

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-090

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FINAL DECISION

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 the case on February 16, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 15, 2007, is approved and 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, who was permanently retired from the Coast Guard by reason of physical disability¹ on August 23, 2004, with a 50% disability rating, asked the Board to increase his disability rating to at least 70%. The applicant alleged that his disability rating should be increased because the Department of Veterans' Affairs (DVA) has awarded him an additional 10% rating for service-connected temporomandibular joint dysfunction (TMJ) with myofascial pain disorder and a 10% rating for service-connected gastroesophageal reflux with hiatal hernia. He also noted that his family doctor has determined that he is 100% disabled. The applicant further alleged that he should have received at least a 70% rating because a Coast Guard doctor measured his GAF (global assessment of functioning) to be 45-55, and a DVA attorney told him that this measurement warranted at least a 70% disability rating.

In support of his allegations, the applicant submitted a DVA decision, dated November 15, 2005, showing that he was awarded the following ratings for service-connected disabilities

¹ 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, 30% or higher under the VASRD at the time of retirement. Chapter 2.A.38. of the Physical Disability Evaluation System (PDES) Manual 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."

under the Veterans' Affairs Schedule for Rating Disabilities (VASRD) effective as of August 24, 2004, the day after his retirement from the Coast Guard:

- 50% for anxiety disorder with delusions (also claimed as delusional disorder and schizophrenia);
- 10% for gastroesophageal reflux with hiatal hernia (claimed as chronic indigestion and reflux disease);
- 10% for TMJ with myofascial pain disorder; and
- 0% for hemorrhoids.

His combined disability rating from the DVA was 60%. The DVA based the 10% rating for service-connected gastroesophageal reflux with hiatal hernia on a finding that the applicant had complained of frequent heartburn and indigestion prior to his retirement. The 10% rating for TMJ with myofascial pain was based on the applicant's complaints of popping and tenderness in his jaw after he was in a motor vehicle accident in March 2000. The DVA denied service connection for asthma, tinnitus, personality disorder with schizotypal and paranoid traits, and post-operative amblyopia with strabismus of the right eye.

The applicant supplemented the file with his latest DVA decision, dated April 30, 2007, which increased his disability rating for "schizoaffective disorder, bipolar type (formerly anxiety disorder with delusions)" from 50% to 70% as of November 21, 2006. The decision states that his combined disability rating is 80%.

The applicant also submitted a psychologist's report dated December 8, 2004, which was apparently prepared for the DVA. The psychologist reported that, given the applicant's report of his condition and his prescribed medication, her diagnostic impression was that he suffered from "schizophrenia undifferentiated type, other or unspecified pattern." She reported that his GAF was 65.

The applicant submitted reports from his current doctor dated September 23, 2004; October 13, 2004; December 15, 2004; January 24, 2005; April 4, 2005; and November 4, 2005. The reports indicate that he is treating the applicant for schizoaffective schizophrenia. The earliest report notes that the applicant also complained of asthma and hemorrhoids but that the applicant's respiratory complaint was actually psychogenic dyspnea (labored breathing)—a symptom of tiredness and depression.

The same doctor wrote a letter for the applicant on May 12, 2005, in which he stated that the applicant was taking his medication regularly but "continues to be profoundly limited by his disease. His self esteem has been damaged. As long as he maintains his medication, his abnormal thought processes are held in check. However, he has trouble comprehending data and performing any type of complex task. He continues to be medically disabled 100% at this point in time." In addition, the applicant submitted a copy of a doctor's note on a prescription pad dated July 17, 2006, which states that he "is disabled from work until further notice."

SUMMARY OF THE RECORD

The applicant served in the Coast Guard from August 7, 1990, through October 15, 1993, when he was released into the Reserve. On January 29, 1996, the applicant reenlisted in the Coast Guard. He continued to serve on active duty and advanced to the rate of storekeeper second class. He received several awards and commendations, including a "Sailor of the Quarter" award.

