

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-078

XXXXXXXXXXXXXXXXXX
xxxxxxx, AMT3 (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 Chair docketed this case on March 11, 2005, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated January 18, 2006, 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 to show that he was placed on the permanent disability retired list with a 20% disability rating for lumbosacral strain under code 5237 of the Veterans Affairs Schedule for Rating Disabilities (VASRD)¹ in addition to the 20% disability rating under VASRD code 7528-7801² that he received from the Coast Guard, for a combined rating of 40%. The applicant was discharged by reason of physical disability with severance pay due to "malignant neoplasm of the genitourinary system, in remission, residuals: scars, other than head, face, or neck that are deep or that caused limited motion; area exceeding 12 square

¹ VASRD is a Manual used by PDES boards to assign codes and percentage of disability for an evaluatee found unfit for duty. See 38 CFR part 4.

² VASRD code assigned to the applicant for "malignant neoplasm of the genitourinary system, in remission, residuals: scars, other than head, face, or neck that are deep or that caused limited motion; area exceeding 12 square inches."

inches" rated as 20% disabling under VASRD code 7528-7801. To be retired by reason of physical disability, the applicant's disability must be rated at least 30% disabling. The applicant also complained about the fact that the FPEB considered his disability to be none combat-related.

ALLEGATIONS

The applicant spent approximately five years on the Temporary Disability Retired List (TDRL).³ He was subsequently removed from that list, and discharged by reason of physical disability with severance pay, as mentioned above.

The applicant alleged that in addition to suffering from the debilitating residuals of malignant neoplasm of the genitourinary system, he also suffered from a thoracolumbar spine disability, which was not rated by the Formal Physical Evaluation Board (FPEB).⁴

The applicant argued that the FPEB's refusal to rate his back/spinal injury because it found the injury did not exist independently of the reason why he was placed on the TDRL, or was not sequelae to this injury, constituted a mistake of law. In this regard, the applicant stated that "the plain language of section 2.C.3.c.(2) of the Physical Disability Evaluation System (PDES) Manual states that . . . 'findings are . . . required for any impairment not previously rated.'" The provision further states, "Impairments not previously rated shall be considered as incurred while entitled to receive basic pay only when the evidence shows that the condition existed prior to temporary retirement." The applicant argued that there is no requirement in section 2.C.3.c.(2) of a nexus between an additional injury (back/spine) and the condition that caused a member to be placed on the TDRL (malignant neoplasm). He cited Sutherland on Statutory Construction for the principal that "words should be given their common and approved usage." The applicant argued that since there is no mention of a sequelae requirement in Chapter 2.C.3.c.(2) of the PDES Manual, the plain language of the regulation makes it clear that a member can be assigned a disability rating for a condition that was incurred prior to being placed on the TDRL irrespective of whether there is a nexus between the claimed injury and the TDRL injury.

³ The TDRL is a list of members whose disabilities are not yet stable. A member's temporary disability retired pay terminates at the end of 5 years, unless the member is sooner removed from the list.

⁴ The FPEB is a fact-finding body, which holds an administrative hearing to evaluate a member's fitness for duty and to make recommendations consistent with the findings. This hearing is not an adversarial proceeding, and the implication of litigation must be avoided. See Chapter 5.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

In this regard, the applicant asserted that his medical records show that he suffered from an injury to his back/spine while on active duty and that in January-February 1998, prior to his cancer surgery, he required medical treatment for the back injury. The applicant also stated that after cancer surgery he experienced an additional exacerbation of the spine injury that required treatment on November 20, 1998, as evidenced by a copy of the medical entry. He further argued that the medical evidence shows that he is currently experiencing marked limitation of motion secondary to this injury.

The applicant stated that his health care provider had submitted a narrative summary showing the direct correlation between the applicant's abdominal scarring and its exacerbating effect upon his back injury to the FPEB. The applicant also stated that during the FPEB hearing he presented testimony from an occupational health practitioner and a physical therapist that he suffered from restricted range of motion in the thoracolumbar spine⁵ of less than 40 degrees on forward flexion. He argued that the FPEB conceded in its findings that he had exhibited back pain prior to being placed on the TDRL but still did not find that this injury existed independently of the reason why he was placed on the TDRL or was sequelae to the TDRL disability.

