

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2002-175

FINAL DECISION

ULMER, Chair:

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 September 30, 2003, upon the Board's receipt of the applicant's complete application for correction of his military record.

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

The applicant asked the Board to correct his record to show that he was retired from the Coast Guard by reason of physical disability with a 30% disability rating, with back pay and allowances retroactive to the date of his separation by reason of physical disability with a 10% disability rating on September 20, 2001. He further requested, if retired, that he be reimbursed for all medical treatment, prescription drugs, and medical insurance expenses he has incurred since the date of his separation.

The applicant requested in the alternative that his medical record be considered by a new Central Physical Evaluation Board (CPEB)¹ and if appealed a new Formal Physical Evaluation Board (FPEB)², which excludes as a member any Coast Guard personnel who were previously members of a CPEB or FPEB that considered his disability rating. He further requested that the new FPEB be directed to render written findings if it does not find him to be disabled by 30% or greater.

¹ According to the PDES Manual (COMDTINST M1850.2C), the CPEB is a permanent administrative body convened to evaluate, on a record only basis, the fitness for duty of active duty, reserve members, and members on the Temporary Disability Retired List (TDRL).

² The FPEB meets to evaluate a case of an individual who has exercised the right to demand a formal hearing subsequent to the evaluation of the case by the CPEB, or upon a case in which the CPEB could not unanimously agree.

Prior to enlisting in the Coast Guard, the applicant served in the United States Marine Corps. On April 7, 1992, he enlisted in the Coast Guard and served on active duty until May 5, 199x, the dated he was placed on the temporary disability retired list (TDRL)³ with a 30% disability rating for pain and limitation of motion associated with degenerative disease of the cervical and thoracic spine. After approximately three years on the TDRL, he was removed from that list and discharged on September 21, 2001, with a 10% disability rating for cervical degenerative disc disease characterized by pain on motion. The FPEB analogized the applicant's cervical degenerative disease to a lumborsacral strain and rated the disability under code 5299/5295 of the Veterans Affairs Schedule of Rating Disabilities (VASRD).⁴

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant alleged that the 10% permanent disability rating assigned to him by the FPEB is erroneous and that his condition warrants, at a minimum, the 30% disability rating he held while assigned to the TDRL. He alleged that the 10% disability rating was against the weight of the medical evidence. In this regard, he argued that despite medical determinations in 199x and 200x that his condition was unchanged from 1998 or that it had worsened slightly, the CPEB recommended only a 20% disability rating, and the FPEB recommended only a 10% disability rating. He stated that his Coast Guard medical record was not available for the members of the FPEB who decided his case. He complained that neither the CPEB nor the FPEB provided an explanation of their findings and recommended disposition, as required by the PDES Manual.

In addition the applicant complained that two members of the earlier CPEB that reviewed his disability case prior to placing him on the TDRL in 199x were on his May 20, 200x FBEP, which determined his final disability rating. He further stated that the medical member of his FPEB was a pediatrician and had never examined or treated the applicant. He complained that FPEB members cross-examined him or asked him medical questions that he did not have the expertise to answer, turning the hearing into an adversarial proceeding in violation of the PDES Manual

PHYSICAL DISABILITY EVALUATION SYSTEM (PDES) PROCEEDINGS

³ The TDRL is a pending list of individuals whose disabilities are not permanent. In order to be placed on the TDRL, the individual must have a disability that renders him or her unfit to perform the duties of his or her office, grade and rank, and the disability must be rated at a minimum of 30%. Temporary disability retired pay terminates at the end of 5 years. See Chapter 8 of COMDTINST M1850.2C. (Physical Disability Evaluation System [PDES] Manual)

⁴ Section 9.A.7 of the PDES Manual states that "[w]hen an unlisted condition is encountered, rate the disability under a closely related disease or injury in which not only the functions but the anatomical localization and symptomatology are closely analogous."