On July 28, 2003, the applicant's command counseled him about a significant decline in his performance during the prior two weeks. The command placed him on performance probation. On November 4, 2003, the applicant underwent a psychological assessment at a Navy hospital after being referred by his command because of "odd or bizarre behaviors in the work center, such a talking or laughing to himself when no one else is around ... admitted discontinuance of contracts for implausible conduct on the part of contractors; he has mismanaged funds and has said things that indicated racial prejudice and sexism ... his duty performance has declined."

On November 19, 2003, a Navy psychologist reported that psychological testing indicated that the applicant suffered from "a severe personality disorder (paranoid or schizotypal) or a schizophrenia spectrum disorder. [He] no longer appears to be fit for retention in the USCG. He should be placed on LIMDU for a period of 08 months for further assessment and treatment. He may need to be considered for a MEB." He diagnosed the applicant with "delusional disorder" and "personality disorder NOS [not otherwise specified] with schizotypal and paranoid traits." He also noted a possibility that the applicant might have schizophrenia and that the applicant's GAF was 68.

On November 25, 2003, the applicant underwent a CT scan of his brain because of his "increasing paranoid and disorganized thought and behavior," as well as complaints about frequent headaches since a motor vehicle accident in 2000. The results of the CT scan were normal.

On December 5, 2003, a staff psychiatrist at the Navy hospital prepared a report for a Medical Evaluation Board (MEB) in which he diagnosed the applicant with schizoaffective disorder² on Axis I and schizotypal and paranoid traits on Axis II. The psychiatrist reported that the applicant's GAF was currently 45-55 and that the applicant was unfit for duty due to the severity of his psychiatric disorders and referred him for further evaluation and disposition by a Physical Evaluation Board (PEB).

² "Schizoaffective disorder" is a psychotic disorder that is characterized by the symptoms of schizophrenia, such as delusions, hallucinations, disorganized speech, and grossly disorganized or catatonic behavior, plus a major depressive and/or manic disorder. It is sometimes preceded by a schizoid, schizotypal, borderline, or paranoid personality disorder. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR), p. 319-21. Schizoaffective disorder is part of "schizophrenia spectrum," along with schizotypal personality disorder. *Id.* at 309. Chapter 5.B.7. of the Medical Manual states that schizoaffective disorder is disqualifying for military service and that members with this condition should be evaluated by a medical board and processed for separation under the PDES.

On March 25, 2004, the applicant submitted a rebuttal to the report and asked to be retained on active duty. The applicant stated that because of an accounting error discovered in April 2003, his command questioned his integrity and professionalism. He alleged that because of this incident, he did not receive a fair and unbiased psychological evaluation. The applicant also noted that he suffered from tightness in his jaw, which increased his stress level, and had been prescribed medication to relieve the tightness.

The applicant further stated in his rebuttal to the report that on February 27, 2004, he consulted a psychiatrist for a second opinion. The report of this psychiatrist indicates that the psychiatrist found “no evidence to support any psychological disorder” during his interview with the applicant. The psychiatrist reported the applicant’s GAF to be 85.

On April 2, 2004, the applicant’s commanding officer (CO) forwarded the report to the Group Commander with a recommendation that the applicant be released from active duty. The CO stated that due to repetitive and costly financial errors, the applicant’s privileges on the unit’s financial network had been revoked and that the applicant’s behavior had become increasingly disruptive. The CO reported that the applicant was unable to focus on his work or to discuss the work in a constructive conversation.

On April 13, 2004, the Group Commander forwarded the report to the Coast Guard Personnel Command (CGPC) and recommended that the applicant be released from active duty. He noted that the second opinion received by the applicant was based on only a single interview, whereas the diagnosis of schizoaffective disorder was based on several visits.

