

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-027

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 application upon receipt of the applicant's completed application on November 16, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated August 18, 2011, 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 her record by changing her disability rating from 30% to 100%. The applicant was retired by reason of physical disability on January 21, 2008 with a 30% disability rating. She asked that her record be corrected to grant her the disability ratings awarded by the Department of Veterans Affairs (DVA) on August 26, 2008. The DVA granted the applicant a 100% disability rating for major depressive disorder with post traumatic stress disorder, 10% for lumbosacral strain, 10% for left foot plantar fasciitis, and 10% for right foot plantar fasciitis.

ALLEGATIONS

The applicant, who was represented by a civilian attorney, wrote that the Formal Physical Disability Evaluation Board (FPEB)¹ recommended that the applicant be permanently retired from the Coast Guard with a 30% disability rating for major depressive disorder under the Veterans Affairs Schedule for Rating Disabilities (VASRD)² code 9434 and a 0% rating for

¹ The FPEB is a fact finding body (in the Physical Disability Evaluation System (PDES)) that holds an administrative hearing to evaluate an individual's fitness for duty and to make recommendations consistent with its findings. Chapter 2.A. 17 of the PDES Manual (2006).

² The VASRD (38 CFR, part 4) is used by the PDES boards to assign codes and percentages of disability for evaluatees found unfit for duty. Chapter 2.A. 55. of the PDES Manual.

Plantar Fasciitis under VASRD code 5399/5310. He stated that upon his advice as her counsel, the applicant accepted the FPEB findings, which were subsequently approved by the Commander, Coast Guard Personnel Command (CGPC). The applicant retired by reason of physical disability on January 21, 2008.

The attorney stated that his advice to the applicant to accept the FPEB recommendation was offered in good faith because his analysis of the evidence, as presented in his brief to the FPEB, merited the assignment of not greater than a 50% disability rating for her psychiatric disorders at that time. He stated that his opinion in this regard was based upon a report from the applicant's treating licensed clinical social worker (LCSW) that the applicant's somatic complaints and depressive symptoms would abate when stressors in her life were resolved. Therefore, the attorney concluded that it was in the applicant's best interest to accept a permanent rating that locked in her medical and other retirement benefits, instead of appealing the FPEB recommendation and risking the loss of retirement benefits if her condition had improved by completion of the PDES process.

The attorney stated that he was overly optimistic about the applicant's potential for improvement because rather than improve, her condition continued to decline as evidenced by the DVA compensation examination, which occurred less than 6 months after her retirement from the Coast Guard. The attorney argued that the Board should adopt all of the DVA ratings for the applicant's various disabilities, retroactive to the date of her discharge.

The record shows that on April 12, 2008, after her discharge, the attorney forwarded a disability claim to the DVA on the applicant's behalf and requested that the DVA grant her a minimum combined rating of 80%. In making his request to the DVA, the attorney submitted the same medical evidence that was considered by the FPEB. He argued that the DVA should grant the applicant a 70% rating for major depressive disorder/conversion disorder/post-traumatic stress disorder, a 20% rating for bilateral plantar fasciitis, and a 10% for lumbosacral strain.

BACKGROUND

The applicant enlisted in the Coast Guard on January 3, 2006. On December 7, 2006, she entered the Coast Guard Physical Disability Evaluation System (PDES)³ by undergoing an initial medical board (IMB)⁴ for a diagnosis of "Chronic Bilateral Plantar Fasciitis. The IMB noted that the applicant began receiving treatment for this condition on February 21, 2006, while in basic training. The applicant continued to complain of bilateral plantar foot pain and was treated

³ The PDES is the structure within the Coast Guard composed of administrative boards and reviewing and approving authorities for evaluating a member's physical ability to perform the duties associated with the member's office, rank, grade, or rating, and the equitable application of the law and regulations relating to separation or retirement of members because of physical disability. Chapter 2.A.42. of the PDES Manual (2006).

⁴ 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 (1996). Under the 2006 version of the PDES, the IMB is renamed "the medical evaluation board." 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 (1996).

with various pain medications and physical therapy. The IMB noted that there had been no improvement in the applicant's condition; that the applicant was unable to stand or walk for prolonged periods; and that currently she was doing only desk work. The IMB confirmed the diagnosis and stated that due to the "chronicity of [the applicant's] condition, it is highly unlikely she will ever return to full duty and that the prospect of her ever being world-wide qualified was remote." The IMB stated that no other conditions were noted on a 2005 physical examination and referred the case to the Coast Guard Personnel Command.