On July 3 and 8, 199x, a Medical Board (MB) met and determined that the applicant was not fit for duty. It diagnosed the applicant as suffering from a painful chronic thoracic spine and a painful cervical spine dysfunction "with left cervical radiculitis (inflammation of the nerve root) secondary to cervical spine spondylosis (degenerative spinal changes caused by arthritis) and degenerative disc disease." The MB stated that the applicant was well until December 28, 1995 when he was sustained multiple injuries as a result of a motor vehicle accident. He received a course of treatment and on March 4, 199x, an MRI showed degenerative disc disease with bulging in the thoracic spine. The report states that on April 20, 199x, the applicant complained that his pain had worsened because of the snow shoveling he was required to do by the Coast Guard at that time. "X-rays of the cervical spine from 18 March 199x revealed minimal degenerative changes at the C5-6 level with no radiological evidence of neuroforaminal encroachment." An MRI of the cervical spine revealed a disc bulge and osteophytes with left neuroforaminal narrowing. The MB contained the following description of the applicant's physical examination:

The member presents as a 5'10" 200 pound . . . male in no acute distress. He is able to demonstrate approximately 60 degrees of right lateral rotation and 60 degrees of left lateral rotation. The pain is referred to the base of his neck with cervical extension. There is no tenderness to palpation of the paracervical musculature. Deep tendon reflexes are judged to be 1+ and symmetrical at the biceps, triceps and brachioradialis musculotendinous junctions. There is no evidence of any motor deficit in the upper extremities. There is no evidence of any sensory deficit in the upper extremities. The member is able to demonstrate a normal gait and a normal heel/toe gait. The member is able to forward flex so as to touch his fingertips approximately 7 inches above the floor. There is no discomfort to palpation of the paralumbar musculature. Deep tendon reflexes are 2+ and equal at the ankle and knees bilaterally. There is no evidence of any sensory or motor deficit in the lower extremities. Straight leg raise maneuver is felt to be negative bilaterally at 90 degrees in both the sitting and supine position. There is a full painless passive range of motion of both hips and the leg lengths are felt to be equal. . . . There was no evidence of cervical disc herniation.

It is the opinion of the MB that conservative modalities such as physical therapy, NSAIDs, activity modification and Pain Clinic management will not elevate his overall cervical and thoracic spine function to a level compatible with full duty in the US Coast Guard. No surgical intervention is felt to be indicated.

On September 16, 199x, the applicant's commanding officer (CO) wrote that the applicant was not qualified to perform the duties associated with his rate, which he described as follows: "Provides administrative support at all types of Coast Guard units. Counsels members on entitlements and prepares pay, travel, and other personnel

related documents. Is familiar with and provides routine maintenance to the Coast Guard standard workstation and associated printers. Prepares correspondence and directives and maintains files and directive libraries." He stated that the applicant suffered from back pain and could not stay seated or stand in one position for very long without discomfort.

On November 13, 199x, the CPEB recommended that the applicant be separated from the Coast Guard with a 20% combined disability rating for thoracic and cervical strain analogous to lumbosacral strain with characteristic pain on motion. On February 10, 199x, the applicant rejected the findings and recommended disposition of the CPEB and demanded a hearing before the FPEB.

On March 31, 199x, the FPEB met and found the applicant unfit to perform the duties of his rate due to severe pain and degenerative disc disease of the thoracic and cervical spine and recommended that he be placed on the TDRL with a 30% disability rating. On May 6, the Commander of the Coast Guard Personnel Command approved the applicant's placement on the TDRL.

On November 23, 199x, the applicant underwent his first TDRL periodic examination. The medical report stated that the applicant had been employed as an auditor with the Department of Veterans Affairs (DVA) since being placed on the TDRL and had lost no time from work, except for medical appointments. It further stated that the applicant "continued to complain of upper back pain with pain upon moving and bending," with no radicular pain. The report noted that the applicant complained of numbness in his small and ring fingers. The medical report further reported the following:

The positive physical findings are full range of motion of his cervical spine with no tenderness to palpation of the cervical spine. He had negative Apley's compression on test and a negative distraction test. Upper extremity range of motion was full bilaterally. He had profound anesthesia of his ring and small fingers on both the radial and ulnar sides with 2 point discrimination of greater than 20 mm.

