicant "could not stand for prolonged periods and therefore could not perform his duties in the galley."

On October 11, 2002, the CPEB found the applicant to be 0% disabled by "flat-foot, congenital, analogous to flatfoot, acquired," under diagnostic code 5299/5276 of the Veterans Affairs Schedule for Rating Disabilities. The CPEB also found that the applicant had been 0% disabled by the condition when he enlisted and that the condition had not been aggravated by his military service. The CPEB recommended that the applicant be discharged without severance pay.

On October 28, 2002, the applicant sought treatment for "splotches" on his skin and was diagnosed with tinea versicolor (fungal skin infection).

On November 11, 2002, the applicant underwent an evaluation at an occupational medical center. He was diagnosed with mild tinea pedis (athlete's foot) and tinea versicolor. The doctor noted that due to his prior foot surgeries, the applicant was "moderately limited because of limited function of the lower legs and ankles and limit-

ed range of motion, but is able to carry out normal activities of daily living without any trouble.”

On November 11, 2002, the applicant underwent an audiological examination. He complained of tinnitus lasting a minute or less a few times a month and difficulty following conversations. The audiologist reported the applicant’s “hearing sensitivity to be essentially within normal limits for both ears with excellent word recognition ability.”

On December 11, 2002, the applicant sought help for “split second pain [with] flexion at lower cervical [and] upper thoracic [and] lumbar areas” for about one month. He told the doctor that he had a history of lower back pain and had tried to resolve the problem with yoga and stretching exercises. The doctor noted that the applicant had a full range of motion in his back with no tenderness, deformity, or neural deficit. He advised the applicant to lose weight, exercise, attend “back school,” and take Motrin for any pain.

On December 19, 2002, the applicant’s podiatrist reported that the surgeries had been successful and that the applicant was “stable and fixed.” He stated that it was “difficult to tell if [the applicant’s foot problem was] a natural progression or if being on his feet for prolonged periods of time [as a cook for the Coast Guard] aggravated the pre-existing condition and allowed the bunions to get worse, causing pain and the necessity for surgery.”

On February 6, 2003, a hand specialist reported that the applicant had sought treatment for pain in his knuckles and wrist, which he stated occurred “approximately three times a week after using his hands for various activities.” Although x-rays showed no abnormalities, the applicant was diagnosed with tendinitis in both wrists, which “limits the use of his hands and fingers for fine manipulation.”

On March 18, 2003, the FPEB recommended that the applicant be discharged with severance pay due to “pes planus, congenital, analogous to pes planus acquired; moderate,” under VASRD code 5299/5276, which it found to be 10% disabling. The FPEB explained its finding as follows:

Although [the applicant] entered the Coast Guard with Pes Planus and Bunions, there was no evidence presented that reflects its severity or the discomfort experienced prior to initial training and subsequent assignment to duties as a Food Service Specialist afloat. It is clear that service in his rating aggravated this preexisting condition and that attempts to correct the condition through manipulation and surgical intervention further worsened the symptoms.

Also on March 18, 2003, the applicant signed a statement indicating that he would not submit a rebuttal to the FPEB’s report. On April 18, 2003, the report of the

FPEB was approved. On May 22, 2003, the applicant was discharged by reason of physical disability with a 10% disability rating and severance pay.

On June 6, 2003, the DVA awarded the applicant a combined 60% disability rating under the VASRD for service-connected disabilities retroactive to May 23, 2003. The 60% combined rating included 10% for left wrist tendinitis; 10% for right wrist tendinitis; 10% for "status post right foot surgeries" (VASRD code 5284); 10% for "status post left foot surgery" (5284); 10% for surgical scarring of his left lower extremity (7804); 10% for surgical scarring of his right lower extremity (7804); 10% for tinnitus; and 10% for tinea versicolor and tinea pedis.

VIEWS OF THE COAST GUARD

On February 15, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief.

