

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-022

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX, BM1 (former)

FINAL DECISION

Author: Ulmer, D.

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 November 9, 2004, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated July 28, 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 retired from the Coast Guard on May 3, 2002, because of a physical disability, rather than having been separated with severance pay. The applicant was separated from the Coast Guard due to instability of the right knee rated as 20 percent disabling, for which he received severance pay. To be retired by reason of physical disability, the applicant's disability rating must be at least 30 percent disabling.

The applicant alleged that in addition to suffering from a disability to his right knee, he also suffered from a disability to his left knee, degenerative disc disease in his lower back and severe depression which were not rated by the Central Physical Evaluation Board (CPEB).¹ He stated that eight months after his discharge from the Coast Guard he underwent his eighth knee surgery. He stated that the Department of Veterans Affairs (DVA) has determined that he is unemployable and given him a 100 percent disability rating.

¹ The Central Physical Evaluation Board is a permanently established administrative body convened to evaluate on a records basis the fitness for duty of active and reserve members and the fitness for duty of members on the temporary disability retired list. See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

The applicant alleged that he did not receive adequate counseling from the lawyer appointed to assist him in the Physical Disability Evaluation System (PDES) process. He stated the lawyer assigned to advise him told him to take the 20 percent disability rating because he could end up with nothing if he did not.

In addition, the applicant alleged that his discharge by reason of physical disability was improper. He stated that because the Coast Guard failed to provide him with adequate medical care after his injuries, he has had to undergo numerous surgeries. He stated that after surgery on his right knee in 1997 for a torn ACL (anterior cruciate ligament),² he was wrongfully sent back to work even though he complained about the problems and pain in his legs. He further stated the following:

I have suffered enough negligence and enough physical pain and mental anguish from my injuries and my mistreatment. Therefore after the wrongs are made right and after careful review of my medical and service record, I hope I can be treated with the respect I deserved two years ago and have my discharge changed to a medical retirement.

SUMMARY OF THE RECORD

On July 18, 1989, the applicant enlisted in the Coast Guard. During his approximately twelve years of service he injured both knees and had several surgeries on each one. However, it was the right knee that was hit by a sledgehammer in 1994 and subsequently twisted in 2001 that precipitated the medical board that led to his discharge by reason of physical disability.

On January 9, 2001, the applicant reported to a medical clinic complaining about pain in his right knee resulting from a work injury that occurred a few days earlier.

A medical report dated January 30, 2001, described the surgeries to the applicant's right knee as follows: a 1994 meniscus repair, a 1996 knee scope, and a 1997 knee scope. The medical note stated that since his 1997 knee scope he had felt pain but thought the knee was stable until early January 2001, when he twisted it while getting off of a buoy. The treating physician diagnosed the applicant as having an ACL and medial meniscus³ tear in his right knee. He recommended that the applicant undergo an anterior ligament reconstruction. He noted that the left knee had "no joint line tenderness, no effusion and FROM [full range of motion (full ROM)]."

On February 16, 2001, the applicant underwent surgery to the right knee. The surgical procedures performed were "Right ACL reconstruction with bone-patellar-tendon bone graft" and "Right partial medial meniscectomy". At a post-surgical visit on April 10, 2001, the applicant was noted to be doing well with some pain in the knee particularly with deep flexion. He was described as having full ROM, minimal medial

² The ACL is a band of tissue that connects bones within the knee. See Dorlands Illustrated Medical Dictionary, 29th Ed., page 900-904.

³ The medial meniscus of the knee joint is a crescent-shaped disk of fibrocartilage attached to the medial margin of the superior articular surface of the tibia. See Dorlands at 1086.

joint line tenderness, no effusion, and a solid end point on Lachman's examination⁴. The applicant was continued on physical therapy.