The applicant filed an extensive rebuttal to the IMB in which she noted that she suffered from sea sickness and low back pain in addition to her foot condition. She also noted that surgery on her feet was scheduled for January 7, 2007. She asked that the Informal Physical Evaluation Board (IPEB)⁵ ensure that "(1) the findings and recommendations of the IMB were just, equitable, consistent with the facts, and in keeping with the provisions of law and regulation, and (2) that due consideration be given to the facts . . ." She asked to be retained on active duty until her medical condition was sufficiently clear to make a fitness for duty determination.

On April 2, 2007, the applicant's commanding officer (CO) agreed that the applicant was unfit for duty and should be separated from the Coast Guard. The CO noted that the applicant was a seaman (SN) and that duties normally associated with a seaman include performing tasks such as routine cleanups, standing watches, and learning basic boat crew seamanship. Due to her limited duty status, the applicant was exempted from performing those duties. The CO noted that the applicant refused to perform duties assigned to accommodate her limited duty status, such as shining brass, studying for her advancement, or making local arrangements to appointments.

On January 7, 2007, the applicant underwent surgery on both feet for plantar fasciitis. On February 27, 2007, an addendum to the medical board noted that the applicant complained of bilateral foot pain and was using a wheelchair because she was unsteady on her feet. The Addendum noted that a neurological consultation had been requested to assess the applicant's back pain, leg weakness and instability.

A second addendum to the IMB noted that the applicant's neurology evaluation on March 8, 2007 was normal except for "vibration, mild decrease in both great toes." The report stated that on or about April 11, 2007, the applicant's father indicated that the applicant had taken an overdose of pills in a suicide attempt. The applicant was medically evaluated and it was determined that she had engaged in a suicide attempt. The applicant was admitted to a mental facility for treatment. The IMB noted that the diagnosis of Chronic Bilateral Foot Pain Secondary to Plantar Fasciitis is correct and

[the applicant] has been appropriately treated for this including physical therapy since Jan 19, 2007, without any improvement at all. An etiology to the back and leg pain and weakness can't be determined; neurologic work up to now has been essentially negative. It is also correct that she had a suicide attempt and an initial

⁵ An IPEB is a standing administrative board that evaluates medical evaluation board reports and the fitness for duty of individuals on the TDRL. Chapter 2.A.25. of the PDES Manual (2006).

diagnosis of depression NOS was given by the admitting mental facility. Her prognosis for continued military life is very poor. Still pending are the Cognitive Studies and the final impression from the neurologist . . .

A cognitive and physical deficits evaluation indicated that the applicant had severe cognitive dysfunction across the Board. The report recommended that the applicant receive psychotherapeutic treatment of her somatization disorder.⁶ Successful treatment in this area should lead to improved functioning. The report stated that the applicant was unfit for full duty.

The applicant was hospitalized from April 11, 2007 to April 19, 2007 because she overdosed on 6 to 8 tramadol pills and stated that “everyone is against me at the base!” During this hospitalization, the applicant was diagnosed with a mood disorder NOS (not otherwise specified), a personality disorder NOS, and a 38 on the Global Assessment of Functioning scale upon admission. The 38 score indicated that the applicant was having “[s]ome impairment in reality testing or communication OR major impairment in several areas, such as work or school, family relations, judgment thinking, or mood.” Upon discharge her GAF score was 60, which indicated that she had moderate symptoms OR moderate difficulty in social, occupational, or school functioning. “

The applicant was hospitalized again from April 30 to May 1, 2007 because “I am 19 years old and I cannot do what other people do.” “I just don’t care” “Everyone at the Coast Guard yells at me and tells me what to do.” The applicant’s mental status on admission was described as being alert, fully intact, and that she looked her age, was dressed appropriately, and was pleasant and cooperative. Her psychomotor behavior was retarded and her speech average. Her emotional state was euthymic, mild irritability, and sad. Her mood was described as depressed and irritable. Her processing capability was described as average and her thought was absent psychotic features. Her anxiety was described as absent. Upon admission to the hospital, she had a GAF of 50 that indicated that she had “serious symptoms OR any serious impairment in social, occupational, or school functioning. Upon discharge, her GAF score was 62.