The JAG argued that the "evidence offered by the applicant is insufficient to overcome the presumption of regularity afforded to the Coast Guard." He stated that the DVA employs a different standard when assigning disability ratings and that therefore the 60% rating the applicant received from the DVA does not prove that the 10% rating he received from the Coast Guard was erroneous. *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983). "The DVA determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combinations 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." The JAG stated that the 10% rating was "based solely on the conditions that rendered [the applicant] unfit for continued service at the time of his separation." PDES Manual, Art. 2.C.2.c. The JAG argued that "any long-term diminution in the applicant's earning capacity attributable to his military service is properly a matter for the DVA, not the Coast Guard or the BCMR."

The JAG based his recommendation on a memorandum on the case prepared by CGPC. CGPC argued that the FPEB's findings were reasonable and appropriate and that the applicant did not rebut them. CGPC stated that the applicant "was afforded his full due process rights within the PDES process."

Regarding the discrepancy between the DVA's rating and the Coast Guard's rating, CGPC stated the following:

The military services first determine unfitness for duty and then rate only the extent that the unfitting condition or conditions prevent the member from performing their duties. The VA ratings are based on an evaluation of the whole person, including the evaluation of the evaluatee's temporary employability status and earning capacity.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On February 16, 2005, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. No response was received.

SUMMARY OF 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 schedule shall be discharged with severance pay.

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

Chapter 2.A.38. defines "physical disability" as "[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty."

Chapter 3 provides that if a member's fitness for continued duty is in question, an IMB of two medical officers shall conduct a thorough medical examination, review all available records, and issue a report with a narrative description of the member's impairments, an opinion as to the member's fitness for duty and potential for further military service, and if the member is found unfit, a referral to a CPEB. The member is advised about the PDES and permitted to submit a response to the IMB report. The member's CO forwards the IMB report and any rebuttal to the CPEB with an endorsement addressing the impact of the member's disability on his performance of duty.

Chapter 4 provides that a CPEB shall review the IMB report, the CO's endorsement, and the member's medical records. Chapter 2.C.3.a.(3)(a) provides that, if a CPEB (or subsequently an FPEB) finds that the member is unfit for duty because of a permanent disability, it will

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. The board shall not rate an impairment that does not contribute to the condition of unfitness or cause the evaluatee to be unfit for duty along with another condition that is determined to be disqualifying in arriving at the rated degree of incapacity incident to

retirement from military service for disability. 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.

Chapter 2.C.2.a. provides that the “sole standard” that a CPEB or FPEB may use 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.” Chapter 2.C.2.i. states that the “existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the [DVA] 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 him or her unfit for military duty. ... Such a member should apply to the [DVA] for disability compensation after release from active duty.”

Chapter 2.C.3.a.(3)(a)1. states that “[w]hen rating a condition which does not appear in the VASRD, the board shall rate by analogy.” Chapter 9.A.7. states that when the VASRD does not list the member’s exact condition, the CPEB or FPEB should “rate the disability under a closely related disease or injury in which not lonely the functions but the anatomical localization and symptomatology are closely analogous.” It also states that when rating by analogy, the “diagnostic code number will be ‘built up’ by taking the first two digits from that part of the VASRD most closely identifying the system of the body involved. The last two digits will be ‘99,’ which will denote an unlisted condition, followed by a slant bar and the diagnostic code number that is most closely related to the actual impairment.”

Chapter 9.A.4. prohibits “pyramiding” as follows:

- a. Pyramiding is the term used to describe the application of more than one VASRD rating to any area or system of the body when the total functional impairment of that area or system is more appropriately reflected under a single diagnostic code. Pyramiding is not permitted as it results in overrating the disability.
- b. Disability from injuries to the muscles, nerves, and joints of an extremity may overlap to a great extent Related diagnoses should be merged for rating purposes when the VASRD provides a single diagnostic code covering all their manifestations. This prevents pyramiding and reduces the chance of overrating. For example, disability from fracture of a tibia with malunion, limitation of dorsiflexion, eversion, inversion, and traumatic arthritis of the ankle would be evaluated 5262 in accordance with the effect upon ankle function with no separate evaluation for the limitation of motion or traumatic arthritis.