On July 11, 2001, the applicant was noted to have some pain in his right knee particularly when doing chain quad exercises. The physician stated that the etiology of the knee pain was unknown and there was no effusion in the knee. His examination revealed that the applicant had full ROM with no joint line tenderness. He further stated that the applicant's "ligamentous exam feels even better than last time" and that he "seems to have a solid end point on the Lachman's exam[ination]." The applicant's posterior cruciate ligament (PCL) was intact.

In a July 25, 2001, medical note, the physician noted that the applicant still had some instability in the knee and that he was given an ACL brace. The note also stated that the applicant was interested in a medical board⁵ (MB), which the physician directed.

On July 29, 2001, a MB performed by a Navy physician diagnosed the applicant as suffering from right anterior cruciate ligament instability, status post right knee meniscectomy, and status post left medial meniscectomy. The medical board report stated the following with respect to the applicant's right knee:

The [applicant] was doing well in rehab until about two and a half months after his surgery when he was doing some open chain quadriceps and hamstring exercises. He felt a pop in his knee at that time. Since that time he has had an increase in pain in his knee and feelings of instability. He has continued an aggressive rehab regimen. He has continued to have pain with going up and down stairs and feelings of instability. At most recent evaluation there was a 6.0 mm difference from side to side with KT 1000 measurements.

The MB report noted that post operative x-rays taken on February 16, 2001, revealed satisfactory positioning of both tibial and femoral tunnels, and the x-rays taken on May 30, 2001, showed no abnormality. The MB recommended that the applicant continue with physical therapy and that his case be referred for a disability determination because his medical condition precluded him from continuing in a full duty status. The MB further recommended that the applicant was fit for limited duty and should be assigned in CONUS near a medical treatment facility with orthopedic capabilities. No sea duty was recommended for the applicant.

⁴ Lachman's is a test for diagnosing a tear of the ACL. See <http://www.aafp.org/980115ap/ballas.html>.

⁵ The purpose of a Medical Board is to evaluate and report upon the present state of health of any member who may be referred to the medical board by an authorized convening authority and to provide a recommendation as to whether the member is medically fit for the duties of his or her office, grade, rank, or rating. See Chapter 3.A. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

A subsequent undated MB addendum by a Coast Guard physician's assistant (PA) stated that despite aggressive physical therapy, the applicant continues to be limited in his duties and not fit for sea duty. The PA stated that the applicant would never be fit for the duties of his rate ashore or afloat and therefore should be separated from the Coast Guard.

The applicant was informed of the MB findings and on August 15, 2001, indicated that he would submit a rebuttal to the MB.

The applicant's rebuttal to the MB is undated. He disagreed with the MB that his left knee was pain free. He stated that he has pain, popping, and arthritis in his left leg, which increases when the right leg is subjected to over use. He stated that his left knee should have been included in determining his physical disability. He also noted that his ACL graft of the right knee had failed.

On September 14, 2001, the MB physician responded to the applicant's rebuttal. He stated that the applicant's left knee was not in optimal condition. In this regard, he stated that while the ligamentous examination is intact, it was not surprising that the knee gave the applicant feelings of pain and weakness when stressed. The physician further stated as follows:

I do believe that [the applicant's] condition at this time precludes him from continuing in a full duty status. Further, I do not believe that the status in either knee is likely to improve. His mild degeneration in his left knee at this point is likely to continue to worsen given his meniscectomy, which is likely to predisposed him to degeneration. In addition, his anterior cruciate ligament (ACL) graft laxity is certainly such that he has clinical instability in that knee. The laxity that he has may well contribute to continued degeneration within that knee as well. Given this, it is unlikely that [the applicant] will have improvement over time in either knee with the exception of possible moderate subjective improvement as his therapy progresses in his right knee.

With respect to the applicant's concern that the MB did not clearly state that the ACL graft failed, the physician stated that the MB clearly noted that the applicant had "recurrent subjective instability in addition to objective instability" of the right knee. The physician stated that it was difficult to state whether the ACL graft had completely failed anatomically, but it had failed functionally. On October 4, 2001, the applicant submitted a statement agreeing with the physician's comments.