A third addendum to the IMB was prepared on May 11, 2007. It noted that the applicant had another hospitalization for depression from April 26, 2007 to May 1, 2007. She was admitted to the hospital because she was “not able to cope with the demands at ISC Boston.” The third addendum also stated the following:

After being discharged from the hospital for her suicide attempt she was not working at all but going to her appointments in the partial hospitalization program from 0900 to 1400 daily. The Colexa was increased to 20 mg daily. The social worker from the psychiatric hospital recommended that she . . . go home on leave on 1 May 2007. On May 9, 2007, the cognitive test report was received . . . It is Dr. [P’s] impression that [the applicant] has a somatoform disorder and that she is unfit for full duty. She recommended psychotherapeutic treatment for this disorder.

⁶ Somatization disorder is a polysymptomatic disorder that begins before age 30, extends over a period of years, and is characterized by a combination of pain, gastrointestinal, sexual, and pseudoneurological symptoms. Diagnostic and Statistical Manual Disorders (DSM-IV-TR), Fourth Edition, p. 485.

It is the impression of the [IMB] that the diagnosis of:

- 1) Chronic Bilateral Plantar Fasciitis . . .
- 2) Somatoform Disorder . . .
- 3) Depressive disorder NOS . . .
- 4) Personality Disorder, NOS . . .

are correct and that [the applicant] is not fit for full duty physically or mentally. The prognosis for this patient for military service is poor. It is the recommendation of the Board that [the applicant] be referred to CPEB for adjudication.

The applicant had a third hospitalization from May 22, 2007 to May 31, 2007 due to a borderline psychosis “seeing knives + HI towards peers at Coast Guard barracks.” The reports stated that the applicant believed that she was a target, that she was disciplined without cause, and that she was harassed. The applicant’s thought content was described as being absent of psychotic features, absent of anxiety, but with a depressed mood. She had thoughts about death and a loss of interests. She had a low level of energy and poor concentration. Upon discharge, she was diagnosed with depressive disorder, NOS, personality disorder, plantar fasciitis, chronic back pain, and chronic knee pain. She had a GAF of 35 on admission and a score of 60 upon discharge.

The IPEB met on May 30, 2007 and recommended that the applicant be separated from the Coast Guard with a 10% disability rating for Undifferentiated Somatoform Disorder under VASRD code 9423. The 10% rating under this code indicates that the applicant’s symptoms were of occupational 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.

The applicant had a fourth hospitalization from June 4, 2007 to June 8, 2007 because she stated she had “thoughts of harming others at Coast Guard.” Upon discharge from the hospital, her condition was described as “denies thoughts of harming others or self, alert ox 3, mood-euthymic affect-congruent with mood-bright, no psychomotor agitation/or retardation, no s/sx of psychosis, no [active] hallucinations, no aggressive behaviors, + focus + concentration +interest + motivation, sleep good and appetite good.” She was diagnosed with psychotic disorder NOS, recurrent unspecified major depressive disorder, and somatoform disorder NOS. She was also diagnosed with a personality disorder NOS, and plantar fasciitis. The applicant was noted to have problems with her primary support group, problems with her social environment, problems with her occupation and housing. Her GAF on admission was 40 but upon discharge it was 60.

On June 22, 2007, the applicant underwent a comprehensive mental health assessment with Dr. E. He diagnosed her with undifferentiated somatoform disorder, depressive disorder, personality disorder, chronic pain and chronic bilateral plantar fasciitis, conflict with chain of command, and a GAF score of 50. He stated that her lower extremity pain could not be explained by any clear organic etiology, but that her level of disability due to the level of pain