On June 4, 2004, the applicant underwent more psychological testing and was evaluated by another psychiatrist because the report forwarded to CGPC had not contained an assessment by the senior physician of the MEB. In response, a psychiatrist serving as the senior physician for the MEB submitted a new report in which he stated that the applicant suffered from paranoid delusions about his command, the local police, and local merchants. He diagnosed the applicant with “Delusional Disorder, Persecutory type” and no personality disorder. He assessed the applicant’s GAF as 65. The psychiatrist stated that the applicant was mentally unfit for further military duty and should be referred to a PEB.

On June 16, 2004, the PEB convened to review the records and recommended that the applicant be permanently retired with a 50% disability rating for “schizoaffective disorder—occupational and social impairment with reduced reliability and productivity due to such symptoms as stereotyped speech; impaired judgment; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.”

On June 17, 2004, CGPC informed the applicant of the PEB’s recommendation and assigned him counsel to decide whether to accept the recommendation or to demand a formal hearing. On June 22, 2004, after consulting counsel, the applicant accepted the PEB’s recommendation that he be retired with a 50% disability rating. The PEB’s recommendation was approved on July 27, 2004, and the applicant was permanently retired by reason of physical disability on August 23, 2004.

VIEWS OF THE COAST GUARD

On June 25, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. The JAG adopted the findings and analysis provided in a memorandum on the case prepared by CGPC.

CGPC noted that under Chapter 2.C.3.a.(3)(a) of the Physical Disability Evaluation System (PDES) Manual, when a PEB determines that a member on active duty is disabled and unfit for continued duty, the PEB must also

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. This policy applies to those evaluatees whose initial entry into the PDES occurs subsequent to 9 July 1987. 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.

CGPC stated that the applicant received all due process under the PDES before he accepted the PEB's recommendation of a 50% disability rating. CGPC stated that although the applicant believes that the Coast Guard should have rated his TMJ with myofascial pain and gastroesophageal reflux with hiatal hernia, there is no evidence in the record that "these conditions were unfitting or that they contributed to the condition which caused his unfitness for duty," which is a necessary condition for a disability rating under Chapter 2.C.3.a.(3)(a) of the PDES Manual. CGPC also stated that the applicant's allegation that his GAF score required a rating of at least 70% is unfounded as there is no such requirement under the VASRD or Coast Guard regulations.

CGPC stated that the fact that the DVA awarded the applicant a combined disability rating of 70% as of his date of separation does not prove that the Coast Guard erred in assigning him a 50% rating. CGPC explained that the

military disability system determines unfitness for duty and then rates only the extent that the unfitting medical condition or conditions prevent the member from performing their duties at that time. The DVA ratings are based on an evaluation of the whole person, including the evaluation of the evaluatee's employability and earning capacity. Accordingly, DVA ratings are not determinative of the issues involved in military disability ratings determinations.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On July 3, 2007, the applicant responded to the views of the Coast Guard. The applicant reported that the DVA has awarded him a 100% rating for unemployability and repeated his allegation that his GAF score warranted a rating higher than 70%. The applicant further complained that although the Coast Guard awarded him a 50% rating, the benefit he receives is "more like 40%" and that because the Coast Guard lost his medical records, his benefits were

delayed for over two years. The applicant asked the board to raise his rating to 90% or 100% so that if the DVA ever lowers his percentage, “the Coast Guard could be there to help.”

SUMMARY OF APPLICABLE REGULATIONS

Chapter 2.C.2.a. of the PDES Manual (COMDTINST M1850.2C) provides that the “sole standard” that a PEB 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 9.A.1.c.(1) states that “[t]here 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. Except as discussed in (2) below [concerning post-operative residuals], in making this professional judgment board members will not rate those disabilities neither unfitting for military service nor contributing to the inability to perform military duty.”

Chapter 9.A.2. states the following:

- a. The VASRD is used in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage ratings represent, as far as can practicably be determined, the average impairment in earning capacity resulting from such diseases and injuries, and their residual conditions, in civilian occupations.
- b. Conditions which do not render the member unfit for continued service will not be considered for determining the compensable disability rating unless they contribute to the finding of unfitness.

