DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-069

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FINAL DECISION

ANDREWS, Deputy Chair:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on April 21, 2003, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated December 18, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former xxxxxxxxxxxxxxxxxxx, asked the Board to correct her record to show that she was medically retired from the Coast Guard on January 9, 2002, with a 30% combined disability rating, including a 10% rating for neuritis of the left external popliteal nerve and a 20% rating for lumbar spondylosis, in accordance with the Veterans' Affairs Schedule for Rating Disabilities (VASRD).

The applicant pointed out that on July 6, 1999, when she was placed on the Temporary Disability Retired List (TDRL), she was assigned a 30% combined disability rating, including a 10% rating for neuritis of the left external popliteal nerve and a 20% rating for lumbar spondylosis. However, she alleged, on November 1, 2001, the Coast Guard's Formal Physical Evaluation Board (FPEB) erroneously rated her as only 10% disabled by neuritis and 0% disabled by lumbar spondylosis even though there had been no improvement in her condition and an MRI (magnetic resonance imaging) done in August 2001 had shown "degenerative disc changes and an annular tear of the disc at L4-5." She pointed out that the Central Physical Evaluation Board (CPEB) that evalu-

ated her while she was on the TDRL had noted that she suffered from foot drop, leg spasms, tenderness between the T10 and L5 vertebrae, back spasms, and an inability to walk on her heels. She further pointed out that the Department of Veterans' Affairs (DVA) has found her to be "totally unemployable" and has rated her as 90% disabled.

The applicant alleged that upon receiving the FPEB's decision, she submitted an appeal in accordance with regulation, but never received a response. Moreover, she alleged, the Coast Guard discharged her on January 9, 2002, without notifying her, which caused her to be without health insurance at a time when she was five months pregnant. She alleged that she did not discover that she had been discharged until February 7, 2002, when she called the Coast Guard's Pay and Personnel Center to inquire about an unpaid travel claim and was told that there was a severance check waiting for her. She was told that the check had not been delivered because they did not know her current address. The applicant alleged, however, that she had previously provided her current address to Coast Guard Headquarters.

The applicant alleged that it was erroneous and unjust for the FPEB to issue such a decision without explanation and for the appellate authority to fail to respond to her appeal. She pointed out that the FPEBs and appellate authorities of every other United States military service provide written explanations for their decisions.

SUMMARY OF THE RECORD

On April 25, 1988, the applicant enlisted in the Coast Guard. Her pre-enlistment physical examination showed that she was in good health. Tests revealed that she had a heart condition, mitral valve prolapse, that was not considered disabling or disqualifying for enlistment. Upon completing training on January 22, 1990, she became a xxxx xxxxxxxxxxx.

On September 19, 1994, while on a joint mission with the National Park Service, the applicant's back was injured when the vessel she was on, being operated at full speed by a park ranger, lifted off the water and then returned to the water abruptly. On December 8, 1994, an MRI revealed desiccation of the L4-5 and L5-S1 intervertebral discs and "central to right sided disc bulge" at L4-5.

Throughout 1995, the applicant's back condition was treated with physical therapy. According to medical records, her symptoms during that year included lower back pain and spasms; stiffness; pain upon lateral flexion; spasms and pain in both buttocks; vertebral tenderness at the L5 vertebra; spasm in the right sacroiliac joint; hip strains; and a foot that "moderately flared to the right."

On April 11, 1995, the applicant's command completed an incident report on her back injury. The investigation concluded that the injury was incurred in the line of duty and noted that the applicant had not missed work because of the injury.

On November 10, 1995, the applicant's doctor noted that she had lower back pain, stiffness, and spasm, and he diagnosed her with intervertebral disk syndrome. On November 22, 1995, an MRI of the lumbar spine showed "no interval change" since December 1994. On December 12, 1995, a neurologist reported that nerve testing showed a "normal study. No electrophysiologic evidence of a radiculopathy, [unreadable]opathy, neuropathy, or myopathy."

For 1996 and 1997, only three documents appear in the applicant's medical record, and they concern a pap smear, an ingrown toenail, and her mitral valve prolapse.

On February 17, 1998, the applicant again began seeking help for lower back pain. On April 6, 1998, she also sought help for increasing shoulder pain that she had experienced since falling onboard a cutter in October 1997. The doctor diagnosed tendonitis, took xrays, and referred her for an orthopedic consultation.

On June 16, 1998, the applicant was examined by an orthopedist, who recommended that she be evaluated by a medical board to assess her fitness for duty. Xrays showed "disc space narrowing at L4-5 with calcification [spondylosis] anteriorly in the disc space."