The remainder of his neurosensory examination was normal. He had no tenderness to palpation of his thoracic spine or his paraspinous muscles. His gait was normal and his lower extremity exam was normal both in motor and sensory. Range of motion of his lumbar spine was normal and cervical spine was normal. Upper extremity exam was normal.

The [applicant's] mental status examination appeared to be stable. The patient does report, however, that he is taking a benzodiazepine under the direction of a physician for anxiety attacks which he has been experiencing since his discharge from the military.

It is the opinion of the examiner that the degenerative disc disease is still evolving as the patient continues to complain of pain in his thoracic spine. A recommendation can be made that final action on the periodic physical examination is not considered appropriate at this time. Compared to the patient's prior condition, it appears that his condition has remained relatively stable or is slightly worsening.

On May 3, 200x, a neurologist examined the applicant and reported that MRI scans showed degenerative changes in the cervical spine "without spinal stenosis or cord compromise." He further stated the following findings:

On examination he had good range of motion of his neck and back. Straight leg raising is essentially negative. He had excellent strength in all muscle groups in upper and lower extremities with 1-2+ and symmetric biceps, triceps, knee and ankle jerks. His toes are down going. There is diffuse decreased pin sensation over the entire left upper extremity but not over trunk or other extremities. Vibratory and position senses are normal. The source of the pain is most likely traumatic degenerative arthritis of the spine . . . I could find no convincing neurology abnormalities and would not recommend further workup of the degenerative disease in his spine.

On June 19, 200x, a letter report from a rehabilitation hospital doctor stated that the applicant "was reluctant to be on an aggressive pharmacologic regimen as he does not want to have any clouded thinking given that he is currently going to school to get an MBA as a certified public accountant." The report noted that a neurosurgeon had not recommended surgery. The report recommended physical and occupational therapy for the applicant.

On March 1, 200x, the applicant had his second TDRL periodic examination. The medical report noted that the applicant was employed but had changed employers. It also noted that the applicant had lost no significant time from work other than for medical appointments and for occasional exacerbations of pain. He reported the following physical examination findings:

The [applicant] is nontender to palpation about the cervical spine in the posterior processes of the cervical, thoracic and lumbosacral regions. He also denies any tenderness overlying the trapezius muscle and denies any pain with lateral flexion to either the right or left side. He also denies pain with lateral rotation of the neck to the right side. He complains of pain with rotation of his neck to the left and this pain he states is in the left shoulder and arm distribution in a broad and diffuse pattern. He also states that there is pain with flexion of the neck when he naturally flexes forward. This causes him to have shooting pain into several dermatomes in the left upper extremity including the C6, C7, C8, and T1 dermatomes

of the left upper extremity including the hand, forearm, and upper arm. The patient also states that he has less severe but significant pain when extending his neck backwards. His lumbosacral spine is noted to be nontender to palpation in both the midline as well as the paraspinal regions. He has no costovertebral angle tenderness. His straight leg raises are negative bilaterally as well as bilateral upper extremity and lower extremity motor strength being 5/5. He has global deep tendon reflexes which are active between 1+ and 2 and symmetric bilaterally. He had decreased sensation in the ulnar aspect of the forearm and the fourth and fifth digits of the left hand without any significant change from the 1999 exam. He has no upper extremity, lower extremity, or trunk muscle wasting. He also has no fasciculation^[5] or clonus^[6] on examination. His Babinski signs [a reflex test to assist in diagnosing injury to the spinal cord] are negative. He has negative Lasegue signs [test the flexion of the hip] as well as negative contralateral straight leg raise signs. He is able to heel and toe walk without difficulties and he has normal gait.

X-rays were taken of the cervical and thoracic spine during this periodic examination. The x-rays showed decreased disc height in the thoracic spine and degenerative disc disease. The doctor offered the following impression of the applicant's condition:

Cervical spine with mild degenerative changes, no fractures, spondylolisthesis or dislocation. Degenerative disc disease of the thoracic spine also. The patient also has significant neurologic deficit of the left upper extremity which is without change from the previous exam. He also has back pain which is brought on by provocative maneuvers and this pain extends at times into the left upper extremity.