Chapter 9.A.3. states the following:

- a. It is not expected that every case will show the exact symptomatology specified in the VASRD, especially with the more fully described grades. Findings which are sufficiently characteristic of the symptoms described in the VASRD and the evaluatee’s disability are adequate. Above all, coordination of assigned if the disability picture more nearly approximates the rating with impairment of function is required in all instances. There is no rigid requirement for the presence of all enumerated manifestations of a given disability. Those manifestations which are sufficiently and significantly representative of the entity and the severity of limitations imposed on the member are the only requirements.
- b. Where there is a reasonable doubt as to which of two percentage evaluations should be applied, the higher evaluation will be criteria for that rating. Otherwise, the lower rating will be assigned.

When, after careful consideration of all reasonably procurable and assembled data, there remains a reasonable doubt as to which rating should be applied, such doubt shall be resolved in favor of the member, and the higher rating assigned.

Under the VASRD at 38 C.F.R. § 4.130, a member diagnosed with schizoaffective disorder (code 9211) should receive a disability rating as follows:

100% for “[t]otal occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.”

70% for “[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.”

50% for “[o]ccupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.”

30% for “[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).”

10% for “[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication.”

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 boards, have acted cor-

rectly and in good faith in assigning his disability rating.³ The applicant bears the burden of proving, by a preponderance of the evidence, that his disability rating was wrong.⁴ Although the applicant accepted the PEB's recommendation that he be discharged with a 50% disability rating for schizoaffective disorder, he now alleges that he should have received at least a 70% rating from the Coast Guard at the time of his retirement because (a) his GAF was measured at "45-55" and (b) the DVA found his TMJ with myofascial pain and gastroesophageal reflux with hiatal hernia to be service connected and assigned a rating of 10% to each condition.

3. The applicant alleged that the Coast Guard should have assigned him a higher disability rating based on his psychiatric condition alone because the psychiatrist who examined him in December 2003 reported his GAF to be "45-55." This broad range of GAF indicates that at the time of examination, the applicant exhibited serious to moderate symptoms interfering with his occupational functioning.⁵ However, the official report of the senior psychiatrist for the MEB, dated June 4, 2004, assessed the applicant's GAF to be 65, which means that he had "some mild symptoms" that interfered with his occupational functioning.⁶ Whatever the applicant's usual GAF at the time of his retirement, however, the GAF is not determinative of what disability rating the applicant should have been assigned. Under Chapters 9.A.2. and 9.A.3. of the PDES Manual, disability ratings are assigned by comparing the member's condition with the written descriptions for each potential percentage rating in the VASRD. The VASRD descriptions for psychiatric disability ratings do not mention GAF assessments. Therefore, the fact that the applicant's GAF was once measured to be 45-55 does not prove that the 50% rating he received from the Coast Guard for his psychiatric condition was erroneous.

4. The descriptions of the applicant's condition by the various military psychiatrists who evaluated him prior to his separation and by his CO do not indicate that the 50% rating he received was wrong. The CO and the psychiatrists reported odd, unreliable behavior and diminished productivity, as required for a 50% rating.⁷ They did not report the more severe symptomatology the VASRD requires for a 70% rating or higher, such as suicidal ideation, obsessional rituals, near-continuous panic or depression, impaired impulse control, spatial disorientation, and inability to establish effective relationships.⁸ The fact that the DVA originally assigned the applicant a 50% disability rating for his psychiatric condition also supports the accuracy of the 50% rating assigned to him by the Coast Guard. Moreover, the fact that the applicant agreed with the PEB's recommendation for a 50% rating, after consulting counsel, indicates that he agreed with their assessment of his condition in 2004.

5. In support of his request, the applicant submitted a report from a doctor dated May 12, 2005, who wrote that the applicant was 100% disabled, and recent decisions of the DVA, which raised his rating for his psychiatric condition from 50% to 70% as of November 21, 2006, and which recently raised his total rating to 100% based on a finding of unemployability.

³ 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").