On June 18, 1998, an Initial Medical Board (IMB), which included the applicant's orthopedist as a member, reported that she suffered from lumbar spondylosis and a laxity in the right shoulder as a result of a past injury. The IMB reported that the applicant had experienced "spontaneous subluxation and reduction of her right shoulder last week while sleeping. The pain in the back is localized to the low back and there is no radicular component. The low back pain is worse with extension of the lumbar spine." The IMB found that she was "handicapped in that she is currently unable to run, jump, perform activities requiring forced waist flexion, lift more than 10 pounds, climb, or perform overhead work." The IMB recommended that she be assigned to limited duty ashore for eight months while undergoing orthopedic care and intensive physical therapy to strengthen her shoulder. In light of the IMB's recommendation, the applicant was transferred from her cutter and began physical therapy again.

On June 25, 1998, the applicant acknowledged the IMB's findings and recommendations and noted that she was still awaiting a neurological consultation that had been ordered on February 17, 1998. The members of her IMB noted that they concurred with her statement. On July 10, 1998, the recommendations of the IMB were approved by the applicant's command, who forwarded them to the CPEB for further review.

On August 10, 1998, an electromagnetogram (EMG) showed "left L5-S1 radiculopathy." On September 9, 1998, an MRI of the applicant's shoulder revealed no problems. On September 28, 1998, an MRI of the applicant's lumbar spine found degenerative disk disease and a "diffusely bulging disk" at the L4-5 level and a "left paracentral disk protrusion, which compresses the thecal sac" at the L5-S1 level.

On October 1, 1998, the Coast Guard Personnel Command (CGPC) reported that a CPEB had convened on September 29, 1998, to review the IMB report and had determined that there was insufficient evidence to make a final recommendation. Therefore, CGPC asked the applicant's command to convene a Disposition Medical Board (DMB) to report further on her condition and to provide a report from an orthopedic consultation by December 15, 1998.

On December 1, 1998, the applicant's orthopedist reported that she suffered from

(1) lower back pain with muscle spasm,
(2) a right shoulder impingement,
(3) left leg muscle spasms and foot drop,
(4) right thigh numbness, and
(5) hip pain.

On December 7, 1998, the DMB, which included the applicant's orthopedist, reported to the CPEB that the applicant's diagnoses included

(1) lumbar spondylosis,
(2) status post right shoulder injury, with resultant laxity,
(3) left leg muscle spasm and occasional foot drop,
(4) right thigh dysesthesia [numbness],
(5) L5-S1 myelopathy, and
(6) bilateral hip pain.

The DMB reported that her physical therapy, chiropractic treatment, and anti-inflammatory medications had not provided "any significant relief." The DMB noted the results of the EMG and the MRI on September 28, 1998, and reported the following:

> Examination of the right shoulder demonstrates a positive impingement and moderate anterior and posterior translation. Motor strength testing reveals external rotators, internal rotators, and supraspinatus are 5 over 5. … The lower extremity motor strength is 5 over 5 in all muscle groups. Sensation is intact to light touch in all dermatomes. … Lumbosacral flexion is limited, with the fingertips 6 inches from the floor. There is full side-bending and extension, which cause pain. Range of motion of the hips is 0 to 120 degrees bilaterally, which 45 degrees of external rotation, 10 degrees of internal rotation (which is painful), and 45 degrees of abduction.

The DMB concluded that the applicant was handicapped and could not perform the duties of her rating (xxxxxxxxxxxx) and recommended that her case be referred to a CPEB "for final adjudication." On January 6, 1998, the applicant acknowledged the DMB's report and indicated that she would not submit a rebuttal to the findings and recommendations.

On February 8, 1999, the applicant's commanding officer approved the DMB's report and forwarded it to CGPC with a letter summarizing the history of her condition. He stated that the applicant was limited to performing desk work and required daily medication to tolerate her lower back pain. He stated that she was unable to climb ladders, bend or twist, or life objects over 2.5 pounds with her right arm. He reported that she wore a back brace daily.

On March 23, 1999, the CPEB reviewed the applicant's case and recommended that she be discharged with a 20% combined disability rating, including a

(1) 20% rating for "lumbar spondylosis analogous to lumbosacral strain," under VASRD codes 5299/5295, and a
(2) 0% rating for "right arm, limitation of motion of, major," under VASRD code 5201.

On April 20, 1999, the applicant rejected the findings of the CPEB and demanded a hearing before the FPEB.

On April 20, 1999, the applicant complained of increasing problems with her left foot drop. The orthopedist noted that she had decreased strength in the foot and prepared an addendum for the DMB report, in which he stated that she had "functional footdrop secondary to L5-S1 radiculopathy" and that the weakness in her left foot was "profound and progressive. It limits her ability to ambulate. She has difficulty on uneven surfaces, sandy soil, stairs, escalators, and with any ambulation which would require active dorsiflexion of the left foot repeatedly. … She continues to be symptomatic on a daily basis with this problem." The orthopedist stated that she was unable to heel walk, which is a test for foot drop. On April 27, 1999, the applicant acknowledged the addendum to the DMB and indicated that she would not submit a rebuttal.