The doctor determined that there was no significant change in the applicant's degenerative disc disease from the earlier TDRL examination and that his condition was stable and a final determination could be made as to his disability. He diagnosed the applicant as suffering pain syndrome associated with degenerative disc disease and neurologic deficit of the left upper extremity.

On April 10, 200x, the CPEB convened and gave the applicant a 10% disability rating for slight limitation of motion of the cervical spine, 10% disability rating for mild

⁵ Fasciculation is defined as "a small local contraction of muscles, visible through the skin, representing a spontaneous discharge of a number of fibers innervated by a single nerve filament." Dorland's Illustrated Medical Dictionary, 29th Edition, p. 654.

⁶ Clonus is defined as "a continuous rhythmic reflex tremor initiated by the spinal cord below an area of spinal cord injury, set in motion by reflex testing." Dorland's, p. 365.

incomplete paralysis of the left ulnar nerve, and a 0% disability rating for slight limitation of motion of the dorsal spine, for a combined 20% disability rating.

On April 26, 200x, the applicant rejected the findings of the CPEB and demanded a formal hearing before the FPEB.

On May 25, 200x, the applicant's chiropractor submitted a report. He stated that he began treating the applicant in December 1996 for moderate to severe neck and mid-back pain. He stated that the applicant's condition worsened when he aggravated his condition shoveling on April 1, 1997. He stated that on May 8, 200x, the applicant's limitation of motion and impairment was a low of 5% to a high of 40%. He stated that the applicant was alert and cooperative and in some obvious distress with bending and rising from the examination table for which he required help.

On May 28, 200x, the applicant's wife wrote a letter to the FPEB. She stated that the applicant experiences severe limitation and pain that greatly impacts the quality of their lives. She stated that the applicant "experiences severe pain when sitting for any length of time where his back and neck are stationary and are strained, [and] this requires him to take frequent breaks and restrict his travel."

On May 30, 200x, the FPEB convened to hear the applicant's case. Civilian counsel represented him. After the hearing, the FPEB deliberated and found the applicant to be fit for duty.

On June 14, 200x, the applicant submitted a rebuttal to the FPEB findings and recommendation, challenging the fitness for duty determination. He also informed the board that he was being treated for a psychiatric condition and kidney stones. A psychiatric clinical nurse specialist wrote a letter dated June 6, 2001. She stated that she has been treating the applicant since November 1998 for a generalized anxiety and panic disorder. "Despite some decrease in intensity and duration of panic attacks while on Klonopin the attacks have not been totally eliminated . . . [The applicant] has recently within the last month noted an increase in panic attacks . . ."

The applicant's PDES file contains a statement from the applicant's civilian supervisor. He stated that the applicant has needed many days of leave per month to cover required medical visits, treatments, and for bed rest due to medical problems. He stated that the applicant takes frequent breaks during the work day to change positions, and that he has observed the applicant taking pain medication on a regular basis. He stated that the applicant's job requires frequent travel, and after the travel he has seen the applicant suffering physically due to pain and limited motion.

On July 3, 200x, the FPEB notified the applicant that his rebuttal did not cause a change in its findings and recommended disposition and that his case would be forwarded to the Physical Review Council (PRC)⁷ for review and processing.

On July 13, 200x, the PRC returned the case to the FPEB noting insufficient evidence to support the finding of fitness for duty. On August 10, 200x, the FPEB entered new findings awarding the applicant a 10% disability for degenerative disc disease of the cervical spine, which it analogized to lumbosacral strain with characterized pain on motion. It also awarded the applicant a 0% disability rating for minor neuralgia of the ulnar nerve.

On September 4, 200x, the Chief Counsel of the Coast Guard approved the findings and recommended disposition of the FPEB. On September 14, 200x, the Commander, Coast Guard Personnel Command approved the findings and recommended disposition of the FPEB and directed that the applicant's name be removed from the TDRL and that he be separated from the Coast Guard due to physical disability with severance pay. On September 20, 200x, the applicant was notified that he would be separated from the Coast Guard due to physical disability with a 10% disability rating.

