

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-027

FINAL DECISION

██████████ Attorney-Advisor:

This proceeding was conducted according to the provisions of section 1552 of title 10, United States Code. It was commenced on December 8, 1997, upon the BCMR's receipt of the applicant's application.

This final decision, dated December 10, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant, a former xxxxxxxxxxxxxxxx in the Coast Guard, was honorably discharged with severance pay on July 16, 199x, due to a medical disability. Prior to her discharge, on April 10, 199x, a Physical Evaluation Board (PEB) had determined her disability rating to be 10 percent. The applicant asked the Board to correct her military record by increasing her disability rating to 30 percent.

APPLICANT'S ALLEGATIONS

The applicant alleged that in determining her disability rating, the PEB "did not take into consideration all [her] disabilities upon discharge, especially the neurocognitive dysfunction, which was not diagnosed in service due to an incomplete examination." She alleged that she had an attention deficit disorder (ADD), which should have been diagnosed prior to her discharge.

In support of her allegation, the applicant submitted the report of a neuropsychological examination, which was conducted by a private psychologist on October 25, 199x, three months after her discharge. The report listed the results

of thirteen neuropsychological tests. Most of the results of those tests were listed as “within normal limits,” “average,” or “above average.” The results of tests of her attention and concentration, however, were shown as follows:

Simple auditory attention (5th percentile)	Moderately deficient
Simple visual attention (14th percentile)	Mildly deficient
Simple visuomotor tracking (7th percentile)	Moderately deficient
Complex visuomotor tracking (9th percentile)	Moderately deficient
Rapid visuomotor encoding (1st percentile)	Severely deficient

She was also determined to be mildly or moderately deficient at simple constructional praxis (copying), delayed design reproduction, incidental recall, and abstract reasoning and concept formation.

The applicant’s doctor reported that some of her dysfunctions might be due to head injuries she had received in 1982 and 1993. He diagnosed “Axis I: Neurocognitive dysfunction” and deferred an Axis II diagnosis.

VIEWS OF THE COAST GUARD

On November 9, 1998, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief because of a lack of proof or, in the alternative, failure to identify or allege a specific error committed by the Coast Guard.

The Chief Counsel alleged that, on January 21, 199x, the applicant’s commanding officer “strongly recommended that Applicant receive an unsuitability discharge with appropriate separation pay and benefits based on the results of an Initial Medical Board held 06 December 199x. . . . The PEB found the applicant unfit to perform the duties of her rating by reason of Dysthymic Disorder (300.4)[¹] with a 10% disability rating.”

The Chief Counsel urged the Board to deny relief because “[c]ompetent medical authority assessed the Applicant’s medical condition and she received the full benefit of the due process provided by the Coast Guard’s physical evaluation board procedures including representation by legal counsel.” The Chief Counsel alleged that, while represented by counsel, the applicant signed a form that acknowledged that she accepted the findings and recommended disposition of the PEB and waived her right to a formal hearing before the PEB. Her decision to waive her right to a hearing, the Chief Counsel alleged, “was an affirmative election not to exhaust her intra-service administrative remedies that should now bar relief before the BCMR.” The Chief Counsel alleged that case law on this is-

¹ Dysthymic disorder, or dysthymia, is mental depression.

sue clearly denies the applicant relief: “[W]here a plaintiff failed in a timely fashion to pursue administrative remedies that were available and open, the plaintiff cannot later claim futility based on her inability to pursue those remedies any longer.” Barnett v. International Business Machines Corp., 885 F. Supp. 581, 588 (S.D.N.Y. 1995). Therefore, the Chief Counsel argued, the applicant’s “application before the BCMR should be barred based on her affirmative waiver of an effective administrative remedy.”

In addition, the Chief Counsel alleged that “the condition Applicant alleges the Coast Guard failed to diagnose is not a disability within the meaning of the law and, therefore, would have amounted to harmless error even if Applicant could prove, by a preponderance of the evidence, that the Coast Guard misdiagnosed her condition.” “Neurocognitive Disorder is not a ratable disability within the meaning of the law.” The definition of “physical disability,” the Chief Counsel stated, “specifically excludes behavior and personality disorders which would include the alleged Neurocognitive Dysfunction of the Applicant.” Moreover, the Chief Counsel alleged that Attention Deficit Disorder does not fall within the definition of physical disability. Rather than appearing before a PEB, a member diagnosed with ADD is administratively separated pursuant to the Personnel Manual. Because “[t]he PEB’s decision provided the Applicant with a higher disability rating than she would have received had they diagnosed her with her alleged Neurocognitive Dysfunction . . . the Applicant received a fair and equitable decision by the PEB.”

Finally, the Chief Counsel argued, “[t]he Applicant has failed to prove that the PEB did not, in fact, consider the outward manifestations of her alleged Neurocognitive Dysfunction. The record before the PEB included observations of the Applicant as a ‘slow learner’ The PEB had this information before them [sic] and made their findings and recommendations accordingly.”

