

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-020

**XXXXXXXXXXXXXX
XXXXXXXXXXXXXX**

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 October 26, 2007, upon receipt of the applicant's completed application, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated July 24, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by increasing his Coast Guard disability rating from 20% to at least 30% based upon a disabling knee condition that was not rated by the Coast Guard when it rated his disabling back condition.¹

BACKGROUND

The applicant enlisted in the Coast Guard on November 10, 1997, and was discharged on August 4, 2006, by reason of physical disability with severance pay due to a 20% disability rating for a back condition.

Physical Disability Evaluation System (PDES)² Processing for debilitating back condition

In 2000, the applicant hurt his back while moving a heavy piece of furniture. Thereafter, he occasionally sought treatment for back pain. On March 21, 2005, the applicant underwent a physical examination for the purpose of separation as he had declined to reenlist. He reported

¹ A 30% disability rating is necessary to be retired from the Coast Guard due to a physical disability.

² The Coast Guard PDES is composed of administrative boards and reviewing and approving authorities that evaluate a member's physical ability to perform the duties associated with the member's office, rank, grade, or rating. The components of the PDES are the medical board, Central Physical Evaluation Board, Formal Physical Evaluation Board, the Physical Review Council, and the Physical Disability Appeal Board.

that he suffered from “constant back pain due to herniated disks.” On May 2, 2005, the physician reported that the applicant did not have any disqualifying defects. Therefore, he was found fit for separation. The applicant objected to the finding and extended his enlistment for one year. In June 2005, the applicant was transferred to a new unit in Louisiana and continued to complain about back pain. On October 13, 2005, the applicant underwent an MRI, which showed that he had a small posterior central disk herniation at L3-4 and a disc bulge at L4-L5.

On December 21, 2005, an Initial Medical Board (IMB)³ diagnosed the applicant with low back pain that caused him to be unable to perform the duties of his rate, to which the applicant agreed. On January 19, 2006, the Central Physical Evaluation Board (CPEB)⁴ reviewed the applicant’s records and recommended that he be discharged with a 20% disability rating and severance pay for intervertebral disc syndrome under the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) code 5243. The applicant, with the advice of counsel, rejected the CPEB findings and demanded a hearing before the Formal Physical Evaluation Board (FPEB)⁵. The FPEB heard the applicant’s case on March 28, 2006, and recommended that the applicant be discharged with a 20% disability rating and severance pay. The applicant rebutted the FPEB findings and recommendation. On April 24, 2006, the Physical Review Counsel (PRC)⁶ reviewed the applicant’s case and agreed with the findings of the FPEB. The Commandant approved the findings and recommendations of the FPEB and the applicant was discharged with a 20% disability due to a back condition.

Prior BCMR Case

In an earlier application, BCMR No. 2006-112, the applicant requested that the Board increase the rating for his back disability from 20% to 40%. The Board denied that application on January 31, 2007.

³ An IMB is a written report of a medical board convened by appropriate authority to evaluate a member's fitness for continued duty due to physical or mental impairments and to make recommendations consistent with the findings. Chapter 2.A.24 of the PDES Manual. A medical board is normally composed of two medical officers, but may be composed on one medical officer under exceptional circumstances. Chapter 3.C.1. of the PDES Manual.

⁴ The CPEB is a permanently established administrative body convened to evaluate, on a record basis, whether active duty, reservists, or temporarily disabled retired members are fit for duty. Chapter 4.A.1. of the PDES Manual. If the CPEB finds the member unfit for continued duty, it shall make such a finding and propose ratings for those disabilities which are unfitting or which contribute to the condition that causes the member to be unfit. Article 2.C.3.a.(3) of the PDES Manual.

⁵ The FPEB is a superior body to the CPEB. It is a fact-finding body that holds an administrative hearing to evaluate a member's fitness for duty and to make recommendations consistent with the findings. The member is assigned counsel or may be represented by civilian counsel at his or her expense. The FPEB makes the same findings as those required of the CPEB. Chapter 5.A.1. of the PDES Manual.

⁶ The PRC is a review body. It reviews every CPEB or FPEB case in which the member rebuts the findings and recommended disposition. In conducting the review, the PRC checks for completeness and accuracy, and ensure consistency and equitable application of policy and regulation. See Chapter 6 of the PDES Manual.

