

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction
of Coast Guard Record of:

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

BCMR Docket
No. 2001-027

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on January 17, 2001, upon the Board's receipt of the applicant's request for correction of her military record.

This final decision, dated January 17, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, x xxxxxx xxxxxx xxxxx xxxxx (xxxxxxxxxxxxxxxxxxxx), enlisted in the Coast Guard on July 23, 1984. She was honorably discharged by reason of physical disability with a 20% disability rating and severance pay for lumbosacral strain, on March 3, 1999. She was assigned a RE-3P (disqualifying condition - physical disability) reenlistment code. She asked that her military record be corrected to show that she was retired due to physical disability rather than having been discharged. (A disability rating of 30% or greater is required for a physical disability retirement.)

SUMMARY OF RECORD AND SUBMISSIONS

The applicant alleged that she suffered from chronic low back pain and DDD (degenerative disc disease), but the Coast Guard did not include the DDD in rating her disability. She also alleged that the Coast Guard improperly found her to have moderate rather than severe low back pain. The applicant stated that prior to her illness she had made the Coast Guard her "life." She alleged that the Coast Guard erred when it medically separated her with a 20% disability rating.

In January 1997, the applicant complained of low back pain. Based on an April 28, 1997 MRI, the applicant was diagnosed as suffering from mild DDD in the lumbar (lower back) region. The MRI showed no disc protrusion or extrusion. On May 19,

1997, two physicians at a naval hospital diagnosed the applicant as suffering from lower back pain, secondary to degenerative disc disease. These physicians described their physical examination of the applicant as follows:

[Patient] is a well-developed, well-nourished female in no acute distress. Examination of her back demonstrates a straight spine with some mild tenderness to palpation over the [lumbar region]. Motor examination demonstrates +5 out of 5 strength throughout her lower extremities and there are no significant sensory deficits, although the [patient] does admit to tingly sensation at the medial aspect of her right leg with no dermatomal distribution. [Patient] has good heel and toe walking, and has negative straight leg raises. Her deep tendon reflexes are +2 throughout both lower extremities. She demonstrated no sacroiliac joint instability and had no pain with extension or rotation of the spine.

Physical Disability Evaluation System (PDES) Processing

On June 16, 1998, an Initial Medical Board (IMB) was held to determine the applicant's medical condition. Relying primarily on the May 1997 examination, the IMB diagnosed the applicant as suffering from pain in the lumbar region (lumbago) and expressed the opinion that she was not fit for full duty. The IMB noted the applicant's complaints about "daily lumbar pain, lumbar spasm, numbness right leg, numbness right foot, sometimes numbness left foot, and numbness left hand." The IMB referred the applicant's case to the Central Physical Evaluation Board (CPEB).

On August 18, 1998, the CPEB met and recommended that the applicant be discharged with a 10% rating disability due to "lumbosacral strain: with characteristic pain on motion." The applicant rejected the findings and recommendation of the CPEB and her case was referred to a Formal Physical Evaluation Board (FPEB). The applicant had appointed military counsel to represent her before the FPEB.

On November 5, 1998, the FPEB met to consider the applicant's case. The applicant was represented by counsel and given the opportunity to submit evidence in her behalf. The FPEB determined that the applicant was unfit to perform the duties of her grade and rate and recommended that she be discharged from the Coast Guard due to the physical disability "lumbosacral strain: unilateral, in standing position" with a 20% disability rating. (According to the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD), which the military uses, a 20% rating for lumbosacral strain should include muscle spasms on extreme forward bending, loss of lateral spine motion, and unilateral in a standing position.)

The applicant rebutted the findings of the FPEB and requested that she be temporarily or permanently retired with a 40% disability rating. She stated that since

the VASRD does not list DDD, she could have been rated by analogy for intervertebral disc syndrome instead of lumbosacral strain. The applicant submitted another MRI dated October 27, 1998, which showed that the applicant had minimal spondylosis. (A general term for degenerative spinal changes due to osteoarthritis. See Dorland's Illustrated Medical Dictionary, 29th Edition, p. 1684.) She submitted additional medical information showing that on November 25, 1998, she was treated for acute exacerbation of low back pain. The President of the FPEB informed the applicant that her rebuttal did not result in a change of the FPEB's findings. The President of the FPEB told the applicant that her case would be forwarded for review to the Physical Review Council (PRC).