On November 1, 2001, the applicant's commanding officer (CO) agreed with the medical board that the applicant was unfit for continued duty and that a physical disability separation was warranted. The CO stated that as a boatswains mate, the applicant's work was physically demanding (lifting, climbing, and strenuous activity)

and that he primarily performed on sea-going platforms and/or shore side depots. He noted that the applicant was the unit's crane and forklift operator and that his current duties for the group also included leading the Master-at-Arms and security force and focusing on the group's aids to navigation mission that involved moving materials from the buoy yard to the buoy tenders. The CO stated that the applicant was limited in the physical duties he could perform and that he was easily susceptible to additional injuries.

On February 7, 2002, the applicant reported to a medical clinic complaining of headaches. The clinical note stated that the applicant had left frontal headaches associated with some nausea and vomiting. He was diagnosed as having migraines and tension headaches. He was treated with Fioricet.

On January 28, 2002, the applicant underwent an MRI to evaluate the graft to the right knee. The radiologist offered the following impression after reviewing the MRI results:

- "1. Cannot exclude very small foreign body in the patellofemoral joint space.
- "2. Findings which may represent small osteochondral lesion or osteochondral defect of the lateral femoral condyle at its articular surface.
- "3. Tear of the posterior horn of the medial meniscus.
- "4. The graft is intact with mild amount of central signal."

On February 1, 2002, the Chief of the Health Services Division of a Coast Guard support center agreed that the applicant's case was appropriate for presentation to the Physical Disability Evaluation System (PDES).

On February 12, 2002, the applicant's executive officer (XO) submitted the applicant's MB to the PDES for consideration. The XO stated that the applicant was not fit for full duty.

On February 27, 2002, the Central Physical Evaluation Board (CPEB) reviewed the applicant's case and recommended that he receive a 20 percent disability rating for moderate "recurrent subluxation [dislocation] or lateral instability" of the right knee under Veterans Administration Schedule for Rating Disabilities (VASRD)⁶ code 5257.⁷

⁶ The VASRD at 38 C.F.R., part 4, is the DVA's schedule for rating disabilities. It is used by the PDES boards to assign codes and percentages of disability for an evaluatee found unfit for duty. See Chapter 2.A.51 of the PDES Manual.

⁷ VASRD code 5257 is used to rate the impairment of the knee due to recurrent subluxation or lateral instability. A 30 percent rating is authorized for severe instability, 20 percent for moderate instability,

The CPEB also gave the applicant a 0 percent disability rating for other impairment of the left knee. The CPEB granted the applicant a bilateral factor⁸ totaling two percent under VASRD code 5257, resulting in a combined disability rating of 22 percent rounded down to 20 percent. The CPEB recommended that the applicant be separated with severance pay.⁹ On March 11, 2002, the applicant accepted the CPEB's findings and recommendation and waived his right to a formal hearing.

On March 12, 2002, the applicant underwent a medical examination for the purpose of discharge. The physician noted that he had a history of chronic right and left knee pain, with multiple surgeries on both knees, and instability in the right knee requiring him to wear a brace. The physician also noted that the applicant had a history of daily low back pain¹⁰ and chronic headaches requiring medication.

A medical note dated March 18, 2002, shows that the applicant was prescribed Zoloft to treat his situational depression.

On March 20, 2002, the Chief Counsel (now the Judge Advocate General) reported that the proceedings were in acceptable form and technically correct. On March 22, 2002, the Chief Administrative Division ordered that the applicant be discharged with severance pay.

On May 3, 2002, the applicant was honorably discharged with a twenty percent disability rating and severance pay.

Decision of the Department of Veterans Affairs (DVA)

The applicant submitted a letter from the DVA stating that he was entitled to commissary and exchange privileges because he was 100 percent disabled. The documentation offered by the applicant did not show whether the 100 percent disability

and 10 percent for slight instability. See Summary of Applicable Law, below, for the meanings of the VASRD codes.