⁴ 33 C.F.R. § 52.24(b).

⁵ DSM-IV-TR, p. 34.

⁶ *Id.*

⁷ 38 C.F.R. § 4.130

⁸ *Id.*

However, evidence of the severity of the applicant's psychiatric condition months or years after his retirement does not prove the severity of his condition at the time of his retirement, which is what a disability rating from the Coast Guard is supposed to reflect. The Coast Guard and other military services assign disability ratings that reflect members' unfitness for active duty at the time of separation; post-separation increases in disability are properly reflected in increases in the DVA's ratings, not in increases in the ratings assigned by the military services. The Board finds that the applicant has not proved by a preponderance of the evidence that his 50% rating for schizoaffective disorder from the Coast Guard was erroneous or unjust or that, at the time of his retirement, his psychiatric condition met the criteria for a 70% or 100% rating under the VASRD.

6. The applicant alleged that his Coast Guard disability rating should be higher than 50% because the DVA found his TMJ with myofascial pain and his gastroesophageal reflux with hiatal hernia to be "service connected" and assigned each condition a 10% disability rating. However, the DVA assigns ratings for all service-connected disabilities ratable under the VASRD in accordance with how they affect a veteran's civilian employment,⁹ whereas the Coast Guard assigns disability ratings only for those disabilities that render the member permanently unfit to perform continued active duty at the time of separation or that contribute to the finding of unfitness for continued duty.¹⁰ DVA ratings are "not determinative of the same issues involved in military disability cases."¹¹ Therefore, the fact that the DVA found the applicant's TMJ and reflux to be service connected and assigned each condition a 10% disability rating does not prove that the Coast Guard erred in failing to rate these two conditions since the DVA rates all service-connected impairments whether or not they actually rendered the member unfit for continued active duty or contributed to the finding of unfitness.

7. To prevail on his claim that the Coast Guard erred in failing to rate his TMJ and reflux condition as well as his schizoaffective disorder, the applicant must prove by a preponderance of the evidence that his TMJ and/or reflux condition rendered him unfit for continued duty or contributed to the finding of unfitness.¹² There is no evidence in the record that the applicant's gastroesophageal reflux with hiatal hernia rendered him unfit for continued service or contributed to his unfitness at the time of his retirement. Although the DVA decision states that while serving on active duty, he complained of frequent heartburn and indigestion, not every medical condition or impairment renders a member unfit or contributes to unfitness since many members tolerate various medical conditions while continuing to serve on active duty without restrictions.¹³ The DVA decision also shows that the applicant incurred his TMJ while serving on active duty, but the only evidence in the record indicating that the TMJ may have contributed to his unfitness is in his request to remain on active duty dated March 25, 2004. In that request, the applicant attributed his problems to a conflict with his CO and stated that his TMJ had added to his stress. However, none of the medical reports in his record attribute any of his behavioral problems or other psychiatric symptoms to TMJ with myofascial pain. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard

⁹ 38 C.F.R. § 4.1.

¹⁰ PDES Manual, Chaps. 2.C.3.a.(3)(a), 2.C.2.i., 9.A.1.c.(1), and 9.A.2.b.

¹¹ *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983).

¹² PDES Manual, Chaps. 2.C.3.a.(3)(a), 2.C.2.i., 9.A.1.c.(1), and 9.A.2.b.

¹³ PDES Manual, Chap. 2.C.2.b.

erred in failing to assign disability ratings for his gastroesophageal reflux with hiatal hernia or his TMJ with myofascial pain.

8. The applicant has not proved by a preponderance of the evidence that his 50% disability rating from the Coast Guard should be increased. He has not proved that his psychiatric symptoms met the criteria for a higher rating at the time of his retirement or that his other medical conditions should have been rated as well as his psychiatric condition. The record indicates that the applicant received due process under the PDES Manual and accepted the 50% rating prior to his retirement.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Patrick B. Kernan

William R. Kraus

Kathryn Sinniger