The applicant submitted a May 27, 2004, letter that his physical therapist submitted on his behalf to the FPEB. The therapist stated that he had been a therapist since 1980 and that he had treated the applicant since March 2000. He described the applicant's physical condition as follows:

[The applicant] was originally referred to physical therapy in March 2000 for hypomobility and weakness of the trunk and pain. With the progression of trunk exercise, [the applicant] began to experience an increase in abdominal discomfort and eventual drainage from his abdominal scar.

[The applicant] demonstrates 40 [degrees] of cervical flexion, 45 [degrees] of cervical extension, 20 [degrees] of right lateral flexion, 27 [degrees] of left lateral flexion, 50 [degrees] of right lateral rotations and 59 [degrees] of left lateral rotation. In the thoracolumbar spine, [the applicant] demonstrates 39 [degrees] forward flexion, 18 [degrees] of extension, 23 [degrees] of right lateral flexion, 14 [degrees] of left lateral flexion, 23 [degrees] of right lateral rotation, and 21 [degrees] of left lateral rotation. All of these movements performed to discomfort with repeated measures. Strength of the abdominal musculature was grossly graded as 3+ to 4/5, with the erector spinae being 4- to 4/5. In standing posture, [the

⁵ Thoracolumbar spine pertains to the thoracic and lumbar parts of the spine. See *Dorland's Illustrated Medical Dictionary*, 29th edition, p. 1834.

applicant] demonstrates an increase in thoracic kyphosis, abduction of both scapula and a rounding of both shoulders with a slight head forward posture.

The applicant's primary care physician since May 2003 submitted a letter to the FPEB on the applicant's behalf. Dr. F stated that he was board certified in Occupational and Environmental Medicine and was a senior FAA medical examiner. He offered the following:

I have reviewed the measurements of the range of motion conducted by [the applicant's] treating physical therapist . . . and concur with his observations that [the applicant's] thoracolumbar ROM is restricted to less than 40 degrees of forward flexions.

In addition to his back injury, [the applicant] also suffers from pain secondary to the involvement of the abdomen rectus muscle group regarding his surgical scar.

[The applicant] has actually experienced a reopening of the scar while attempting to comply with his physical therapy regimen and experiences ongoing pain at the scar site itself.

However, the point that I would like to make clear is that his pain is due to damage that extends deeper than the surface wound itself into the abdomen rectus group, causing him pain and discomfort upon bending, rotation and extension.

. . . I do not believe [the applicant] is a symptom magnifier.

SUMMARY OF THE RECORD

On November 1, 1994, the applicant enlisted in the Coast Guard. On April 10, 1995, the applicant reported to a medical clinic complaining of neck and back pain. While the medical note indicated no objective findings, it stated that the applicant was placed on limited duty for three days.

On June 13, 1995, the applicant reported to the medical clinic complaining of low back pain that had existed for two weeks. The applicant claimed that the pain radiated up the center of his spine, but admitted that it varied from day to day. The medical entry noted that the applicant was a fireman and his work required lifting. The medical note indicated that there was no history of trauma. The applicant was diagnosed with a muscle spasm, given medication, and placed on limited duty for seven days, with no lifting over 25 pounds.

On July 28, 1995, the applicant reported to the medical clinic complaining of low back pain. The applicant was diagnosed with muscle spasms and given medication. An x-ray of the lumbar spine was ordered as well as a physical therapy consultation. The medical note indicated that the applicant was fit for duty.

The x-ray of the lumbar spine was negative. It stated, "The vertebral body heights, their disc spaces and posterior elements are intact and in normal alignment. NO compression fracture is identified. There are no pars defects. The sacroiliac joints are normal."

An August 23, 1995, physical therapy note indicated that the applicant had been evaluated on July 31, 1995 for spondylosis of the lumbar spine and had had five subsequent visits. The applicant was placed on a home exercise program.

On January 8, 1998, the applicant reported to the clinic complaining of low back pain. The applicant denied a recent history of trauma. He was diagnosed with a mechanical back strain. He was placed on light duty.