⁸ The bilateral factor is used when a partial disability results from disease or injury of both arms or of both legs, or of paired skeletal muscles. The ratings for the disabilities of the right and left sides will be combined and 10 percent of this value will be added before proceeding with further combinations or converting the degree of disability. See 38 C.F.R. § 4.26.

⁹ Under 10 U.S.C. § 1201, only disabilities ratings of 30 percent or higher entitle a member to a medical retirement. Ratings of 10 or 20 percent entitle a member to severance pay. 10 U.S.C. § 1203.

¹⁰ A medical note indicates that the applicant first reported low back pain after falling off of a motorcycle in 1994. He was treated with medication and ice and given 72 hours of sick leave. On December 12, 1994, in a follow-up visit, the applicant was feeling much better although still sore. He was continued on medication and prescribed 30 days of light duty. A medical note dated May 25, 2000 indicates that the applicant complained of recurrent low back pain. His diagnosis was lumbosacral strain and he was treated with rest, ice, and referred to orthopedics.

rating covered just the knees or if other conditions were included. He submitted evidence showing that he was receiving treatment from the DVA for depression.

A medical report dated April 24, 2003, stated that the applicant had a left knee medial meniscus tear that was scheduled for a scope and meniscus repair. It also indicated that the applicant suffered from a major depressive disorder that had been treated with Zoloft, but Wellbutrin was being recommended.

On or about October 27, 2003, A DVA doctor diagnosed the applicant as suffering from depression related to chronic pain. He rated the applicant's prognosis as fair if further knee replacement surgery increased the applicant's ability to ambulate without pain, otherwise he rated the applicant's prognosis as poor. He stated that the applicant was not able to work due to severe pain and depression. The report indicated that the applicant was taking Sertraline HCL for depression, Bupropion, and Tramadol for pain. A DVA outpatient psychiatric social worker (SW) stated, on or about October 22, 2003, that the applicant suffered from "depression, multiple knee surgeries, joint pain, S/P Rhinoplasty [nose surgery] and Hypercholesterolemia." The SW stated that the applicant's depression was directly related to his chronic pain, injuries, and surgeries and that he was unable to work.

An MRI of the applicant's back was taken at the DVA on December 16, 2003 because of his complaint of low back pain that radiated down the left leg. The MRI revealed degenerative disc disease at L5-S1 level and annular bulging at the L5-S1 level causing very minimal compression upon the anterior surface of the thecal sac, slightly greater to the left of the midline. The report also noted the appearance of an annular tear at the posterior aspect of the L5-S1 disc. The impression of the radiologist was that the applicant had "very mild central canal stenosis at the L5-S1 level due to annual bulging."

VIEWS OF THE COAST GUARD

On March 28, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG 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 20 percent 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 only evidence offered by the applicant to prove that the Coast Guard erred in evaluating his condition is the 100 percent disabling rating from the DVA. According to the JAG, the DVA rating is not persuasive given the different standard that the DVA employed. In this regard, the JAG argued that the DVA rating is not determinative of issues involved in military disability cases. 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 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 finding that the Applicant was 100% disabled is not relevant to the Coast Guard's finding that he was 20% disabled *based solely on the conditions that rendered him unfit for continued service at the time of his separation*. 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 PDES. He noted that the applicant, with the advice of counsel, waived his opportunity to challenge the Coast Guard's rating of his disability at a formal hearing.