CURRENT CASE: BCMR DOCKET NO. 2008-020

Allegations

As stated earlier, in his current application, the applicant is requesting an increase in his disability rating to at least 30% due to an alleged knee disability that was incurred on active duty, but was not rated by the Coast Guard. He argued that although he incurred the knee condition while on active duty, it was not considered by the medical board or the CPEB when they evaluated and rated his disabling back condition. He stated that he complained about pain in his knees while on active duty, but the condition was never treated. He stated that within four months of his discharge from the Coast Guard, the Department of Veterans Affairs rated each of his knees as being 10% disabling for a combined disability rating of 20%.

In support of his application, the applicant submitted a copy of the decision from the DVA granting him a 10% disability rating for each knee. With respect to the right knee, the DVA doctor diagnosed the applicant as having osteoarthritis and granted him a 10% disability rating due to pain in the knee when in motion. The DVA noted that there was no evidence that the applicant's right knee condition manifested itself while he was in the service, but it granted the 10% disability rating for the right knee on the presumption that it was incurred while the applicant was on active duty because the condition manifested itself within one year of his separation from the Service.

With respect to the left knee, the DVA stated that the applicant's Coast Guard medical record noted that the applicant complained of left anterior knee pain on one occasion while in the Service, but that that examination was unremarkable. The DVA decision further stated:

The examination results from the Tampa VA Medical Center note you reported that you hurt your knees numerous times while on a boat in service. The examiner noted that range of motion testing of your left knee showed full extension to 0 degrees, and flexion limited to 95 degrees. Upon repetitive motion testing an additional 5 degrees of flexion was lost bringing the range of motion to 90 degrees. The report notes painful motion. Lachman's and McMurray's tests were negative and there was no evidence of instability. An x-ray report showed minor degenerative changes. The examiner diagnosed osteoarthritis.

You complained of left knee pain in service and were diagnosed with arthritis within one year of separation. Service connection for left knee osteoarthritis is granted as the evidence shows the disability is directly related to service. An evaluation of 10 percent is assigned from August 5, 2006, for painful motion. The effective date is the day following your separation from service as your claim was received within one year of that date and service connection is granted on a direct basis. A higher evaluation of 20 percent is not warranted unless extension of the leg is limited to 15 degrees or evidence demonstrates leg flexion which is limited to 30 degrees.

Coast Guard Medical Record Entries Related to the Applicant's Knees

The applicant's Coast Guard medical records shows that on December 5, 2005, the applicant complained to medical personnel about his left knee, back pain, and sore throat. The medical note states that the applicant "has been having a left anterior knee pain lately when he puts a lot of pressure on his left leg. Left knee exam is unremarkable with full range of motion, no effusion present [and] no ligamentous instability demonstrated. Left knee x-ray is normal."⁷

IEWS OF THE COAST GUARD

On March 12, 2008, the Board received an advisory opinion from the Office of the Judge Advocate General (JAG) of the Coast Guard. He recommended that the applicant's request for relief be denied in accordance with the memorandum provided by the Commander, Coast Guard Personnel Command (CGPC).

CGPC stated that there was no evidence that the Coast Guard's decision in the applicant's case was in error or unjust. CGPC noted that the applicant did not mention any knee problems during the PDES processing for his back condition. Moreover, CGPC noted that the applicant was afforded his full due process rights within the PDES process. CGPC further stated the following:

The applicant contends that the issues of knee pain (Osteoarthritis) should have been considered as part of his PDES processing. There is no indication in the applicant's record that these conditions were unfitting or that they contributed to the condition which caused his unfitness for duty . . . Additionally at no time did the applicant rebut the findings of the PDES with these additional conditions. His record indicates one notation of evaluation for knee pain on December 5, 2005, ancillary to complaint of a sore throat and treatment for chronic back pain. The evaluation was unremarkable with regards to knee pain or related impairment . . . There is no indication that the applicant's knee pain was unfitting at the time of his discharge.

The applicant indicates that the DVA awarded him a disability rating of 20% for osteoarthritis of both knees (10% disability rating for each knee). The subsequent DVA disability does not reflect an incorrect rating or omission when he was processed through the PDES. 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 the time. The DVA ratings are based on an evaluation of the whole person, including the evaluation of the evaluatee's employability status and earning capacity. Accordingly, DVA ratings are not determinative of issues involved in military disability ratings determinations. Fluctuation in ratings over time is not unexpected and the applicant's current physical disabilities are being addressed through the appropriate venue. The evaluation of the applicant at the time of discharge is not effected by subsequent DVA or private provider disability rating.