On January 14, 1998, the applicant returned to the clinic for follow-up of his back pain. He was diagnosed with muscle spasms and prescribed medication. He was found not fit for duty for 48 hours and ordered to return to the clinic in two days.

On January 16, 1998, the applicant returned to the clinic for follow-up, where he was referred to physical therapy and given light duty for one week with no lifting over 15 pounds. A physical therapy consult was provided this same day.

On January 23, 1998, the applicant reported to the clinic where his pain was noted as resolving. He was found fit for light duty for 15 days.

On February 5, 1998, the applicant reported to the medical clinic for follow-up and was found fit for duty.

On February 24, 1998, March 3, 1998, and March 10, 1998, the applicant appears to have had physical therapy treatments.

On March 19, 1998, the applicant reported to the clinic complaining about a lump in his testicle.

On April 9, 1998, the applicant underwent a radical orchiectomy,⁶ and on April 30, 1998, he underwent a left modified nerve sparing retroperitoneal⁷ lymph node dissection.

From May through July 21, 1998, the applicant had several limited duty and medical board evaluations. The July 21, 1998, medical board diagnosed the applicant as suffering from "Stage T2N1MO Mixed Non-seminomatous germ cell tumor of the testis." The medical board noted that the applicant had been offered two years of limited duty for follow-up of his cancer, but now desired a medical board. The medical board determined that the applicant's condition interfered with the reasonable performance of his assigned duties and on that basis referred his case to the Coast Guard reviewing authority for determination. The medical board stated that while awaiting the results of the Physical Evaluation Board, the applicant would require monthly follow-ups for two years, but otherwise his physical activities were unlimited. The medical board noted that if the applicant were retained in the military he would require an assignment near a major medical center for follow-up appointments.

The applicant's commanding officer (CO), as required by regulation, commented on the report of the medical board⁸ and recommended approval. The CO described the applicant as a conscientious, hardworking member of the unit who is called upon to serve as an air crewman on local flights and frequent C130 deployments for three to seven days while not performing C130 aircraft maintenance. The CO stated that the applicant's duties were consistent with those of his peers, and that prior to and since recuperation from chemotherapy for his cancer, the applicant had been able to perform all duties assigned and expected of him. According to the CO, the applicant worked with his supervisors to meet all expectations, but had encountered some difficulty in scheduling and meeting follow-up medical appointments. The CO noted that the applicant had decided to leave the Coast Guard and return to the civilian workforce and wanted to be discharged on May 1, 1999. The CO recommended favorable consideration for the applicant's concerns about the inability to obtain medical insurance once discharged from the Coast Guard.

On October 5, 1998, the applicant submitted a rebuttal to the finding of the medical board, expressing concern about the need for ongoing medical treatment and the unlikelihood of obtaining health insurance once he was out of the Service. The

⁶ Orchiectomy is the excision of one or both testes. See Dorland's Illustrated Medical Dictionary, 29th Edition, p. 1274.

⁷ Retroperitoneal means external to or posterior to the peritoneum. *Id.* at 1568. The peritoneum is the serous membrane lining the abdominopelvic walls. *Id.* at 1358.

⁸ Apparently a medical board was held in June 1998 on which the applicant's CO provided comment. Apparently this medical board had recommended placing the applicant on limited duty, after which he was expected to be fit for full duty.

medical board referred the applicant's case to the Central Physical Evaluation Board (CPEB).

On February 8, 1999, the CPEB diagnosed the applicant as suffering from "Malignant Neoplasm of the Genitourinary System Rated as Renal Dysfunction." It recommended that the applicant be temporarily retired with a 30% disability rating. On March 15, 1999, the applicant accepted the findings of the CPEB, and he was subsequently placed on the TDRL.

On November 11, 1999, a medical note indicated that the applicant complained about low back pain. The doctor prescribed medications and exercise for the applicant and placed him on light duty, with no lifting greater than 20 pounds.