Views of the Coast Guard

On February 28, 2003, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the applicant's request be denied for lack of proof of error or injustice. The Chief Counsel stated that the applicant failed to prove by a preponderance of the evidence that the Coast Guard committed error or injustice when it determined that the applicant's physical disability rating should be 10%. He argued that the applicant has failed to provide sufficient evidence to overcome the strong presumption of regularity afforded the military officials who determined that the applicant's physical disabilities justified a 10% disability rating.

Attached to the advisory opinion as Enclosure (1) was a memorandum from the Commander, Coast Guard Personnel Command (CGPC). He concluded that the medical evidence supported a 10% disability rating. He further stated the following:

The [FPEB] found that while the Applicant continued to suffer pain and physical impairment due to his medical condition that occasionally resulted in lost time from work and other activities, he held full-time clerical employment that was comparable to the duties of a Coast Guard yeoman and completed a lengthy daily commute. He was also able to complete an MBA while on the TDRL, a significant accomplishment.

⁷ The PRC reviews decisions by the CPEB and FPEB in which individuals rebut the findings or recommended dispositions of those boards.

. . . Placement on the TDRL does not guarantee a member permanent disability retirement. The TDRL is likened to a "pending list". It provides a safeguard for the Government against permanently retiring members who may later fully, or partially, recover from the disabling condition. Conversely, the TDRL safeguards members from being permanently retired with a condition that is not stable and could result in a higher disability rating. The applicant was placed on the TDRL with a 30% disability when his condition was found disabling but was not stable. When his condition was found to be stable, final action concerning his disability was appropriate. I disagree with his claim that the record supports a finding that the final evaluation of his condition showed that it was worse since his placement on the TDRL. To the contrary, I find that the record showed that his condition had improved in respect to its effect on his ability to perform the duties of his rate.

The [applicant] has no absolute right to receive an amplifying statement on demand . . . Presumably, the approving authority may also direct the [FPEB] to provide one after the fact, but did not do so in this case.

Applicant's Reply to the Views of the Coast Guard:

On March 3, 2003, the Board received the applicant's reply to the views of the Coast Guard. He disagreed that his case should be denied.

The applicant stated that the Coast Guard makes much of his job, commute, and schooling. He stated, however, there is no statute or regulation that prohibits him or any disabled veteran from pursuing those activities. On the contrary, there are Department of Veterans Affairs (DVA) programs that encourage disabled veterans to educate themselves, re-train for a job, and re-integrate into society, so that despite their disability, they can live as normal a life as possible.

Applicant disagreed that his civilian employment duties are similar to those of a yeoman. He stated that yeoman duties go far beyond those of secretarial and administrative functions and extend to sea duty, law enforcement, search and rescue, port security, facility maintenance, vessel inspection, and military readiness, all of which are part and parcel of Coast Guard military duty.

The applicant stated that CGPC's comment -- the applicant's "condition had improved in respect to its effect on his ability to perform the duties of his rate" -- applied an incorrect standard. He further elaborated:

The test for fitness for duty (FFD) is whether the person can perform all of the duties of his rank and rate. COMDTINST M1850.2C. [PDES Manual] Section 2.A.15. Once a finding that a person cannot perform all of the duties of his rank and rate, a finding of unfitness (NFD) is made, then the evaluator (CPEB or FPEB) refers to guidance in the VASRD or

COMDTINST M1850.2C., Chapter 9 for the criteria for assigning a percentage of disability . . . These are two (2) separate processes. COMDTINST M1850.2C, Chapters 2 and 9.

The applicant disagreed that the Coast Guard was entitled to the presumption of regularity. He stated that the Coast Guard offered no evidence to support its entitlement to the presumption. He noted the fact that the PRC returned the FPEB to the FPEB because its findings that the applicant was fit for duty was against the weight of the evidence. He also argued that the FPEB failed to state the basis for finding the applicant fit for duty or for finding him only 10% disabled on remand.