The applicant submitted a statement to the PRC stating that her preference would be to remain on active duty or in the alternative to be temporarily or permanently retired. Attached to the applicant's rebuttal was an orthopedic report from a civilian clinic dated December 1, 1998. The report stated that the applicant described her pain as moderate to severe and that the pain is made worse by sneezing, bending, sitting, standing, and walking. "Her low back pain has been to the point that she has hired [a] housekeeper to facilitate household chores." The orthopedist did not perform any new diagnostic tests, but rather reviewed those that had been taken by military facilities. The orthopedist diagnosed the applicant as suffering from chronic low back pain, lumbar degenerative disc disease, and intervertebral disc derangement.

On January 22, 1999, the PRC concurred with the findings of the FPEB. On January 27, 1999, the Chief Counsel reviewed the disability proceedings and found them to be in acceptable form and technically correct. On January 29, 1999, the Commandant of the Coast Guard took final action and approved the applicant's discharge due to disability with a 20% disability rating for "lumbosacral strain; unilateral, in standing position."

Department of Veterans Affairs (DVA) Rating Decision

On December 8, 1999, after the applicant's discharge from the Coast Guard, the DVA granted the applicant a 20% disability rating for "low back pain [and] degenerative disc disease [of the] lumbar spine." (Some of the applicant's other conditions were rated by the DVA but these are not at issue in this case and are not discussed in this decision.) The DVA noted that during its medical examination, the applicant related frequent spasms and limitation of motion due to pain. The DVA rating decision also stated that X-rays taken during the DVA examination were normal, but an earlier MRI and X-rays taken while the applicant was on active duty noted minimal posterior disc bulge without evidence of true herniation or protrusion. The DVA rating decision also noted that 1998 EMG (electromyogram) and NCV (nerve conduction velocity) studies at a civilian institution did not reveal any evidence of right lumbosacral radiculopathy (disease of the nerve roots). The DVA report stated, "A

higher evaluation of 40 percent is not warranted unless the record shows lumbosacral strain with listing of the whole spine to the opposite side, positive Goldthwait's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion."

On October 10, 2001, the DVA issued an updated rating decision increasing the applicant's disability rating for the back to 40%. This increase was based on a DVA medical examination dated January 31, 2001. During this medical examination, the applicant complained of increased pain. The DVA examiner noted that the applicant's posture was abnormal. The DVA report further stated:

[The applicant] cannot stand in any one position for any length of time. Examiner noted the veteran walking as if she is in a lot of pain in her lower back. The [applicant] has limitation of function of standing and walking. She can only stand for 15 minutes and can only walk for 30 minutes. Examiner noted tenderness throughout the entire lumbar area . . . She was unable to lay flat due to extreme pain. Range of motion of the lumbar spine is flexion 15 degrees with pain at 15 degrees, extension 5 degrees with pain at 5 degrees; right lateral 25 degrees with pain; left lateral 25 degrees with pain; right rotation 35 degrees and left rotation 35 degrees. Examine noted no muscle atrophy and decreased sensation along the right lateral thigh. Reflexes are within normal limits.

Views of the Coast Guard

On June 4, 2001, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the application be "denied for lack of proof."

The Chief Counsel stated that the applicant received a full and fair hearing before the Physical Disability Evaluation System (PDES), which found her physical condition caused her to be unfit for continued duty by reason of physical disability, with a 20% disability rating.

The Chief Counsel said that the applicant failed to prove that she should have been medically retired from the Coast Guard with a disability rating of 30% or higher. He noted that although the Coast Guard is not bound by DVA rating decisions, it is noteworthy that the [DVA] assigned a 20% disability rating for her back condition, which is the same percentage of disability assigned by the Coast Guard.

The applicant failed to prove that the Coast Guard committed error when it involuntarily separated her in 1999 with a 20% disability rating. The Chief Counsel

stated that the Government does not have to disprove the applicant's allegations of error and is entitled to the presumption that its officials acted correctly, lawfully, and in good faith in the applicant's case. He stated that the applicant has failed to provide sufficient evidence to overcome the presumption of regularity afforded the military officials who determined that the applicant's physical disabilities justified a 20% disability rating.

The Chief Counsel noted that the findings of a 1997 and a 1998 MRI of the applicant's back were consistent with the PDES findings of lumbosacral strain with characteristic pain with motion at the 20% disability rating level. "Moreover, to find for the applicant, the Board would have to determine that she suffered from chronic severe pain at the time of her FPEB rather than mild to moderate pain." The Chief Counsel stated there is insufficient evidence in the record to make that finding by a preponderance of the evidence. Accordingly, he recommended that the Board deny relief in this case.