On October 25, 2000, the applicant underwent his first TDRL periodic examination.⁹ The TDRL report stated that the applicant reported no current complaints. The physician recommended that the applicant be continued on the TDRL and noted no significant change in the applicant's condition since his initial placement on the TDRL. The physical examination revealed the following:

Patient is a healthy appearing 25-year-old Caucasian male in no acute distress. Neck is supple without adenopathy or bruits. Lungs are clear to auscultation bilaterally. Cardiovascular exam shows a regular rate and rhythm without murmurs, rubs or gallops. *Back is without CVA or spinal tenderness.* Abdominal exam shows a well-healed midline abdominal incision. Patient has normoactive bowel sounds and has no palpable abdominal masses. The patient also has a left inguinal incision. The patient has normal phallus. His left testicle is surgically absent. His right testicle is normal without evidence of mass. His extremities are without clubbing, cyanosis or edema. His neurological examination is grossly non-focal. [Emphasis added.]

In February 2003, the applicant underwent a second TDRL medical examination. The medical report dated February 28, 2003, noted that the applicant had no complaints, weight loss, or constitutional symptoms. The medical report stated that the applicant was "approaching five year disease free interval from nonseminomatous germ cell tumor with evidence of recurrence."

⁹ A member on the TDRL must undergo periodic physical examinations and CPEB review to determine if the member's condition has stabilized sufficiently to adjudicate the case. An examination is required (1) at least once every 18 months; (2) not less than 12 months prior to the termination of 5 years from the date the member was first placed on the TDRL; and or (3) at any other time as specified by appropriate authority. See Chapter 8.C. of the Physical Disability Evaluation Manual.

The applicant's record also contains an April 8, 2003, letter from a physical therapy rehabilitation clinic, which stated that during March and April 2000, the applicant was a patient following a motor vehicle accident. It stated the following:

[The applicant] was a patient in our physical therapy clinic during March and April of 2000, following a motor vehicle accident. With the treatment progression associated with his low back pain, we initiated trunk strengthening. During trunk strengthening, [the applicant] experienced both subjective discomfort and eventual objective drainage from his abdominal scar. This occurred with abdominal strengthening. In his chart on 4/05/2000, the subjective complaint of abdominal discomfort is noted. To the best of my recollection, by decreasing his abdominal strengthening, [the applicant's] discomfort resolved.

In or around February 2004, the applicant underwent a third TRDL examination. The medical report notes that the applicant complained about occasional back pain. Upon physical examination, the doctor reported that the applicant was alert and oriented; that he had no cervical or supraclavicular adenopathy; that his abdomen was without palpable mass; that he had a 21 cm midline scar 1 cm in width, mildly tender; that his right testicle was without mass; that his left testicle was absent; and that he had flexion and extension of the back, was nontender, and no limited motion on exam.

On March 3, 2004, the applicant underwent a retirement/medical board physical examination. The applicant was found not qualified for service during this examination. The medical report did not clearly state why the applicant was found not fit for duty, but the President of the CPEB (discussed later) attributed the finding to the applicant's tender scar that partially impeded the applicant's mobility.

After approximately five years on the TDRL, the CPEB met and found the applicant unfit for duty because of "malignant neoplasm of the genitourinary system, in remission, residuals: rated as scar, superficial on examination." The CPEB rated the applicant's disability as 10% disabling and recommended his discharge with severance pay. The President of the CPEB attached an amplifying statement noting that the applicant's cancer was in full remission and that a loss of one testicle was not an unfitting condition. The amplifying statement noted that the applicant did not pass a flight physical on March 3, 2004, due to a tender scar that partially impeded his mobility, which was a ratable residual of the original unfitting condition. On May 26, 2004, the applicant rejected the findings of the CPEB and demanded a hearing before the FPEB.

On June 17, 2004, the FPEB agreed that the applicant was unfit for duty due to "malignant neoplasm of the genitourinary system, in remission, residuals: scars, other than head, face, or neck that are deep or that cause limited motion; area exceeding 12

square inches" and rated his disability as 20% disabling under VASRD code 7528-7801. The FPEB also attached an amplifying statement, which contained the following in pertinent part:

In considering this case, the [FPEB] did review evidence concerning [the applicant's] claim of spine impairment. The [FPEB] did find evidence in the record that [the applicant] had experienced back pain and that his pain was documented prior to his being placed on the TDRL in February of 1999. However, the [FPEB] determined from the medical evidence that the back pain existed independent of his reasons for being placed on the TDRL and furthermore, was not sequela, while on TDRL, to the reason for his being placed on the TDRL. The [FPEB] determined that [the applicant's] disability was not incurred during combat and was not the result of an instrumentality of war.