The applicant noted the Coast Guard's argument that his due process rights were not violated during the PDES processing of his case despite: 1. the absence of his complete medical record from the Board room; 2. the adversarial questioning of him during the FPEB hearing; 3. two of the FPEB members having served on the applicant's first CPEB; 4. the decision of the FPEB against the medical opinion of its own doctor; and 5. the failure of the FPEB to give any rationale for its decisions. He argued that each of these items violated the Coast Guard's own regulations.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant requested an oral hearing. The Chair, under section 52.31 of title 33, Code of Federal Regulations, recommended disposition on the merits without a hearing. The Board concurred in that recommendation.

3. The applicant alleged that the Coast Guard committed an error and/or injustice by discharging him with severance pay due to a physical disability that it considered to be 10% disabling. Article 2.C.2.a of the PDES Manual states that unfitness to perform the duties of one's office, grade, rank or rating due to disease or injury incurred on active duty shall be the sole standard for determining a retirement or separation due to physical disability. This provision further states, "Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements and duties that a member may reasonable be expected to perform in his or her office, grade, rank or rating."

4. The applicant has submitted insufficient evidence to show that the Coast Guard committed an error or injustice when it determined that his back condition was only 10% disabling and his left ulnar nerve neuralgia was 0% disabling. Although the Coast Guard uses the VASRD to rate disabilities, the Court stated in Lord v. United States, 2 Cl. Ct. 749 (1983) that the Armed Forces disability ratings are based on the

extent to which a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of physical disability.

5. The applicant's CO, in agreeing with the initial medical board, stated that the applicant was unfit to perform the duties of his rating due to pain, for which he took over the counter medications, and his inability to stay seated or to stand in one position for a long time. The CO described the applicant's duties as mostly administrative, which included the preparation of pay, travel, and other personnel related documents, provision of routine maintenance to computers and printer, and the maintenance of files and directive libraries. The physical requirements of the applicant's military duties are very similar to those the applicant performs in his civilian employment. The Board notes in this regard that he has held a fulltime job as an auditor since approximately the time of his temporary disability discharge from the Coast Guard. In addition, the applicant was able to earn an MBA while on the TDRL. The Board finds persuasive the two TDRL periodic examination reports that indicate that the applicant has not lost any significant time from work, except for medical appointments and occasional exacerbation of pain.

6. The findings of the last periodic examination appear to support the FPEB's determination that the applicant suffered from cervical degenerative disease analogous to lumbosacral strain with characteristic pain on motion under code 5299/5295 of the VASRD. The diagnosis of the final TDRL physician was mild degenerative disease of the cervical spine, also of the thoracic spine noting pain with movement. An earlier neurology report stated that the source of the applicant's pain was most likely "traumatic degenerative arthritis of the spine." In addition, it was proper for the FPEB to rate the applicant's degenerative disc disease by analogy (lumbosacral strain) since the VASRD does not contain a listing for degenerative disc disease.

7. The FPEB finding that the applicant's condition is 10% disabling under VASRD Code 5295 is reasonable. The criterion for a 10% disability rating for mild degenerative cervical disease analogized to lumbosacral strain is characteristic pain on motion. The orthopedist who performed the last TDRL periodic examination stated that the applicant has back pain that is brought on by provocative maneuvers and that extends at times into the left upper extremity. This is consistent with the applicant's complaint of pain in his neck, left shoulder and arm with natural flexion of the neck and pain when extending his neck backwards. The first TDRL physician found that the applicant had full bilateral upper extremity range of motion, and although the applicant complained of pain, he had no radiculitis. The neurologist reported that the applicant had good range of motion of his neck and back, with the MRI scans showing degenerative changes but no spinal stenosis (abnormal narrowing) or cord compromise. The weight of the medical evidence supports the FPEB finding that the applicant's disability met the criteria for a 10% disability rating.