The JAG attached comments from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. CGPC stated that 0 percent ratings are appropriate in cases where the medical condition that causes unfitness for military service is to such a mild degree that it does not meet the criteria even for the lowest rating provided in the VASRD. CGPC further stated that at the time of the MB, the degenerative disc disease in the applicant's lower back and his severe depression were not the conditions that caused his impairment and subsequent separation. Moreover, CGPC stated that there is no evidence that the applicant objected to the 20 percent disability rating.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On April 18, 2005, the Board received the applicant's response to the views of the Coast Guard. He stated that he had problems with his left knee, back, and depression that were not rated by the CPEB. He alleged that the Coast Guard failed to diagnose and treat the degenerative and bulging disc disease in his back. He also alleged that he suffered severe nerve damage. He stated that the use of crutches resulting from the four surgeries on his right knee has caused further damage to his left leg, shoulders and back. He stated that currently he is in need of two knee replacement surgeries.

The applicant stated that the attorney appointed by the Coast Guard to advise him during the PDES processing stated "to take what I could get or I could end up with nothing." He stated that he should have been medically retired.

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 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."

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

The PDES Manual governs the separation of members due to physical disability. Chapter 3 provides that 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.

Chapter 3.I.7. provides that before forwarding an IMB report to the CPEB, the member's CO shall endorse it "with a full recommendation based on knowledge and observation of the member's motivation and ability to perform." The endorsement must include a summary of the duties normally associated with the member's grade or rating and a statement regarding the member's ability to perform those duties.

Chapter 4 provides that a CPEB, composed of at least one senior commissioned officer and one medical officer (not members of the IMB), shall review the IMB report, the CO's endorsement, and the member's medical records. Chapter 4.A.5.7. provides that if the CPEB finds that the evidence is insufficient for a proper determination, it will return the case to the member's command for a Disposition Medical Board (DMB) to amplify the record.

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 unfit to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service.”

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 9.A.8. provides that if “a medical condition which causes or contributes to unfitness for military service is of such mild degree that it does not meet the criteria even for the lowest rating provided in the VASRD ... [a] zero percent rating may be applied in such cases.”

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 section 1552 of title 10 of the United States Code. The application was timely.
2. The applicant has submitted insufficient evidence to prove that the Coast Guard committed an error by discharging him with a 20 percent disability rating for instability of the right knee and a 0 percent disability rating for other impairment of the left knee under code 5257 of the VASRD.
3. The CPEB's determination that the applicant suffered from subluxation or lateral instability of the right knee is supported by the MB diagnosis of "right anterior cruciate ligament instability." Medical examinations after right knee surgery in 2001 noted that the applicant had some pain and instability in the knee for which he was prescribed a brace. The post-surgical examinations also revealed no lack of ROM, no effusion and minimal to no tenderness. An MRI taken on February 7, 2002, suggested some irregularities with the knee, but showed that the graft (surgical reconstruction of the knee) was intact. The MRI was available to the CPEB when it determined the applicant's fitness for duty and percentage of disability. There is no medical evidence in

the record that the Coast Guard's diagnosis of subluxation or lateral instability of the right knee was erroneous.

4. In rating disabilities, the PDES manual requires the Coast Guard to use the VASRD. The CPEB determined that the applicant's condition and symptoms were most similar to those under VASRD code 5257. This code described the rating percentages for recurrent subluxation or lateral instability of the knees as follows: 30 percent for a severe condition, 20 percent for a moderate condition, and 10 percent for slight condition. The CPEB's 20 percent disability rating of the knee appears to be supported by the evidence. None of the medical reports describe the applicant's knee instability as severe. In this regard, a July 25, 2001, medical report noted that the applicant has some instability in the knee; the July 29, 2001, MB described the instability as "feelings of instability in the knee"; and the September 14, 2001, MB reply to the applicant's rebuttal stated that the applicant had "feelings of" and "clinical" instability in the knee. A brace was prescribed for the applicant's knee. However, the use of an orthopedic device is not listed as a criterion for rating instability of the knee under VASRD code 5257. Therefore the 20 percent disability rating under the VASRD appears to be correct.