On June 30, 2004, the applicant submitted a rebuttal to the findings and recommendations of the FPEB. He argued then as he argues before this Board that the FPEB's failure to rate his thoracolumbar spine injury was a mistake of law and that it should have rated the applicant's spine injury as 20% disabling.

On July 8, 2004, the President of the FPEB denied the applicant's rebuttal. The President of the FPEB stated the following, in pertinent part:

The [FPEB] considered your claim that [it] made a mistake of law . . . in its finding of June 17, 2004 . . . Title 10 USC Chapter 61, Sec 1210 . . . required the Secretary to make a final determination in TDRL cases on the physical disability(s) "for which the member's name was carried on the temporary disability retired list." Your interpretation of [Section 2.C.3.c.(2) of the PDES Manual] inappropriately expands the law . . . and this is not permitted. The aforementioned section of [the PDES Manual] as written, pertains to entitlement to receive basic pay if the disability existed prior to retirement. The [FPEB] does recognize you had a pre-existing back impairment at the time of your separation for TDRL. However, the record does not support your claim that this was an unfitting condition.

The [FPEB] then considered your claim that other services making TDRL final determinations allow for disabilities that were not part of the original TDRL finding. The other services subject to Title 10 USC Chapter 61 make allowances for these disabilities if they are documented prior to the member being separated and if they are deemed unfitting. Once again, the [FPEB] reviewed the medical evidence in this case and found that your back condition taken independently at the time of your temporary

retirement, would not have made you permanently unfit for duty at that time.

The [FPEB] considered additional medical evidence provided by Dr. [F] regarding his opinion of the nexus between your existing back condition and the possible worsening of this condition by the existence of your abdominal scar . . . The Board recognizes Dr. [F's] opinion. However, the preponderance of the evidence in this case shows you never claimed your back condition as being disabling or making you unfit for duty, even though you had several opportunities to do so both prior to your going on the TDRL and during your TDRL period (all while your scar was healing). More significantly the record shows your back condition only became an issue after (and in direct response to, given the medical treatment sought) you had a motor vehicle accident during the course of your five-year TDRL period. The evidence shows it was this incident, if any, and not your scar, that exacerbated your back condition. Based on the above, your back condition is not sequelae to the condition for which you were placed on the TDRL. Furthermore your back condition at the time you were placed on the TDRL did not make you unfit for duty, independently of your testicular cancer condition.

On September 7, 2004, the PRC reviewed the findings of the FPEB and found no errors in the findings of the FPEB and concurred with the findings and disposition. On September 23, 2004, the Judge Advocate General found the PEB proceedings to be in accepted form and technically correct, the findings to be supported by the evidence of record, and the recommended disposition to be supported by the evidence of record.

On September 27, 2004, the Deputy, Coast Guard Personnel Command directed that the applicant's name be removed from the TDRL and that he be separated from the Coast Guard with severance pay.

Decision of the Department of Veterans Affairs (DVA)

On or about September 9, 1999, the DVA rated the applicant as being 10% disabled due to Tender Abdominal Scar, 10% disabled for low back strain, and 10% disabled due to Tender Testicular Scar for a combined disability rating of 30%. The applicant underwent a DVA compensation and pension examination on August 3, 1999, approximately three months after his discharge from the Coast Guard. The physical examination of the applicant's abdomen and musculoskeletal areas revealed the following pertinent information:

ABDOMEN: There is a surgical scar . . . [which] is slightly hypertrophic . . . Very light stroking causes discomfort along the scar. Any deeper

palpation in the scar area at all, is reported as a deep aching sensation. We find no organomegaly. Bowel sounds are normal.