On May 5, 1999, an FPEB[1] met to hear and review the applicant's case. It found her to be

(1) 20% disabled by "lumbar spondylosis analogous to lumbosacral strain," under VASRD codes 5299 and 5295;
(2) 10% disabled by "external popliteal nerve (common peroneal): paralysis of: incomplete: mild, left foot," under VASRD code 8521; and
(3) 0% disabled by "right arm, limitation of motion of, major," under VASRD code 5201.

The applicant's combined disability rating was 30%. The FPEB found that her conditions might be permanent and recommended that she be placed on the TDRL. On May 6, 1999, after receiving advice from counsel, the applicant accepted the FPEB's findings and recommendation. On May 18, 1999, the decision of the FPEB was approved. On May 19, 1999, CGPC ordered that the applicant be placed on the TDRL with a 30% disability rating as of July 6, 1999.

[1] On December 17, 2003, CGPC informed the BCMR that neither a tape recording nor a transcript of the FPEB could be found.

On July 5, 1999, the applicant was temporarily retired because of her physical disability. She was placed on the TDRL effective July 6, 1999.

Also on July 6, 1999, the applicant applied to the DVA for disability benefits. On November 17, 1999, the DVA completed its examination and review and awarded her a 70% combined disability rating, including a

(1) 60% rating for spondylosis of the lumbar spine with L5 fracture, L4 herniated nucleus pulposus [disc], L3 herniated nucleus pulposus, and left foot drop, under VASRD codes 5285-5293;
(2) 10% rating for residuals of status post right shoulder under VASRD codes 5202-5019; and
(3) 10% rating for dysthymic disorder [depression].

The DVA found that a 60% disability rating for her back condition and foot drop was appropriate because the applicant had "pronounced intervertebral disc syndrome with persistent symptoms compatible with sciatic neuropathy, characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc and little intermittent relief." Since there is no VASRD code for this condition, the DVA used analogous codes 5285-5293.

The DVA found that the applicant was 10% disabled by her right shoulder condition because it constituted a "painful or limited motion of a major joint" and 10% disabled by dysthymic disorder because she had mild or transient symptoms that decreased her work efficiency and ability to perform occupational tasks during periods of stress or that were controlled by medication. The DVA deferred its findings on several of the applicant's medical problems because of a lack of recent evidence. Other conditions were found to be service-connected but not disabling.

Following further medical examinations of the applicant's various conditions, on January 26, 2000, the DVA amended its decision, raising her combined disability rating to 80% based on service-connected disabilities not at issue in this case. In addition, the DVA found that she met the requirements for "individual unemployability" and so was entitled to disability pay for a 100% rating.

On August 7, 2001, the applicant underwent a periodic examination at the naval hospital to asses her status. The doctor recommended that the applicant be kept on the TDRL, and he reported the following:

> [The applicant] reports no interval change in the symptoms related to her right shoulder and left and right legs since her Physical Evaluation Board in December 1998. Specifically, with regard to the shoulder, she complains of pain primarily with overhead activities and notes episodes of subluxation, of the shoulder coming in and out, that she is able to control on her own. She is not doing any formal physical therapy, but does work on

> strengthening exercises for the shoulder. With regards to her lower extremities, she notes that she continues to have the footdrop on the left. She notes that this has caused her to fall on occasion. She is working on trying to strengthen her evertors and ankle dorsiflexors and plantar flexors. She notes that she has continued decreased sensation on the lateral border of her left foot and also a sensation of pins and needles over the right posterolateral aspect of the thigh and gluteal region. … Her medications on this visit are Motrin, Flexeril, Naprosyn on an as needed daily basis.
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> … The right shoulder was notable for forward flexion of 160 degrees, external rotation of 60 degrees, and internal rotation to the sacrum. She was noted to have increased translation in both an anterior and posterior direction with a 1 plus focus, consistent with multidirectional instability. She was also noted to have positive Hawkins and Neer impingement signs. She was, distally, neurovascularly intact in the upper extremities and her motor strength was 5 out of 5. Her back exam was notable for forward flexion to the midtibia, with full extension, rotation, and bending. She was tender to palpation from approximately T-10 to L-5. She was noted to have dysesthesias to light touch over the proximal lateral aspect of the right thigh and gluteal region. Motor strength of bilateral lower extremities was 5 out of 5 with the exception of the left peroneals, extensor hallucis longus, and ankle dorsiflexors, which were graded as 4 out of 5. Sensation was decreased to light touch in an S-1 distribution on the left foot. She had a negative sitting straight leg raise. She was able to walk on her toes, but could not walk on her heels.
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> The patient's present condition is summarized as follow: 1) right shoulder impingement syndrome and multidirectional instability; 2) right hip dysesthesias; 3) lumbar spondylosis; and 4) L5-S1 myelopathy, affecting left lower extremity. The patient is limited in that she cannot use her right upper extremity for heavy lifting or activities that require her to raise her arm above the level of her head. She is limited in regards to her footdrop because this causes her to trip on occasion and she is unable to run or walk on uneven surfaces. She also continues to get muscle spasms in both legs.