8. The medical evidence does not support the next higher rating for a 20% disability under Code 5295 because the applicant did not have muscle spasms on extreme bending or loss of lateral spine motion. In fact, the last TDRL report stated that

the applicant denied pain upon lateral flexion to either the right or left side. The medical evidence does not establish that the applicant suffered any fractures, spondylolisthesis⁸, or dislocation of the spine. The neurologist also stated that he could find "no convincing neurologic abnormalities and would not recommend further workup of the degenerative disease in [the applicant's] spine." Although the 199x MRIs showed some bulging in the thoracic and cervical spine, there was no indication that it involved the cord. The first TDRL periodic examination physician stated that the applicant has full bilateral upper extremity range of motion. To summarize, the Board is persuaded that the applicant's 10% disability rating is not in error because the applicant has been able to work fulltime at a job requiring skills and physical ability similar to that of a yeoman third class. He has been able to go to school and study for an MBA presumably while holding a fulltime job; he has neck pain but no muscle spasms, fractures, spondylolisthesis, or dislocation of the spine.

9. The applicant makes much of the fact that he was placed on the TDRL with a 30% disability rating, which he alleged should be maintained as his permanent disability rating. However, section 8.A.2. of the PDES Manual states that placement on the TDRL does not guarantee a member permanent disability retirement. Such placements protect the government from permanently retiring members who may later fully or partially recover from disability conditions, and conversely, it protects the member from discharge or retirement when the condition is not stable and could result in a higher disability rating. It was proper for the Coast Guard to remove the applicant from the TDRL once his condition had stabilized and to rate the disability based on the applicant's current status and level of disability. See section 2.C.3.a. of the PDES Manual. There is no persuasive evidence in the record subsequent to the second TDRL examination that shows the Coast Guard's findings are in error.

10. The applicant received a 0% disability rating for minor neuralgia of the ulnar nerve. There is insufficient evidence showing that this disability rating is erroneous. In this regard, the neurologist stated that he could find "no convincing neurologic abnormalities." There is also insufficient evidence in the record that the applicant's anxiety disorder and kidney stones contributed to his unfitness for duty. Section 9.A.1.c.2.b. of the PDES Manual states, "Conditions which do not render the member unfit for continued service will not be considered for determining the compensable disability rating unless they contribute to the finding of unfitness."

11. Having two members on the 200x FPEB who also served on the 199x CPEB that placed the applicant on the TDRL appears not to have been a violation of the PDES Manual. Section 5.A.4. of the PDES Manual states that a member of the CPEB may not serve as a member of the FPEB convened to hear the same case. Placement on the TDRL and the determination of a permanent disability rating are two separate processes, where the applicant is entitled to all due process rights that attach to each proceeding.

⁸ Spondylolisthesis is forward displacement of one vertebra over another. Dorland's, p. 1684.

12. The applicant's complaint that the lack of an amplifying statement by the FPEB was a denial of due process is not established in this case. The basis for the FPEB's decision in this case is apparent from the medical evidence submitted after applicant's placement on the TDRL. The applicant suffers from cervical degenerative disease with pain on motion.

13. The Board notes the applicant's complaint that certain of the PDES members turned the PDES hearing into an adversarial proceeding by asking confrontational questions. This Board does not equate the asking of difficult and pointed questions with an adversarial proceeding. It very well could have been that member's way of searching for the truth.

14. The Board notes that the revised FPEB findings and recommended disposition that the applicant be discharged with severance pay due to a 10% disability were not referred to the applicant for a rebuttal. It is not clear from section 5.D.2.C.(2) of the PDES Manual whether the FPEB was required to refer its revised findings to the applicant for a rebuttal. This provision states that when the FPEB concurs in all or in part with the evaluatee's rebuttal it shall prepare new findings and forward a copy to the evaluatee and his legal counsel, after which the record is forwarded for review and final action. However, the issue was not raised before this Board and we do not rule on it.

15. The applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error by assigning him a 10% disability rating and discharging him from the Coast Guard with severance pay. Absent clear evidence of error or injustice, the Board will not disturb findings rendered by the FPEB.

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

ORDER

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

Felisa C. Garmon

Quang D. Nguyen

G. Alex Weller