was extreme. He stated that she “had chronic sleep difficulties, severe fatigue, and episodes of crying spells and amotivation that were noted in her medical record. He stated that “[i]t is unclear whether her presentation is colored by conscious or unconscious secondary gain and that she had significant distrust of the medical system, which . . . may significantly color her presentation of the symptoms.” With regard to her mental examination, Dr. E wrote that her psychomotor activity was mildly retarded. Her hygiene and grooming were intact and her clothing was appropriate. He described her affect as somewhat restricted and mildly irritated. He stated that her speech was somewhat quiet and mildly slowed, but otherwise normal. Her thought process was linear, logical, and goal directed. She denied any suicidal or homicidal thoughts and there were no apparent delusions and perceptual alterations. He wrote that the applicant did not appear to be responding to internal stimuli and there was no evidence of any formal thought disorder. Her attention was good. “Her impulse control appears on admission to be poor in the sense that she fears she might behave violently if she was confronted by one of the individuals with whom she is having problems in the Coast Guard.” Her insight and judgment were poor. He stated that the applicant should continue her therapy with a LCSW.

On July 11, 2007, the applicant rejected the IPEB recommendation and demanded a formal hearing before the FPEB. In a petition to CGPC, prior to the FPEB hearing, the applicant’s attorney submitted his outline of the case and asked that the applicant be found unfit for duty and placed on the TDRL or PDRL. He recommended a 50% rating for major depressive disorder/conversion disorder/post traumatic disorder under VASRD code 9434/9424/9411, and 0% rating for Plantar Fasciitis under VASRD code 5399/5210. He requested a combined disability rating of 50%. In his petition to CGPC, he noted that:

1. The applicant had had four hospitalizations for mental health problems;
2. The applicant had a comprehensive mental health assessment from June 29, 2007-July 6, 2007, in which the primary diagnosis was a depressive disorder, NOS and undifferentiated somatoform disorder. The applicant’s GAF assessment was at 50, thereby showing serious impairment in occupational and social settings, and that the therapist recommended an increase in the dosage in her medication.
3. That a LCSW stated in a report dated September 22, 2007, that the applicant was suffering from post-traumatic stress disorder (PTSD) secondary to her recent hospitalizations and her perception of how others in the Coast Guard viewed her. The LCSW agreed that the applicant suffered from a number of somatic complaints that the LCSW felt met the criteria for a conversion disorder vice an undifferentiated somatoform disorder. The LCSW stated that the applicant’s somatic complaints and depressive symptoms should abate in whole or in part once her suicidal ideation and symptoms of anxiety have resolved. The LCSW concluded that the applicant’s then-current degree of impairment in occupational and social settings was profound. She stated that the applicant could not live independently at that time.

The FPEB, a superior board to the IPEB, met on September 27, 2007. At this hearing the applicant was represented by her attorney. The FPEB found that the applicant was unfit for continued duty because of a major depressive disorder, with “occupational and social impairment

with occasional decrease in work efficiency and intermittent periods of inability to perform occupational task.” The FPEB rated this disability as 30% disabling under VSRD code 9434. In an amplifying statement the FPEB described the criteria for VSRD code 9434 as follows:

Major Depressive Disorder; occupational 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; depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often) chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events) rated at 30%.

The FPEB also found the applicant’s plantar fasciitis disabling and rated it at 0% under VSRD code 5399-5310. The FPEB recommended that the applicant be permanently retired from the Coast Guard with a total disability rating of 30%.

On the advice of her attorney, the applicant accepted the findings and recommendations of the FPEB on October 15, 2007. CGPC approved the findings and recommendations of the FPEB. The applicant retired on January 21, 2008 due to physical disability with a 30% disability rating.

DVA Claim

The applicant’s attorney filed a claim on her behalf with the DVA on April 12, 2008, in which he requested a minimum combined DVA rating of 80%. He argued that the applicant should have a 70% DVA rating for major depressive disorder/conversion disorder/post-traumatic stress disorder, 20% DVA rating for plantar fasciitis, and a 10% DVA rating for lumbosacral strain. In making his request to the DVA, the attorney cited the same medical evidence that was considered by the FPEB in making its findings and recommendations.

On May 15, 2008, the applicant underwent a DVA medical examination. The DVA psychiatrist diagnosed her with major depressive disorder, recurrent severe with atypical features and PTSD chronic severe. Her GAF was at 35.