⁷ There are no further entries in the applicant's medical record with respect to his knees.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On March 13, 2008, a copy of the Coast Guard views was sent to the applicant for a response. The BCMR did not receive a response.

APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be “unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay” may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, “at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.” Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that “[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it.”

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

Article 2.A.50. of the PDES Manual defines unfit for continued duty as the status of a member who is physically and/or mentally unable to perform the duties of his office, grade, rank or rating because of a physical disability.

Article 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 office, grade, rank or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating.

Article 2.C.2.i of the PDES Manual states in pertinent part that "a member may have physical impairments ratable in accordance with the VASRD, [however] such impairments do not necessarily render him or her unfit for military duty."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The applicant alleged, but failed to prove, that the medical board failed in its responsibility to diagnosis his alleged knee condition on its medical evaluation and report. Nor has he shown that the CPEB erred in not rating his knee condition. There is insufficient evidence in the record to establish that the applicant suffered a disabling knee condition while in the Coast Guard. The fact is that during the applicant's nine years of active duty service, there was only one entry in his medical record in which he complained about pain in his left knee. That entry is dated December 5, 2005. The Coast Guard medical note indicated that that left knee examination was unremarkable and that the knee had a full range of motion, no effusion, and no ligament instability. Moreover, the x-ray of the knee indicated that it was normal. There were no Coast Guard medical entries about his right knee. Therefore, no basis existed in the medical record that would have caused the medical board to diagnose the applicant as having a knee condition in the right knee and no persuasive medical evidence in the record that the applicant suffered a disabling knee condition in his left knee. Further, there is no evidence that the applicant brought his concern about a possible debilitating knee condition to the attention of the medical board, CPEB, FPEB, or PRC during the PDES processing for his unrelated back condition. Certainly, he or his counsel should have raised the matter with one of the various PEB boards if there was a concern that he suffered from a debilitating knee condition. The DVA's decision to grant the applicant a 10% disability rating in each knee for painful motion after his discharge from the Coast Guard based upon their doctor's examination and to describe their disability rating for the left knee as being service-connected based upon a single Coast Guard medical entry that revealed a healthy knee, does not persuade this Board that the Coast Guard erred in not diagnosing or rating the applicant's alleged knee condition during his PDES processing for his back disability.

3. Even if the applicant could prove that the medical board or CPEB should have diagnosed his knee condition in their evaluation and reports, it is improbable that the CPEB would have found the knee condition to be physically disabling because the applicant has pointed to no evidence, medical or otherwise, that the alleged knee condition contributed to or caused him to be unfit to perform the duties of his rank, rate, or rating. In making this finding, the Board notes that Article 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 office, grade, rank, rate, or rating. Article 2.A.50. of the PDES defines unfit for continued duty as the status of a member who is unable to perform the duties of office, grade, rank, or rating because of a physical disability. Article 2.C.2.f.i. makes it clear that a member may have physical impairments ratable in accordance with the VASRD, but such impairments may not necessarily render the member unfit for military duty. Taking into consideration the three provisions just discussed, it is the applicant's burden to prove that he incurred a knee injury while on active duty and that said knee injury was unfitting for military duty, i.e. caused him to be unable to perform the duties of his office, grade, rank, or rating. The applicant has pointed to no medical evidence that he had disabling knee condition while on active duty and certainly he has offered no evidence (medical or otherwise) that a knee disability caused him to be unable to perform the duties of his rate, grade or rating. The DVA's decision to grant the applicant a 10% disability rating for painful motion in each knee contains no evidence that the applicant was unfit to perform his military yeoman duties.

4. Moreover, the DVA rating, as in the applicant's case, does not establish error by the Coast Guard. This Board has consistently held that a disability rating from the DVA does not *per se* establish that the Coast Guard committed an error or injustice by not assigning a 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."

5. The applicant received all due process to which he was entitled under the PDES. The Board notes that the applicant failed to raise any issue with respect to his alleged knee condition during that process and has not presented medical evidence that he suffered a knee disability while on active duty that caused him to be unfit to perform his yeoman duties.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Francis H. Esposito

Paul B. Oman

David A. Trissell