The results of an EMG completed on August 7, 2001, showed "no electrophysiological evidence of an acute or severe chronic left lumbar radiculopathy. Mild chronic muscle denervation, typically detected on EMG exam with volitional effort, is unable to be assessed secondary to [the patient's] inability to exert force with indwelling monopolar needle."

The results of the MRI completed on August 7, 2001, showed "[d]isc space narrowing and disc desiccation is greatest at the L4-5 level followed by L5-S1. There is pseudodisc formation noted at the first sacral element. Vertebral body marrow signal is normal. … L4-5 shows a small central annular tear posteriorly in the midline without evidence of disc protrusion or extrusion. There is no evidence of central canal stenosis. The neural foramen are patent. … L5-S1: Broad base disc bulge is seen. There is mild central protrusion and bulge of the disc to the left of midline. There is no evidence of central canal stenosis or neural foraminal narrowing." The diagnosis was "degenerative disc changes at L4-5 and L5-S1 with annular tear of the disc at L4-5."

On September 6, 2001, the CPEB met to review the applicant's case and recommended that she be discharged with a 20% combined disability rating, including

(1) 10% for "lumbosacral strain: with characteristic pain on motion," under VASRD code 5295; and
(2) 10% for "neuritis, left external popliteal nerve, rated as paralysis of, incomplete, mild," under VASRD code 8621-8521.

On October 2, 2001, the applicant rejected the findings of the CPEB and demanded a hearing before the FPEB.

On October 29, 2001, a housemate of the applicant wrote a letter to the FPEB and stated that the applicant frequently suffers extreme pain after attempting activities such as painting or unpacking a box and sometimes gets such pain for no apparent reason. The housemate also stated that the applicant could not lift things or exercise and that she once fell in the driveway when her foot gave way.

In an undated addendum to his report of August 7, 2001, the doctor wrote that the "patient states she continues to experience bilateral hip pain, with intermittent left leg and low back muscle spasms." However, he noted that she had a full range of motion in her hips.

On November 1, 2001, an FPEB was convened to hear the applicant's case.[2] The FPEB recommended that she be discharged with a 10% combined disability rating, including a

(1) 0% rating for "spondylosis analogous to lumbosacral strain: with slight subjective symptoms only," under VASRD code 5299/5295; and a
(2) 10% rating for "neuritis, left external popliteal nerve, rated as paralysis of, incomplete, mild," under VASRD code 8621-8521.

On November 14, 2001, the applicant faxed a rebuttal to the FPEB regarding its decision to rate her lumbar spondylosis as 0% disabling. She pointed out that the doctor who examined her on August 7, 2001, had recommended that she remain on the TDRL. In addition, she pointed out that the doctor had found her back "tender to palpation" and that she had "paravertebral spasms." She summarized her back condition as "degenerative disc disease [with] a neurological implication, to include drop foot, leg spasms, and right thigh dysesthesias. There is also lumbosacral strain with attendant pain and paravertebral spasms." In addition, she alleged that at the FPEB hearing it was apparent that the board members had not reviewed her case prior to the hearing.

[2] On December 17, 2003, CGPC informed the BCMR that neither a tape recording nor a transcript of the FPEB could be found.

Although CGPC received the applicant's rebuttal and placed it in her PDES record, the place on the FPEB report form where receipt of the rebuttal would have been noted is blank, and the FPEB never responded to the rebuttal, as required by Chapter 5.D.2.c. of the Physical Disability Evaluation System (PDES) Manual.

On December 7, 2001, a one-officer Physical Review Counsel (PRC) concurred in the FPEB's recommendation. On December 13, 2001, the Chief Counsel found the proceedings to be technically correct. On December 21, 2001, the final approving authority approved the recommendation of the FPEB and ordered that the applicant be discharged with severance pay.

On January 7, 2002, as a result of recent examinations, the DVA increased the applicant's rating for dysthymic disorder to 30% effective as of October 26, 2001, and increased the rating for her shoulder condition to 20% effective as of August 7, 2001. These ratings, when combined with the 60% rating for her back condition and foot dropsy and her 10% rating for residuals status post condylectomies, produced a total combined disability rating of 90%. She still qualified for "individual unemployability."

On January 9, 2002, the applicant was discharged from the service with a 10% disability rating and $53,182.80 in severance pay. However, her notice of discharge was apparently mailed to the wrong address.

The applicant also submitted copies of the reports of MRIs done this past year. On February 19, 2003, tests revealed "possible spasm" secondary to "degenerative change in the posterior facet joints at L5-S1. The disc spaces are maintained except for mild narrowing of the L4-5 interspace." On May 22, 2003, tests revealed "mild central canal stenosis and biforaminal narrowing" where the L4-5 disc was bulging.

VIEWS OF THE COAST GUARD

On August 22, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief by correcting the applicant's disability rating for lumbar spondylosis from 0% to 10%, for a combined 20% disability rating. He based his recommendation in part on a memorandum on the case prepared by CGPC, which is summarized below.