With regard to her depression, the DVA psychiatric report noted that the applicant was experiencing the following symptoms and functional impairment:

Depressed mood, anxiety, suspiciousness, chronic sleep impairment, flattened affect, impairment of short-term memory, disturbances or motivational and mood, difficulty in established and maintaining effective work and social relationships, suicidal ideation, near continuous depression affecting the ability to function independently, appropriately and effectively, difficulty maintaining personal appearance and hygiene, difficulty adapting to stressful circumstances.

The DVA psychiatric report stated that the applicant met the criteria for PTSD. In this regard, the psychiatrist stated that the applicant reported that she was harassed by her superiors

during her time in the Coast Guard and that she was fearful because a friend was raped in the barracks. The psychiatric report stated that as a result of the alleged harassment, the applicant suffers vivid nightmare 3 to 4 times per week and that she has flashbacks.

The DVA also diagnosed the applicant with plantar fasciitis, chronic pain in knees, hip and back. With regard to the applicant's foot condition, the physical examination revealed that there was mild tenderness to palpation on the plantar aspect of both feet. The medical report stated that the applicant's active and passive range of motion for inversion was 30 degrees for the right foot and 0 to 30 degrees for the left foot. Eversion for the right foot was 0 to 20 degrees and the same for the left foot. She had no pain with inversion or eversion. The physician diagnosed bilateral plantar fasciitis, mildly active in both feet at the time of examination.

With regard to the applicant's lumbar spine, the DVA examination revealed that the applicant experienced mild pain on range of motion of the lumbar spine with forward flexion 70 to 80 degrees, lateral flexion to the right to 30 degrees, to the left 20 to 30 degrees, and extension 20 to 30 degrees. She did not experience pain with rotation to the left or to the right. The report noted that based on objective findings, the applicant had no tenderness or spasms in the lumbar spine and there was no weakness in either lower extremity. Nor was there any muscle atrophy or loss of muscle tone in the lower extremities. The applicant's motor strength was equal and symmetrical in both lower extremities. There was no sensory deficit to light touch and reflexes are equal and symmetrical in both lower extremities. The report noted that the applicant had had no incapacitating episodes during the past 12 months. She was diagnosed with lumbosacral strain, mildly active at the time of the examination.

VIEWS OF THE COAST GUARD

On March 30, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a recommendation from the Commander, Personnel Service Center (PSC).

PSC stated that the applicant received due process throughout the Coast Guard's PDES process and that the applicant has the burden of proving the existence of an error or injustice by a preponderance of the evidence. PSC stated that the applicant, through her counsel, does not call into question any error or injustice experienced with respect to her discharge. Rather, her counsel asserts that now, after-the-fact and in retrospect, the applicant should have protested the findings and elected to exercise further administrative review of the PEB findings. PSC stated that the applicant's counsel freely admits that he advised the applicant to accept the findings of the FPEB without contention based on the optimistic belief that such an acceptance would lessen the stressors in her life, which has proven not to be the case. Therefore, he believes that the FPEB findings should be set aside.

PSC argued that the applicant's current physical condition is beyond the scope of the Coast Guard's original cause for discharge and does not negate the fact that the applicant received a full and fair hearing—a point not contested by the applicant's counsel. PSC stated that the appropriate avenue for relief was completed by her request for service-connected compensation through the DVA.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 5, 2011, the Board received the applicant's response to the views of the Coast Guard. The applicant submitted documentation showing that she had elected to be represented by her father instead of the attorney. Her representative made the following arguments:

1. That the Coast Guard accepted a medical board report signed by one officer instead of two as required by the PDES Manual. He stated that the medical board was signed after the applicant filed a formal complaint under Title VII of the Civil Rights Act. He also argued that the MB failed to conduct a thorough examination and review all available evidence.
2. That the original IPEB failed to facilitate a mental examination prior to or subsequent to concluding that the applicant had physical impairments, despite having full knowledge of the stressor's suffered by the applicant prior to surgery.
3. That the IPEB and the FPEB overlooked the diagnostic findings of the civilian psychiatric hospital and the LCSW, who provided the major treatment to the applicant. In this regard, he noted the applicant's GAF scores from these treatments.
4. That the FPEB erred by not considering all medical and mental health records prior to arriving at a disability percentage decision. The applicant argued that based on a complete review of clinical reports, applicant's major depressive disorder is recurrent with considerable social and industrial adaptability impairment. The minimum rating for this condition under VASRD 9434 is 50%.
5. That insufficient evidence existed to support FPEB findings. The applicant suggested that the FPEB did not award a disability rating for somatoform disorder because it would be considered as pyramiding with the 30% major depressive disorder.
6. That the FPEB altered its final disability findings and refused to provide the applicant with a copy of the transcript.
7. That the Coast Guard failed to disclose to applicant and or failed to eliminate the conflict of interest between the applicant's former lawyer and the lawyer's ex-wife who was directly involved in the FPEB.