5. The applicant is mistaken in his allegation that the CPEB did not rate his left knee when it reviewed his case on February 27, 2002. The impairment of the applicant's left knee was rated as 0 percent disabling, which meant that the problems of the left knee were mild and did not meet the requirements for the lowest rating under VASRD code 5257. A 0 percent disability rating is valid and entitled to the same compensation prescribed for ratings of less than 30 percent. See Chapter 9.A.8. of the PDES Manual. An April 24, 2003, medical report from the DVA indicates that the applicant was scheduled for a scope and meniscus repair of the left knee. However, this evidence does not prove that when the CPEB met a year earlier on February 27, 2002, the applicant's left knee was more than 0 percent disabling. A medical report dated January 30, 2001, described the applicant's left knee as having "no joint line tenderness, no effusion and [full range of motion]." Subsequently, the MB physician described the degeneration of the applicant's left knee as mild, but noted that it would likely worsen in the future. Accordingly, the evidence submitted by applicant from the DVA is insufficient to prove that at the time of his separation from the Coast Guard the impairment of his left knee was greater than 0 percent.

6. The applicant has failed to prove that his back condition and depression should have been rated as physical disabilities. Chapter 2.A.38 defines physical disability as any manifest or latent physical impairment that separately makes or in combination make a member unfit for continued duty. Chapter 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. Chapter 2.C.2.i. makes 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. Chapter 9.A.1.c. of the PDES directs that disabilities that are neither unfitting for

military service nor contributing to the inability to perform military duty shall not be rated.

7. Taking into consideration the provisions just discussed, it is the applicant's burden to prove that conditions other than those identified as disabling by the CPEB caused him to be unfit or contributed to his unfitness for military duty, i.e. unable to perform the duties of his office, grade, rank, or rating. The last medical report on the applicant's back pain while in the Coast Guard occurred on May 25, 2000, and there is nothing in the medical report that indicates that the applicant's back condition was unfitting for duty then or at the time of his discharge. The December 16, 2003, DVA MRI noted the applicant had "*very mild* central canal stenosis at the L5-S1 level." (Emphasis added.) This MRI taken over a year after the applicant's discharge is not sufficient to prove that at the time of his discharge in May 2002 he suffered from a back disability that caused him to be unfit to perform the duties of his rate.

8. While a March 18, 2002, medical note and the discharge medical examination noted the applicant's treatment for depression, neither indicated that the condition was unfitting for military duty. Under Chapter 2.C.3.a.(3)(a) of the PDES Manual, the CPEB rates only "those disabilities which make an evaluatee unfit for military service or which contribute to his or her inability to perform military duty." While the applicant suffered from numerous conditions, it appears that only the knee conditions caused the applicant to be unfit to perform the duties of his office and rate.

9. Chapter 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 physically unable to climb, lift and perform strenuous activity required of a boatswain's mate 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 (back pain and depression) caused him to be unable to perform the duties of his rate and rank, although each may be service connected for purposes of the DVA.

10. Although the applicant submitted evidence showing that the DVA has determined that he is unemployable and is 100 percent disabled, such evidence does not establish error by the Coast Guard. This Board has consistently held that a higher disability rating from the DVA does not of itself 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."

11. Importantly, the Board finds that the applicant 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 20 percent disabling. The applicant also waived his right to a formal hearing, 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 20 percent disability rating and he relied on that advice. However, there is no 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 a formal hearing. Absent persuasive proof of error or injustice, the Board will not disturb findings rendered by the Coast Guard.

12. 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.

13. The Board notes the applicant's allegations that he received poor medical care from the Coast Guard for his knees. Even if this were true, that fact would not be a basis for increasing the disability rating. As stated above, a disability rating from the Coast Guard is the extent to which a physical disability causes a member to be unfit to perform the duties of his office, grade, or rate. For conditions and disabilities that do not fall into this category, the DVA is the proper source for care and compensation.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former BM1 xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

David Morgan Frost

Patrick B. Kernan

Audrey Roh