SUMMARY OF THE RECORD

- 6/14/8x The applicant enlisted in the regular Coast Guard for a term of four years under the delayed entry program.
- 8/28/8x The applicant sought help for stress, mood swings, and anger. She began weekly counseling sessions with a social worker at the xxxxxx Medical Center Mental Health Unit in xxxxxxxxx.
- 11/4/9x Dr. X. diagnosed the applicant as having an adjustment disorder with anxiety. He noted that she was still receiving counseling.

- 9/10/9x A summary of the applicant's performance ratings indicated that since 198x, she had consistently received very average marks of 4 and 5 on a scale of 1 to 7, with 7 being the best score. Occasionally she received a mark of 3 or 6.
- 6/14/9x Dr. Y. at the xxxxxxxxxxxx Medical Clinic in xxxxxx, reported that the applicant was receiving counseling for depression. The counselor recommended that she take Prozac, Paxil, or Zoloft. Dr. Y. prescribed Prozac and found the applicant fit for duty.
- 10/16/9x The applicant reported to a physician's assistant at the Support Center in xxxxxxxxxxxx that she had stopped taking her medication because it gave her a sore throat. She was starting to feel very anxious and depressed. The physician's assistant referred her to a psychiatric clinic at the xxxxxx Medical Center in xxxxxxxxxxxx, for evaluation and an opinion on whether an Initial Medical Board (IMB) should be convened.
- 11/19/9x The applicant was examined by Dr. Z., a psychiatrist at the xxxxxxxx Medical Center. Dr. Z. reported that the applicant's "history is consistent with dysthymia, but I believe there is strong characterological component as well. Her personality is in the cluster a range, and is not well suited to a supervisory position." He diagnosed "Dysthymic Disorder, early onset, [existing prior to entry into active service], service aggravated DSM-IV 300.4; precipitating stress - routine military service - mild; predisposition - strong cluster a personality traits - severe; impairment - military service - severe; civilian - mild." Dr. Z. recommended that an IMB evaluate the applicant and referred the case to the Public Health Service for disposition.
- 12/6/9x Dr. Y. and Dr. Q. conducted an IMB on the applicant. They diagnosed dysthymic disorder 300.4 and referred her to a PEB. They also restricted her duty to not include sea duty, use of firearms, or night work. In a narrative clinical summary, the doctors reported that she had

a long history of depression dating back to her early school years and has felt depressed more times than not over the years. During school she was a slow learner and often felt stupid. In the last several years she feels that things were getting worse after she allegedly started to have supervisors give her a hard time. More recently she has been distressed after finding herself in a supervisory position and having a hard time supervising and getting the respect of her subordinates. .

. . . Physical examination revealed subjective depression but no neurovegetative signs. . . . At the present time the evaluatee complains of depression and work related stress especially from night work. . . . The prognosis for this patient is guarded. Her personality is not well suited to a supervisory position. She is finding that this is difficult for her, aggravating her "depression" and causing anxiety symptoms. With increasing supervisory responsibilities, she will have a harder and harder time. The patient is expected to never be fit for full duty. . . .

1/13/9x The applicant signed a Patient's Statement Regarding the Findings of the Medical Board. The statement lists her diagnosis as dysthymic disorder 300.4. It also states, "I feel that all my impairments have been evaluated adequately by the Medical Board, and that these diagnoses (listed above) will be considered by the . . . PEB, for its independent evaluation." The applicant indicated on the statement that she would not submit a rebuttal.

1/13/9x The applicant signed a statement to "amplify" the findings of the IMB. The applicant alleged that her depression began when a supervisor began swearing at her, harassing her, and threatening her. The supervisor, she said, threatened to tell the command that she was crazy. When she became a xxxxxxxxxxxxxxxx and supervisor, she found the responsibilities "overwhelming." She discovered that other xxxxxxxx were gossiping about her and became very angry and depressed. After an injury to her xxxxxxxx kept her off the job for several weeks, "the xxxxxxxxxxxx refused to permit [her] to continue [her] training as a xxxxxxxx. [She] was informed by the xxxxxx that rather than continue [her] training, he was training someone else for [her] job. This decision depressed [her] and made [her] feel as though [she] was being punished because of [her] injury."

1/21/9x The applicant's commanding officer recommended she "receive an unsuitability discharge with separation pay and transition benefits." He based his recommendation on the findings of the IMB. He stated that the applicant "has been distressed since assuming a supervisory position Supervising subordinate personnel is a responsibility associated with the majority of xxxx billets in the Coast Guard." He further stated that the applicant

is an average xxxx qualified in the xxxxxxxx position and adequately performs assigned duties. Her potential to fulfill xxxxxxxxxxxxxxxxxxxx responsibilities in the future is suspect

based on her medical condition. She has the knowledge, however doubts her own abilities and second-guesses herself, placing unwarranted pressure on herself to ensure all decisions are “correct”.