The applicant asked that the Board grant her a 100% disability rating for major depressive disorder with post traumatic stress disorder, 10% for lumbosacral strain, 10% for left foot plantar fasciitis, and 10% for right foot plantar fasciitis.

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 submission 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 Board finds that the applicant and her attorney made a strategic decision to accept the FPEB's recommendation and finding that she be permanently retired from the Coast Guard with a 30% disability rating, with full knowledge of the PDES procedures and the ramifications of that decision.

3. In this regard, although the applicant's attorney argued for a 50% disability rating for the applicant's mental disability under VASRD codes 9434/9424/9411 (major depression/conversion disorder/post-traumatic stress disorder) and a 0% disability rating for plantar fasciitis before the FPEB, he admitted that he counseled the applicant to accept the FPEB's recommended permanent retirement with a 30% disability rating under VASRD code 9434 because, once approved, her permanent retirement and rating would never be subject to modification. Whereas if the applicant had contested the FPEB's recommendation and finding, her PDES case would have been subject to further review and processing and to possible modification by the Physical Review Council (PRC), a higher level physical evaluation board.

4. Under Article 5.D.2.c. of the PDES Manual, if the applicant had filed a rebuttal to the FPEB, her case would have been forwarded to the PRC, where the PRC could have found that the FPEB assigned the incorrect VASRD code(s), pyramided impairments, assigned an erroneous percentage of disability, or did not support its findings and recommendations with sufficient evidence. Upon a finding of either, the PRC could have returned the applicant's case to the FPEB president for reconsideration and remedial action, or it could have referred her case to a three-member PRC panel for consideration and disposition, in which substitute findings and recommendations could have been made. Therefore, the applicant and her attorney made a conscious and knowing decision to accept the FPEB's findings and recommendations, even though the rating was less than they had requested, because they did not want to risk losing the FPEB's recommendation for permanent retirement with a 30% disability rating, which is the minimum rating required for retirement. The applicant's decision to do so is not proof that the Coast Guard committed any error in processing the applicant's PDES case, and in fact, her attorney makes no allegations of error in that process. Further, the applicant voluntarily agreed to accept the FPEB findings on the advice of her counsel.

5. Even if the applicant had not agreed with the FPEB and had not waived any further PDES processing, the Board would still find that the applicant has failed to prove that the Coast Guard committed an error or injustice in awarding her a 30% disability rating. The Board is not persuaded by the applicant's attorney's argument that she should have the higher DVA ratings because those ratings show that he was too optimistic in his analysis that her condition would improve. The applicant had been discharged for approximately 4 months when she was examined by DVA doctors and almost 8 months had elapsed since her FPEB hearing. As her attorney suggested, her condition worsened after her discharge.

6. Additionally, the Board notes that even though the DVA granted the applicant a 100% disability rating under VASRD code 9411-9434 for major depressive Disorder/PTSD; a 10% rating for lumbosacral strain under code 5237; a 10% rating for plantar fasciitis, left foot under

code 5278-5384; and a 10% rating for plantar fasciitis right foot, neither the DVA rating decision nor the DVA medical report state to what extent the applicant's mental and foot disabilities interfered with her ability to perform her duties as a seaman or even whether this issue was considered. Nor do they address whether her lumbar strain caused her to be unfit to perform her duties as a seaman. Rather, the DVA reports address whether her conditions were service-connected disabilities and the impact the disabilities have on her civilian earning capacity. A service-connected disability is not necessarily the same as having an unfitting condition that renders a member unable to perform the duties of his or her office, grade, or rate. A service-connected disability means that a condition was incurred or aggravated in the line duty while in the military.