CGPC's Memorandum

CGPC alleged that there were "no substantive violations of the established rules governing the PDES process committed by the CPEB or FPEB that deprived the applicant any of her rights or due process." CGPC alleged that the fact that, at the FPEB hearing, the board members questioned the applicant and her attorney about her medi-

cal history "was not prohibited by law or regulation and did not deprive her of any substantial rights or result in unfair prejudice during the hearing process."

CGPC stated that, although the record contains no evidence that the applicant was notified of the receipt of her rebuttal, the fact that the PRC did not sign off on her case until December 7, 2001, indicates that there was ample time for her rebuttal to be considered. CGPC alleged that when questioned about the case, the PRC stated that although he could not recall the specifics of the applicant's case, he is certain that he would have noticed if her rebuttal was missing because of the process he uses to review FPEB decisions.[3]

CGPC stated that the failure of the CPEB and the FPEB to provide an amplifying statement explaining their decisions, in accordance with Chapter 2.C.3.a.(3)(d), was not erroneous since the regulation leaves the determination of whether an amplifying statement is needed to the discretion of the boards. CGPC stated that placement on the TDRL does not guarantee a member a disability retirement. CGPC likened the TDRL to a "pending list" that "provides a safeguard to the Government against permanently retiring members who may later fully, or partially, recover from the disabling condition." CGPC stated that the TDRL also protects members from being separated with a low disability rating when their conditions are unstable and could worsen.

CGPC argued that the DVA's decision to rate the applicant's back and foot condition as 60% disabling is not determinative of the issue before the BCMR because the DVA and military evaluation systems serve different purposes. The DVA evaluates veterans based on their civilian employability, whereas under the PDES, disability ratings are based on "the extent that the unfitting medical condition or conditions prevent the member from performing their [sic] duties." Therefore, CGPC argued that comparing the disparate ratings is like "comparing apples and oranges."

CGPC stated that the officer who presided over the applicant's CPEB in 2001 has again reviewed the case and stated that the highest disability rating she could have received for lumbar spondylosis analogous to lumbosacral strain is 10%. Therefore, CGPC recommended that the BCMR increase the applicant's disability rating for lumbar spondylosis to 10%, for a combined rating of 20%.

CGPC argued that it was appropriate for the CPEB not to consider the applicant's shoulder condition "because she had accepted their earlier finding of 0% disability for this at her 1999 PEB."

Chief Counsel's Advisory Opinion

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[3] No copy of the PRC's statement was provided to the BCMR.

The Chief Counsel argued that the applicant submitted "no persuasive evidence that the [PDES] erred in rating her disability [at] less than 30%. He argued that under *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), the DVA's higher rating does not prove that the Coast Guard erred in rating "the extent [the applicant] has been rendered unfit to perform the duties of [her] office, grade, or rating because of [her] physical disability." The Chief Counsel argued that "any long-term diminution in the applicant's earning capacity attributable to [her] military service is properly a matter from the DVA, not the Coast Guard or the BCMR."

The Chief Counsel argued that "[a]bsent a strong showing of evidence to the contrary, it is presumed that Coast Guard officials carried out their official duties lawfully, correctly, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). However, he stated that, "even though Applicant has failed to show, by a preponderance of the evidence, that the Coast Guard committed an error or injustice in rating her disability, the Coast Guard undertook another review of her medical record. That review supports changing Applicant's disability rating for Spondylosis analogous to lumbosacral strain (with characteristic pain on motion) from 0% to 10%. In the interests of justice, the Coast Guard is proposing that the Board grant Applicant that partial relief."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On September 8, 2003, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited her to respond within 30 days. The applicant responded on November 7, 2003.

The applicant argued that if her spondylosis had to be rated by analogy to lumbosacral strain, it should be rated as 20% disabling because of her paravertebral spasms. She stated, however, that "[i]f DDD [degenerative disc disease] or DJD [degenerative joint disease] is the proper analogy, then 40% is the minimum due to the neurological residuals to include drop foot."

The applicant argued that "[n]either [VASRD code] 5295 at 10%, nor 5293 unrecognized is a proper result in light of the irrefutable clinical evidence which includes L5-S1 myelopathy, affecting left lower extremity."

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."

Veterans Affairs Schedule for Rating Disabilities (38 C.F.R. Part 4)

There is no VASRD code specifically for lumbar spondylosis.

VASRD code 5293 is for intervertebral disc syndrome. Possible ratings are 60% for "[p]ronounced: with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk or other neurological findings appropriate to the site of diseased disc, little intermittent relief"; 40% for severe: recurring attacks with intermittent relief; 20% for moderate: recurring attacks; 10% for mild; and 0% for posteroperative, cured. [Emphasis added.]