Applicant's Reply to the Views of the Coast Guard

On July 23, 2001, the Board received the applicant's reply to the views of the Coast Guard. She repeated her request for a retirement due to physical disability. She further stated as follows:

[I] contend[] the evidence did not adequately reflect the extent of [my] disability from which [I] suffer[]. Moreover, it did not take into consideration the secondary disabilities connected to the spinal disc condition. It has been clearly defined in 38 CFR § 3.310 (1996) that service connection may be granted for disabilities resulting from a service connected disease or injury. Judicial interpretation of the matter of secondary service connection, embodied in 38 CFR § 3.310 (1996), requires consideration of whether or not a service connected disability either causes or aggravates another condition. . . .

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of the case pursuant to § 1552 of title 10 of the United States Code. The application was timely.
2. In 1997, after 11 years of service in the Coast Guard, the applicant, a xxx, was evaluated for low-back pain and DDD. The FPEB met on November 5, 1998, and found

the applicant unfit to perform the duties of her rating due to a physical disability considered to be 20% disabling. On January 29, 1999, the Commandant directed that the applicant be separated from the Coast Guard with severance pay. On March 3, 1999, the applicant was honorably discharged with a JFL (physical disability) separation code.

3. The applicant has failed to submit sufficient evidence establishing that the Coast Guard committed an error or injustice by diagnosing the applicant with lumbosacral strain that was 20% disabling at the time of her discharge. As the applicant stated, DDD is not listed in the VASRD. Therefore, her disability was rated under lumbosacral strain, which in the opinion of the FPEB was the most analogous to the applicant's disability. While the applicant suggested that she should have been rated by analogy under intervertebral disc syndrome, she submitted insufficient evidence establishing that intervertebral disc syndrome was more appropriate for rating her disability than lumbosacral strain. Moreover, even if intervertebral disc syndrome were the more appropriate diagnosis for rating the applicant's disability, she would still have to show that her condition was severe rather than moderate as rated by the FPEB. A finding that an intervertebral disc syndrome disability is of a moderate nature carries a 20% disability rating, which is the applicant's disability rating for lumbosacral strain. See 38 CFR 4.71a.

4. Whether listed under lumbosacral strain or intervertebral disc syndrome, the question is did the Coast Guard commit an error by rating the applicant's condition as 20% disabling, which indicated her condition to be moderate rather than severe. An April 30, 1997, MRI showed the applicant with mild degenerative disc disease, but no evidence of disc protrusion or extrusion. A medical report dated May 19, 1997 stated that the applicant was not in any acute distress, but noted mild tenderness to palpation in the lumbar region. The report also stated that the applicant had no sacroiliac joint instability and no pain with extension or rotation of the spine. An October 27, 1998 MRI stated that the applicant had minimal spondylosis and 1998 EMG and NCV studies did not reveal any evidence of right lumbosacral radiculopathy. The VASRD describes the requirements for a 20% disability rating as "muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral in standing position." The MRIs and medical reports were consistent with the VASRD and the FPEB's determination that the applicant had a 20% (moderate) disability for lumbosacral strain at the time of her discharge.

5. For the applicant's lumbar strain to have been rated severe rather than moderate at the time of her discharge, her condition needed to include a "listing of the whole spine to opposite side, positive Goldthwaite's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteo-arthritis changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion." See 38 CFR 4.71a. (VASRD). The evidence of record does not show

that the applicant met these requirements such that her condition should have been rated severe rather than moderate.

6. The fact that the applicant received a higher disability rating from the DVA approximately two years after her discharge from the Coast Guard does not mean that the Coast Guard committed an error or injustice by assigning the applicant a lower rating at the time of her discharge. The Board notes that the DVA's initial rating of the applicant's back condition in December 1999 was the same as that given by the Coast Guard upon the applicant's discharge in March 1999. Moreover, the Court of Federal Claims has 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." Lord v. United States, 2 Cl. Ct. 749, 754 (1983).

7. The applicant received all the due process rights to which she was entitled during the PDES processing. She was represented by counsel during the FPED. She failed to convince any of the boards within the PDES that she should have received a higher disability rating. The Board will not disturb the decision of the Coast Guard in the absence of a preponderance of the evidence showing that its decision was in error or unjust. With regard to the applicant's arguments about service connection as discussed in 38 CFR 3.310, the Board finds this provision applies to the DVA and not the Coast Guard.

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

ORDER

The application of xxxxxx xxxxxxxxxxxxxxxxxxxxxxxx, xxx xx xxx, USCG, for correction of her military record is denied.

Angel Collaku

Astrid Lopez-Goldberg

L. L. Sutter