MUSCULOSKELETAL: He undresses with no difficulty. He stands erect with the shoulders and pelvis level. With straight knees, he can bend forward getting his fingertips within about 2 inches from the toes and can return to the upright position with no difficulty. In the seated position, he will flex forward getting his shoulders down as far as his knees. He will extend about 15-20 degrees. He complains of mild generalized low back pain on extension movement, but not on flexion. He will rotate the trunk bilaterally about 80 degrees and side bend bilaterally about 40 degrees without any pain or discomfort. In the cervical area, he will flex the head forward about 50 degrees, extend it about 50 degrees, rotate bilaterally 85 degrees, and side bend bilaterally about 40 degrees without pain or discomfort.

On or about November 3, 2004, the DVA increased the applicant's disability rating to 20% for Tender Abdominal Scar, and 20% due to low back strain. The DVA did not increase the applicant's 10% rating for Tender Testicular Scar. The DVA assigned the applicant a combined DVA rating of 40%. To obtain an increase in his disability rating, the applicant underwent a physical examination on July 20, 2004, approximately five years after his placement on the TDRL. X-rays of the lumbar spine were taken and revealed "normal alignment of the lumbosacral vertebrae. The disc spaces are preserved. No bony or joint abnormality is seen." The radiologist's impression was that of a "normal . . . lumbosacral spine." The physician stated that the applicant's rectus abdominis muscle contracted normally in all of the tested maneuvers and there was no evidence of diastasis recti. The physician noted that the applicant stated that he had been told that his rectus abdominis muscle did not work properly, which was related to his pain and back pain. However, this doctor stated that he could not confirm the applicant's statement in this regard because the applicant had normal rectus abdominis muscle function at that time. The physician further stated that the applicant's "subjective complain[t]s far outstrips any objective findings on today's examination."

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 failed to show by a preponderance of the evidence that the Coast Guard committed legal error by not rating his back condition. The JAG stated that the only evidence submitted by the applicant to prove

his allegation is his reference to Article 2.C.3.c.(2) of the PDES Manual which states in part: ". . . Impairments not previously rated shall be considered as incurred while entitled to receive basic pay only when the evidence shows that the condition existed prior to temporary retirement." The JAG also noted that Article 2.C.3.C(3) of the PDES Manual states that "An impairment incurred after temporary retirement shall be found "Not incurred while entitled to receive basic pay."

The JAG noted that the FPEB reviewed evidence concerning the applicant's spine and found that the back pain existed independently of his reason for being placed on the TDRL and was not sequela to the reason for the applicant's placement on the TDRL.

The JAG stated that the applicant has the burden of proving error or injustice, but failed to do so in this case. He argued that absent strong evidence to the contrary, it is presumed that Coast Guard officials carried out their duties lawfully, correctly, and in good faith. See Arens v. United States, 969 F. 2d 1034, 1037 (D.C. Cir. 1990).

The JAG stated that the DVA rating for the applicant's low back strain is not persuasive that the Coast Guard committed an error or injustice by not rating the back condition given the different standard employed by the DVA. 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 40% 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.

The JAG attached comments from the Commander, Coast Guard Personnel Command (CGPC), as Enclosure (1) to the advisory opinion. CGPC stated that the applicant was afforded all of his due process rights with respect to the processing of his case through the PDES. He stated he found no error in the process or the decision of the FPEB. Moreover, he stated that the preponderance of the evidence in the case shows the applicant never claimed that his back condition was disabling or made him unfit for duty until he had a motor vehicle accident during the course of his five-year TDRL period.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On September 6, 2005, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that the Coast Guard's position that his back condition was not sequelae to the condition that placed him on the TDRL is incorrect. In this regard, he noted the following:

- a. There is no dispute that the [applicant] suffered a lumbar spine injury while on active duty that required him to seek medical treatment in January to February 1998 time period, a time frame approximately two months prior to the surgery for testicular cancer that would eventually place him on the TDRL.
- b. Likewise there is no dispute that he experienced an exacerbation of this injury after his cancer surgery in the fall of 1998, a period of time that was several months after the two surgical procedures to treat his testicular cancer.
- c. Where the agency's analysis of the sequelae issue falls short is in its failure to produce any evidence refuting the medical opinion establishing a causal nexus between [the applicant's] abdominal surgery to treat his cancer and his back injury.
- d. [T]he board-certified occupational health provider who has been treating the [applicant] since placement on the TDRL stated that the scarring on the [applicant's] abdominus rectus muscle group secondary to the surgeries performed in 1998 caused additional strain on his back and aggravated his previous back injury.