VASRD code 5295 is for lumbosacral strain. Possible ratings are 40% for "[s]evere: with listing of whole spine to opposite side, positive Goldthwaite's sign, marked limitation on bending in standing position, loss of lateral motion with osteoarthritic changes"; 20% for "muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position"; 10% "with characteristic pain on motion"; and 0% "with slight subjective symptoms only."

VASRD code 8521 is for paralysis of the external popliteal nerve. Possible ratings are 40% for "[c]omplete: foot drop and slight droop of first phalanges of all toes, cannot dorsiflex the foot, extension (dorsal flexion) of proximal phalanges of toes lost; abduction of foot lost, adduction weakened; anesthesia covers entire dorsum of foot and toes"; 30% for incomplete but "severe"; 20% for "moderate"; and 10% for mild.

Title 38 C.F.R. § 4.14, titled "Avoidance of Pyramiding," states that the "evaluation of the same disability under various diagnoses is to be avoided."

Provisions of the Medical Manual (COMDTINST M6000.1B)

Article 3.F. of the Medical Manual provides that members with medical conditions that "are normally disqualifying" for retention in the Service shall be referred to an IMB by their commands. Article 3.F.1.c. of the Medical Manual states the following:

> Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) which interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Members considered temporarily or permanently unfit for duty shall be referred to an Initial Medical Board for appropriate disposition.

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 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 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.10.a.(2) provides that the CPEB or FPEB will consider a medical condition to be "permanent" when "[a]ccepted medical principles indicate the defect has stabilized to the degree necessary to assess the permanent degree of severity or percentage rating" or if the "compensable percentage rating can reasonably be expected to remain unchanged for the statutory five year period that the evaluee can be compensated while on the TDRL." Under Chapter 8, if the CPEB (or the FPEB) determines that a member is unfit for duty and the condition may not be permanent but is at least temporarily greater than 30 percent, the member may be placed on the temporary disability retired list (TDRL) for a maximum of five years. Chapter 8.A.2. provides that the TDRL "safeguards members from being permanently retired with a condition that is not stable

and could result in a higher disability rating." While on the TDRL, a member's case is periodically reviewed by the CPEB to determine if his condition has stabilized so that a permanent rating may be assigned (or he may be found fit for duty if he recovers).

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 evaluee 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 evaluee 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 form military service for disability. In making this professional judgment, board members will only rate those disabilities which make an evaluee 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 2.C.3.a.(3)(a)1. states that "[w]hen rating a condition which does not appear in the VASRD, the board shall rate by analogy."

Chapter 2.C.3.d., entitled "Amplifying Statements," states that "[w]hen the basis for its findings and recommended disposition is not readily apparent from the documents of record, as in the case of a disability percentage award varying from the normal, or when the true physical condition of the evaluee is not adequately reflected by the VASRD, the board [a CPEB or FPEB] will prepare an amplifying statement, setting forth the basis for its findings and recommended disposition."

Chapter 4.A.14.c. provides that the member has the right to reject the CPEB's recommendation and demand a formal hearing by the FPEB in accordance with 10 U.S.C. § 1214. Under Chapter 4.A.14.d. the member must reject or accept the CPEB's "offer" within 15 days of notification by the legal counsel.

Chapter 5.A.4. provides that an FPEB convened under 10 U.S.C. § 1214 normally consists of three officers, one of whom is a medical officer and none of whom have served on the member's CPEB. Chapter 5.C.11.a. provides that the FPEB shall issue findings and a recommended disposition of each case in accordance with the provisions of Chapter 2.C.3.a. (see above). The applicant has three days in which to decide whether to file a rebuttal and 15 working days in which to file the rebuttal. The rebuttal "may include substantial existing evidence, which by due diligence, could not have been presented before disposition of the case by the FPEB." Chapter 5.D.2.c. provides that the FPEB will inform the member or his counsel, normally within 15 working days, whether the rebuttal supports a change in the FPEB's determinations. If the FPEB concurs in the rebuttal, it prepares a new report in accordance with Chapter 2.C.3.a.

Chapter 6.B.1. provides that whenever a member rebuts the recommended disposition of the FPEB, a PRC composed of one commissioned officer in pay grade O-5 or above will review the entire case, to "check for completeness and accuracy, and ensure consistency and equitable application of policy and regulation." Chapter 6.B.2. provides that the reviewing officer will not modify the findings and recommended disposition of the FPEB unless they are clearly erroneous. Chapter 6.B.3. provides that the officer must concur with the FPEB unless it has assigned the wrong VASRD codes, pyramided the impairments, applied an "[i]ncorrect percentage of disability to the VASRD descriptive diagnosis/code(s), or was arbitrary and capricious or abused its discretion in making its determinations. If the officer finds such an error, he shall return the case to the FPEB for reconsideration." Chapter 6.B.6. allows a member to submit new evidence or any pertinent information in writing to the PRC officer.

Chapter 1.B.4. provides that the Chief Counsel will review the actions of the CPEB, FPEB, and PRC to ensure legal sufficiency. If no legal insufficiency is found, the Chief Counsel forwards the case to the Chief of the Administrative Division of CGPC for final action.