Chapter 4.A.14.c. provides that if the member objects to a CPEB finding, he may demand a formal hearing by the FPEB, where he may be represented by assigned or private counsel. Chapter 5.C.11.a. provides that the FPEB shall issue findings and a recommended disposition of each case in accordance with the provisions of Chapter 2.C.3.a. The applicant may submit a rebuttal within 15 working days, and the FPEB must respond and, if indicated, prepare a new report. The FPEB's final report is reviewed for sufficiency by an officer at CGPC and by the Judge Advocate General, and forwarded to the Chief of the Administrative Division of CGPC for final action.

VASRD (38 C.F.R. Part 4)

Under 38 C.F.R. § 4.1, VASRD ratings "represent as far as can practicably be determined the average impairment in earning capacity" resulting from the disability. In addition, it provides that reratings may be required as a veteran's physical condition and earning capacity diminish or improve.

VASRD code 5284, which was used by the DVA to rate the applicant's "status post left [and right] foot surgeries," is a code for rating "foot injuries, other." The possible ratings are 40% for loss of foot, 30% for severe foot injuries, 20% for moderately severe, and 10% for moderate.

VASRD code 7804, which was used by the DVA to rate the applicant's "surgical scarring, left [and right] lower extremity," is a code for rating "scars, superficial, tender and painful on objective demonstration." The only allowed rating is 10%.

The CPEB and FPEB rated the applicant's condition by analogy (5299) to acquired flatfeet (VASRD code 5276). The possible ratings are for bilateral flatfoot are 50% when it is "pronounced; marked pronation, extreme tenderness of plantar surfaces of the feet, marked inward displacement and severe spasm of the tendo achilles on manipulation, not improved by orthopedic shoes or appliances"; 30% when it is "severe; objective evidence of marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated, indication of swelling on use, characteristic callosities"; 10% when "moderate; weight-bearing line over or medial to great toe, inward bowing of the tendo achilles, pain on manipulation and use of the feet"; and 0% when "mild; symptoms relieved by built-up shoe or arch support."

Title 38 C.F.R. § 4.14, titled "Avoidance of Pyramiding," states that the "evaluation of the same disability under various diagnoses is to be avoided."

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 submissions, and applicable law:

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

2. The Board begins each case presuming that the applicant's military records are correct and that Coast Guard officials, including his doctors and medical evaluation boards, have acted correctly and in good faith in assigning his.² Although prior to his discharge, the applicant did not rebut the FPEB's recommendation that he be discharged with a 10% disability rating and severance pay, he now alleges that the 10% disability rating he received from the Coast Guard was erroneous and pointed to his 60% combined disability rating from the DVA as evidence of the alleged error. The record indicates that the applicant's 60% combined disability rating from the DVA includes 10% for left wrist tendinitis; 10% for right wrist tendinitis; 10% for "status post right foot surgeries"; 10% for "status post left foot surgery"; 10% for surgical scarring of his left lower extremity; 10% for surgical scarring of his right lower extremity (7804); 10% for tinnitus; and 10% for tinea versicolor and tinea pedis.

3. Under Chapter 2.C.3.a.(3)(a) of the PDES Manual, the CPEB and FPEB may rate only "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. The board shall not rate an impairment that does not contribute to the condition of unfitness or cause the evaluatee to be unfit for duty along with another condition that is determined to be disqualifying in arriving at the rated degree of incapacity incident to retirement from military service for disability. 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." Although the applicant's medical records contain diagnoses of tendinitis, tinnitus, tinea versicolor, and tinea pedis, there is insufficient evidence in the record for the Board to conclude that these conditions actually interfered with his performance of duty or contributed to his unfitness for duty at the time of his discharge. Therefore, the Board finds that the applicant has not proved that the FPEB committed error or injustice in failing to rate them.