Chapter 2.A.35 of the PDES Manual defines not fit for duty⁷ as "the status of a member who is determined by the final approving authority within the PDES to be unable to perform the essential duties of the member's office, grade, rank, or rating." Chapter 2.C.2.a. of the PDES Manual provides that the "sole standard" to be used 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." It further provides that each case is to be considered by relating the nature and degree of physical disability of the member concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank, or rating. The FPEB is entitled to the presumption that it applied this standard in reaching its recommendations and findings in the absence of evidence to the contrary.

7. Therefore, although the DVA granted the applicant disability ratings for certain other conditions that the FPEB did not find disabling and granted a higher rating than the FPEB did for her mental illnesses and plantar fasciitis, this Board has consistently held that a higher disability rating from the DVA does not, in and of itself, establish that the Coast Guard committed an error or injustice because it gave a lower disability rating than the DVA. 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."

8. The Board notes that in rating her disabilities, the DVA substantially relied upon its own doctors' evaluations of the applicant's condition approximately 4 months after her discharge. Likewise, the Coast Guard in rating the applicant's disabilities reached its decisions based upon the medical evidence of record and the recommendation and finding of the FPEB after a hearing in which the applicant was represented by counsel. The Board finds that based upon its review of the medical evidence available to the FPEB and taking into consideration the applicant's duties as a seaman that, according to the CO, included routine cleanups, standing

⁷ In this revision of the 2006 PDES Manual, the Coast Guard replaced "unfit for duty" with "not fit for duty," but continued to use the term unfit in other provisions of the Manual.

watches, and learning basic boat crew seamanship, the Coast Guard's rating of her unfitting conditions (30% mental plus 0% feet) as being 30% disabling was appropriate.

9. A 100% disability rating for her mental illness under the VASRD would not have been an appropriate finding by the FPEB because there was insufficient medical evidence that the applicant had *total* occupational and social impairment, *gross impairment* in thought processes or communication, *persistent* delusions or hallucinations, persistent danger of hurting self or others, no disorientation to time or place, or memory loss for names of close relatives, own occupation, or own name. (Emphasis added.) The applicant's attorney essentially admitted this by asking only for a 50% disability rating before the FPEB. The applicant's last mental assessment before the FPEB by a physician, Dr. E, noted that the applicant experienced chronic sleep impairment, severe fatigue, crying spells and amotivation and that her insight, judgment and impulse control were poor and her psychomotor activity was mildly retarded. His evaluation of the applicant's condition did not appear nearly as severe as that described for a 100% DVA rating under the VASRD. Additionally, earlier upon her discharge from her fourth and last hospitalization prior to the FPEB, the applicant's condition was described as: "denies thoughts of harming others or self, alert ox 3, mood-euthymic affect-congruent with mood-bright, no psychomotor agitation/or retardation, no s/sx of psychosis, no av hallucinations, no aggressive behaviors, + focus + concentration +interest + motivation, sleep good and appetite good." These last two Coast Guard evaluations persuade the Board that the Coast Guard's rating was not inconsistent with that for a 30% rating under the VASRD for rating mental disabilities. The criteria for which are as follows: "Major Depressive Disorder; occupational 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; depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often) chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)."

10. With regard to the DVA ratings of 10% for plantar fasciitis in each foot and 10% for lumbar strain, the Board finds that the applicant had the opportunity to argue these issues before the FPEB. Apparently, the FPEB found the plantar fasciitis to be 0% disabling and that her lumbar strain/pain was not unfitting for duty. The evidence does not persuade the Board otherwise.

11. The applicant's father replaced the applicant's attorney in the middle of the BCMR process. The Board notes that in his response to the advisory opinion, he made allegations of procedural and substantive errors in the PDES process. However, the Board finds that the applicant's attorney did not make any such objections in his submission to the Board. Therefore, the Board is satisfied that the Coast Guard complied with the procedural and substantive rules in processing the applicant's case under the PDES, and if it did not the applicant waived them by not objecting at the time of her hearing. Also, the applicant failed to provide sufficient evidence to support her contention that a potential conflict of interest existed between her then-attorney and his ex-wife who was allegedly involved in the applicant's FPEB.

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

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXX for correction of her military record is denied.

Donna A. Lewis

Paul B. Oman

Darren S. Wall