Chapter 9.A.1. states the following:

> Where there is a reasonable doubt as to which of two percentage evaluations should be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. When, after careful consideration of all reasonably procurable and assembled data, there remains reasonable doubt as to which rating should be applied, such doubt shall be resolved in favor of the member, and the higher rating assigned.

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

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that she should have been retained on the TDRL in accordance with the recommendation of the doctor who examined her on August 7, 2001. Under Chapter 2.C.10.a.(2) of the PDES Manual, a member may be removed from the TDRL when her medical condition is determined to be "permanent" in that it is clear that she will not become fit for duty and when (a) "[a]ccepted medical principles indicate the defect has stabilized to the degree necessary to assess the permanent degree of severity or percentage rating" or (b) the "compensable percentage rating can reasonably be expected to remain unchanged for the statutory five year period that the evaluee can be compensated while on the TDRL." Although the doctor who examined her recommended her retention on the TDRL, the applicant has not proved by a preponderance of the evidence that the FPEB acted unreasonably or erroneously in deciding in 2001 that her condition met this definition of "permanent." The fact that the examining physician disagreed with the decision to remove her from the TDRL does not prove that the FPEB erred in its recommendation. The doctor's report did not mention any expectation of significant changes in the applicant's condition prior to July 5, 2004, the end of the maximum five-year period that she could have remained on the TDRL.

4. The applicant alleged that the FPEB erred by rating her lumbar spondylosis as 0% disabling, instead of at least 20% disabling. She alleged that the necessity of using analogous VASRD codes to rate her lumbar spondylosis contributed to the erroneous rating. There is no VASRD code for lumbar spondylosis, so the FPEB was forced to choose an analogous code. The DVA chose to rate her back and foot conditions together and to analogize her condition to code 5293, for intervertebral disc syndrome. However, the definition for code 5293 does not include back conditions with "neurological findings appropriate to site of diseased disc," such as the applicant's footdrop. The applicant has not proved that the FPEB erred by rating her neurological condition separately and analogizing her lumbar spondylosis to lumbosacral strain.[4]

5. The applicant alleged that the FPEB erred in evaluating her lumbar spondylosis as 0% disabling, instead of at least 20% disabling. She alleged that her 60% rating for her back condition by the DVA and the addendum to the doctor's report noting that she had reported back spasms prove that she met the criteria for at least a 20% rating. Because the DVA's 60% rating covers both her lumbar spondylosis and her footdrop, the exact rating the DVA would ascribe to her back condition alone is unknown. Moreover, as the Chief Counsel stated, a higher DVA rating, based on her employability or lack thereof, does not prove that the Coast Guard erred in assessing her back condi-

[4] The Board notes that when a member's back condition has been operated on, her residual condition is rated under VASRD code 5295 for lumbosacral strain and "the relevant code for neurological impairment." *See* DOD Instruction 1332.39, Para. E2.A1.1.19.6.

tion's impact on her fitness to perform the duties of her rating, in accordance with Chapter 2.C.2.a. of the PDES Manual. *See Lord v. United States*, 2 Ct. Cl. 749, 754 (1983).

6. In his addendum to his report on the applicant's August 7, 2001, physical examination, the doctor wrote that the applicant herself had reported having back spasms. He did not state that he witnessed any back spasms during testing or that she reported having chronic back spasms.[5] In addition, the doctor mentioned that there had been "no interval change in the symptoms related to her right shoulder and left and right legs," which leaves open the issue of whether her back condition had improved or worsened since 1999. Although the applicant was found to suffer from back spasms prior to her placement on the TDRL in 1999 and testing showed "possible spasms" in 2003, two years after her discharge, such evidence does not prove that upon examination in 2001 she suffered from "muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position," as required for a 20% rating under VASRD code 5295.[6] In fact, the doctor noted that "[h]er back exam was notable for forward flexion to the midtibia, with full extension, rotation, and bending," without noting any complaint of pain upon extension, and in the addendum he noted that she had a full range of motion in her hips. Therefore, the Board finds that the applicant has not proved that the Coast Guard erred in not assigning her at least a 20% disability rating for her back condition.

7. The applicant alleged that it was erroneous and unjust for the FPEB to issue its decision without explanation. She argued that the FPEB should have prepared an "amplifying statement" in accordance with Chapter 2.C.3.d. of the PDES manual. The Coast Guard argued that the decision to issue such a statement falls completely within the discretion of the FPEB. However, Chapter 2.C.3.d. states that the FPEB will prepare an amplifying statement "[w]hen the basis for its findings and recommended disposition is not readily apparent from the documents of record." Although the FPEB differed from the CPEB in assessing the applicant's back condition, the Board finds that the lack of evidence that the applicant experienced pain on motion during her back examination on August 7, 2001, provided a sufficient and readily apparent basis for the FPEB's assignment of a 0% rating for lumbar spondylosis analogous to lumbosacral strain.