4. Although the DVA did not assign the applicant a disability rating for back pain, the Board notes that in his rebuttal to the IMB, the applicant complained of back

² 33 C.F.R. § 52.24(b). See *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that "absent strong evidence to the contrary," government officials are presumed to have acted "lawfully, correctly, and in good faith").

ache and asked that it be rated along with his foot problem. Although his medical records indicate that the applicant complained of back pain in December 2002, there is no evidence in the record that it interfered with his performance of duty or contributed to his unfitness for duty at the time of his discharge. The doctor found that the applicant had a full range of motion in his back with no tenderness, deformity, or neural deficit. Therefore, pursuant to Chapter 2.C.3.a.(3)(a) of the PDES Manual, the FPEB did not commit error or injustice in failing to rate the applicant's back condition.

5. The record indicates that the disability that caused the applicant to be unfit for duty was aching feet, following surgery for bilateral flatfoot, which prevented him from standing for periods longer than 20 to 40 minutes as a food service specialist. The DVA chose to rate the applicant's problem as both bilateral foot injuries (VASRD code 5284) and tender scars (7804). However, 38 C.F.R. § 4.14 states that the "evaluation of the same disability under various diagnoses is to be avoided." This regulation is elaborated under Chapter 9.A.4. of the PDES Manual, which clearly prohibits the application of more than one VASRD rating to any area of the body when the impairment can appropriately be reflected by a single VASRD code. The Board finds that the FPEB's decision not to evaluate the aches and pains in the applicant's feet, which limited his ability to stand for long periods, under more than one VASRD code was both reasonable and correct in accordance with 38 C.F.R. § 4.14 and Chapter 9.A.4. of the PDES Manual.

6. There is no VASRD code that exactly describes the condition of the applicant's feet following his surgeries. The CPEB and FPEB chose to rate his disability, by analogy, to acquired flatfoot, in accordance with Chapter 2.C.3.a.(3)(a)1. of the PDES Manual. Although the DVA chose to apply different codes (5284 and 7804), the Board finds that the Coast Guard's decision to rate the applicant's foot ache by analogy to acquired flatfoot was reasonable and correct under Chapter 9.A.7. of the PDES Manual in light of the localization and symptomatology of his disability.

7. Under the VASRD, the possible ratings the FPEB could have assigned for the applicant's aching feet are 50% if it found the condition to be "pronounced" with "extreme tenderness of plantar surfaces of the feet" and "severe spasm of the tendo achillis on manipulation, not improved by orthopedic shoes or appliances"; 30% if it found the condition to be "severe" with "pain on manipulation and use accentuated, indication of swelling on use, characteristic callosities"; 10% if it found the condition to be "moderate" with "pain on manipulation and use of the feet"; and 0% if it found the condition to be "mild" with "symptoms relieved by built-up shoe or arch support." The Board finds that the applicant has not proved that the FPEB erred or committed an injustice in assessing his foot ache as "moderate" with "pain on manipulation and use of the feet" rather than severe. The reports by his doctors and physical therapist in 2002 do not indicate that his foot ache following the surgeries was severe rather than moderate, even though it rendered him unfit to serve as a food service specialist.

8. Although the DVA assigned the applicant's achy feet four separate 10% ratings, as the JAG argued, under *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), DVA ratings are "not determinative of the same issues involved in military disability cases." In assigning ratings pursuant to 10 U.S.C. §§ 1201 and 1203 and Chapter 2.C.2.a. of the PDES Manual, the FPEB considers to what extent a member is permanently disabled by a condition that renders him unfit for duty, whereas the DVA considers the extent to which a veteran's current earning capacity is diminished by the disability. Therefore, the Board finds that ratings assigned by the DVA do not prove that the 10% disability rating that the applicant received from the Coast Guard is erroneous or unjust.

9. The applicant did not allege any lack of due process, and the Board finds that he received all due process provided under the PDES Manual. Moreover, he did not rebut the FPEB's findings and recommendation that he be discharged with a 10% disability rating and severance pay. His failure to submit a rebuttal suggests that he accepted the FPEB's assessment of his condition prior to his discharge.

10. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

James E. McLeod

J. Carter Robertson

Darren S. Wall