The applicant also argued that the Coast Guard is incorrect in its assertion that his back injury was not separately unfitting at the time that he was placed on the TDRL. In this regard, he noted that the Coast Guard conceded that the applicant suffered a spine injury prior to being placed on the TDRL. The applicant stated that the medical evidence shows that the injury was exacerbated in January-February 1998 and in

November 1998, a period of time after the surgeries. Therefore, he argued that a nexus is established between the surgeries and the aggravation of the applicant's spine.

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 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.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."

Chapter 9.A.1.c. states that there is no legal requirement, in making disability retirement determinations, to rate a physical condition, not in itself considered to be disqualifying for military service, 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. This section further states that "except [for rating residuals] board members will not rate those disabilities neither unfitting for military service nor contributing to the inability to perform military duty."

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 failed to prove that the Coast Guard committed an error by not rating his back condition prior to his removal from the TDRL and discharge with severance pay by reason of physical disability due to "malignant neoplasm of the

genitourinary system, in remission, residuals: scars, other than head, face, or neck that are deep or that caused limited motion; area exceeding 12 square inches" rated as 20% disabling. The applicant is correct that under Chapter 2.C.3.c.(2) of the PDES Manual, an impairment that is unfitting for duty should be rated during the physical disability evaluation process whether or not it resulted from or is related to the reason for the applicant's placement on the TDRL. Chapter 2.C.3.c.(2) of the PDES Manual states when the CPEB (or FPEB) reviews the case of a member on the TDRL findings are required for any impairment not previously rated. This provision further states that "[i]mpairments not previously rated shall be considered as incurred while entitled to receive basic pay only when the evidence shows that the condition existed prior to temporary retirement." [Emphasis in regulation.]

3. Whether or not the FPEB's basis for refusing to rate the applicant's back/spinal injury contained in its amplifying statement constitutes a mistake of law is subject to interpretation. The questionable statement was "the [FPEB] determined from the medical evidence that the back pain existed independent of his reasons for being placed on the TDRL and furthermore, was not sequela, while on TDRL, to the reason for his being placed on the TDRL." However, the Board finds that if such statement in the amplifying comments constituted a mistake, it was cured by the FPEB's reply to the applicant's rebuttal. The reason offered by the FPEB in its reply for not rating the applicant's alleged back/spinal injury is in accord with law and regulation. The FPEB stated in its reply to the applicant's rebuttal that although there was evidence in the record that the applicant had a back/spinal injury prior to placement on the TDRL, the record did not support a finding that such injury caused the applicant to be unfit for military duty, nor did it contribute to the applicant's unfitness for duty caused by his testicular cancer.

4. Other provisions of the PDES Manual support the FPEB's interpretation of the regulation as put forth in its reply to the applicant's rebuttal. Chapter 2.C.2.a. of the PDES Manual 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 addition, Chapter 2.C.3.a.(3)(a) of the PDES Manual states that 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." Last, Chapter 9.A.1.c. of the PDES Manual states that there is no legal requirement, in making disability retirement determinations, to rate a physical condition, not in itself considered to be disqualifying for military service, 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. This section further states, "except [for rating residuals] board members will not rate those disabilities neither unfitting for military service nor contributing to the inability to perform military duty."

5. 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 FPEB 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. 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.f.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.

6. The Board finds that the applicant did not prove that his back/spinal condition caused him to be unfit to perform the duties of rate or rating. In this regard, the Board finds no medical statement that the applicant was rendered unfit for duty as a result of his back/spinal injury. The medical board report that referred the applicant's case to the CPEB did not mention or diagnose the applicant as suffering from back pain/injury. In fact, the medical board report of July 21, 1998, noted that the applicant was a well-developed, well-nourished male in no acute distress. Even the applicant's CO stated that the applicant had been able to perform all duties assigned and expected of him prior to and since his recuperation from chemotherapy. Chapter 2.C.2.a. states that the CO's statement is critical in determining how the applicant's conditions affected his ability to do his job. The evidence further shows that the applicant was placed on the TDRL on March 15, 1999 due to "malignant neoplasm of the genitourinary system" with a 30% disability rating and that no other disabilities were rated by the CPEB at that time. The applicant accepted the findings of the 1999 CPEB and was placed on the TDRL with a 30% disability rating.