8. The applicant alleged that the FPEB never saw her rebuttal. The record shows that the rebuttal was timely faxed to the FPEB on November 14, 2001, and placed

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[5] DOD Instruction 1332.39, which is used by the Coast Guard as guidance in rating disabilities, though it is not legally binding, provides that a 20% rating under VASRD code 5295 is appropriate for lumbosacral strain if "paravertebral muscle spasms [are] chronic and evident on repeated examinations." Para. E2.A1.1.20.2.

[6] The Board notes that the applicant's medical record lacks evidence of any back pain complaints by the applicant for the two-year period from January 1996 to February 1998, which suggests that her back condition might fluctuate.

in her PDES record. However, the receipt of the rebuttal was never noted on the FPEB's report form, and no response was ever sent to the applicant, as required by Chapter 5.D.2.c. of the PDES Manual. Nevertheless, the Coast Guard asked this Board to conclude that the rebuttal was properly considered based on the fact that the PRC did not raise any objection when he reviewed her case file. However, the PRC's failure to raise objections when the form was not properly completed and there was no evidence of a response by the FPEB in the record does not persuade the Board that the applicant's rebuttal was properly considered. The Coast Guard is entitled to a presumption of regularity with respect to its records.[7] However, the incomplete form and the lack of a response to the rebuttal proves that the rebuttal was, at least, not properly processed and strongly suggests that it was never considered. The mere inclusion of the applicant's rebuttal as the last document entered in her case file (except for the notice of discharge) and the failure of the PRC to raise an objection (when he also apparently failed to notice the incomplete form and the lack of response) does not outweigh the evidence of improper processing. However, the Board also finds that the applicant's rebuttal contained no new information or arguments that were unknown and unconsidered by the FPEB prior to its decision on November 1, 2001. The Board finds that the rebuttal, even if properly processed, was unlikely to change the outcome of her case.

9. Many of the examining physician's notes from the August 7, 2001, examination concern the condition of the applicant's right shoulder. Neither the CPEB nor the FPEB assigned a rating for the condition, even though the condition was included in their reports in 1999, prior to her placement on the TDRL. CGPC argued that the boards' failure to consider the condition in 2001 was proper "because she had accepted their earlier finding of 0% disability for this at her 1999 PEB." CGPC's argument in this respect is clearly erroneous given the acknowledged purpose of TDRL placement to protect members in cases where their conditions are likely to deteriorate. The fact that the applicant accepted the 0% rating in 1999 is irrelevant to whether her condition could have deteriorated while she was on the TDRL. Accepting a 0% rating upon placement on the TDRL does not legally preclude receiving a higher rating if the condition worsens. However, the CPEB and FPEB were not required to include the shoulder condition in their reports if they found that the condition did not contribute to her unfitness for duty, and the applicant has not challenged the failure to assign her shoulder condition a disability rating. Therefore, the Board finds no error or injustice in the CPEB's and FPEB's failure to include a rating for the applicant's shoulder condition in their reports.

10. Likewise, the applicant has not challenged the 10% rating she received for the partial paralysis of her left external popliteal nerve, which causes footdrop. Moreover, the evidence of record does not prove that her problems with footdrop exceed a "mild" assessment under VASRD code 8521.

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[7] 33 C.F.R. § 52.24(b).

11. The Chief Counsel and CGPC both recommended that the Board raise the applicant's disability rating for lumbar spondylosis from 0% to 10%, for a combined disability rating of 20%, based on a recent assessment by a doctor who served on her CPEB. The Board also notes the fact that the applicant's housemate stated that she sometimes witnessed the applicant suffering back pain after doing physical work, such as painting or unpacking boxes. Accordingly, the Board agrees with the Coast Guard that the preponderance of the evidence in the record indicates that the applicant's back condition does meet the requirements for a 10% disability rating under VASRD code 5295, which requires "characteristic pain on motion."

12. The applicant complained that the Coast Guard sent notification of her discharge to the wrong address, which prevented her from knowing that she had no insurance coverage for about one month at a time when she was pregnant. Although the administrative error was certainly unfortunate and could have caused her significant financial harm, the applicant has not shown that she was monetarily or substantively harmed by the late notice.

13. Accordingly, partial relief should be granted by raising the applicant's disability rating under VASRD code 5295 to 10% and her combined rating to 20%.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxx xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is granted in part as follows:

Her record shall be corrected to show that she was discharged on January 9, 2002, with a 20% combined disability rating, including

(1) a 10% rating for "lumbar spondylosis analogous to lumbosacral strain with characteristic pain on motion," under VASRD code 5299/5295; and
(2) a 10% rating for "neuritis, left external popliteal nerve, rated as paralysis of, incomplete, mild," under VASRD code 8621/8521.

The Coast Guard shall pay the applicant any sum she may be due as a result of this correction.

Julia Andrews

George J. Jordan

Kathryn Sinniger