7. In addition, the applicant was on the TDRL for approximately five years and had three periodic TDRL examinations during that time. The medical reports for the first two examinations did not mention a back/spinal injury or back pain. The first periodic examination occurred on or about October 25, 2000, and the medical report stated that the applicant had no complaints and noted that his "back is without CVA or spinal tenderness." The second periodic examination occurred in February 2003, and the medical report stated that the applicant had no complaints, weight loss, or constitutional symptoms."

8. The third periodic examination occurred in February 2004, and the medical report noted that the applicant had some back pain, but it also stated that the applicant had flexion and extension of the back, was nontender, and had no limited motion on exam.

9. The applicant argued that the evidence from a physical therapist and Dr. F proves that his back injury is secondary to his testicular cancer surgery to his abdomen.

The physical therapist states in his May 27, 2004 letter to the FPEB that the applicant was originally referred to physical therapy in March 2000 for hypomobility and weakness of the trunk and pain. However, the therapist failed to state, as he did in an earlier April 8, 2003, letter, that the applicant had been in an automobile accident for which he received physical therapy treatments in March and April of 2000. This 2003 letter also stated that the applicant experienced discomfort and drainage from the abdominal scar during the trunk strengthening exercises. Therefore, it appears to the Board that the applicant's physical therapy treatments and back pain were attributable at that time to injuries caused by the automobile accident.

10. Dr. F stated in his May 28, 2004, letter to the FPEB that the applicant had suffered a reopening of the surgical scar while attempting to comply with his physical therapy regimen. However, the Board notes that the physical therapist's letter of April 8, 2003, indicated that the physical therapy treatments that resulted in the reopening of the applicant's scar were prescribed after the applicant was involved in an automobile accident and appeared to have nothing to do with the cancer treatment or surgeries. Therefore, the Board is not persuaded that the physical therapy treatments were related to any condition that the applicant had prior to his placement on the TDRL. Nor is the Board persuaded by Dr. F's statement that the applicant suffered pain secondary to the involvement of the abdomen rectus muscle group resulting from his surgical scar. In contrast, the Board notes that the DVA's medical examination of the applicant on July 20, 2004, approximately two months later, revealed, "normal rectus abdominis muscle function." During the five years that the applicant was on the TDRL, he did not complain about pain in his abdomen rectus muscle group until his time on the TDRL was about to expire. Here, it is important to note that Dr. F did not state that the applicant's back/spine injury caused him to be disabled or unfit to perform the duties of his rate. As stated above, 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. To be rated for a back disability while in the Coast Guard, the applicant must prove that he incurred the disability while entitled to basic pay and that it rendered him unfit or contributed to his unfitness to perform the duties of his rate or rating. The applicant has not met his burden of proof on this issue.

11. Although the applicant submitted evidence showing that the DVA has determined that he is 40% 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."

12. The applicant has not shown by preponderance of the evidence that he suffered a back/spinal injury that caused him to be unfit for duty at the time he was placed on the TDRL or contributed to his unfitness due to testicular cancer and surgeries while on the TDRL. 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. The Board would note that the CPEB, FPEB, PRC, and the JAG reviewed the applicant's case, and none found that his back/spine injury was unfitting for military service or contributed to his unfitness due to his testicular cancer and surgeries.

13. The applicant complained about the FPEB's finding that his disability was not combat-related but provided no argument or evidence to show that the FPEB committed an error or injustice by making such a finding or that the finding was erroneous. The Board has consistently held that a mere allegation is insufficient to prove error or injustice. Therefore, the Board will not disturb the finding of the FPEB in this regard.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former AMT3 XXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Toby Bishop

J. Carter Robertson

Eric J. Young