- 1/29/9x The Personnel Command of the Coast Guard responded to the letter from the applicant’s commanding officer by stating that “no action will be taken on recommendation for unsuitability discharge of [the applicant], since the diagnosis listed in medical board is ratable. . . . The initial board has been referred to the Central Physical Board for consideration [capital letters lower cased].”
- 4/10/9x The Coast Guard PEB issued its Findings and Recommended Disposition in the applicant’s case. The PEB found that she suffered from a dysthymic disorder whose symptoms were controlled by continuous medication. The disorder rendered her 10% permanently disabled. All 10% of the disability was reported to be attributable to aggravation of a preexisting condition.
- 5/25/9x The PEB report was signed by an attorney who acknowledged that he had consulted with the applicant and counseled her regarding acceptance or rejection of the PEB’s findings and recommendation.
- 5/16/9x The applicant signed a statement acknowledging that (1) she had been advised by counsel; (2) she accepted the findings and recommendation of the PEB; and (3) she waived her right to a formal hearing before a PEB.
- 7/16/9x The applicant was honorably discharged from the Coast Guard after 14 years, 2 months, and 11 days of active duty service. The narrative reason cited on her DD214 is “disability, severance pay,” and the separation code is JFL (involuntary discharge due to physical disability).
- 10/25/9x The applicant underwent neurocognitive tests that revealed significant deficiencies in her ability to concentrate and pay attention.

APPLICABLE REGULATIONS AND CASE LAW

Provisions of the Medical Manual

According to Section 3-C-17 of the Medical Manual (COMDTINST M6000.1B), prior to discharge, a member must undergo a physical examination that includes a neurological examination. The examiner is instructed to pay at-

tention to the member's gait, pupils, deep reflexes, deep sense, sensory disturbances, motor disturbances, muscular development, tremors, tics, cranial nerves, psychomotor tension, and peripheral circulation. No tests of cognitive function are required.

According to Section 5-B-17 of the Medical Manual, members with disruptive attention deficit disorders and members with learning disorders shall be administratively separated in accordance with Chapter 12 of the Personnel Manual.

Provisions of the Physical Disability Evaluation System (PDES) Manual

According to Section 2-A-21 of the PDES Manual (COMDTINST M1850.2B), the terms "physical impairment" and "physical defect" include mental diseases but not primary mental deficiency.

Section 2-A-36 of the PDES Manual states the term "physical disability" includes mental diseases that render a member unfit for continued duty but not primary mental deficiency.

Chapter 9 of the PDES Manual provides that, when assessing the extent of a member's disability, the PEB shall use the schedule for rating disabilities of the Department of Veterans Affairs (DVA).

Code of Federal Regulations

The DVA's schedule for rating disabilities does not include the applicant's alleged neurocognitive disorder in its lists of neurological conditions and mental disorders. 38 C.F.R. §§ 4.120-4.132. In addition, 33 C.F.R. § 4.127 provides that "[m]ental deficiency and personality disorders will not be considered as disabilities under the terms of the schedule."

Barnett v. International Business Machines Corporation

In *Barnett v. International Business Machines Corp.*, 885 F. Supp. 581 (S.D.N.Y. 1995), the plaintiff filed suit under 29 U.S.C. § 1132 (ERISA). She alleged that the defendant had wrongfully denied her long-term disability benefits. In December 1986, the plaintiff had suffered neurological injuries to her shoulder while lifting machinery. She received worker's compensation until April 1988, when the carrier refused to pay any more. The plaintiff did not timely apply for long-term disability benefits. She alleged that the defendant's management employees had actively discouraged her from applying. She also al-

leged that the management had told her it had already reviewed her case and decided that any application by her would be denied.

The defendant moved for summary judgment based in part on the plaintiff's failure to exhaust administrative remedies. The judge granted the motion and dismissed the suit with prejudice. The judge held that the facts alleged by the plaintiff, if assumed to be true, did not prove that any application by her for long-term benefits would have been futile. (Futility would have excused her failure to exhaust administrative remedies.) Citing *Tiger v. AT&T Technologies Plan for Employees' Pensions, Disability Benefits*, 633 F. Supp. 532 (E.D.N.Y. 1986), the judge also stated that "if a plaintiff failed in a timely fashion to pursue administrative remedies that were available and open, the plaintiff cannot later claim futility based on her inability to pursue those remedies any longer."

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 alleged that the Coast Guard had erred by failing to diagnose her neurocognitive disorder, ADD, prior to her discharge. Because of this error, she alleged, she received a disability rating of only 10% rather than 30%.

3. The Chief Counsel urged the Board to dismiss the application because on May 16, 199x, the applicant had waived her right to a formal hearing before the PEB. Her waiver, he alleged, constituted a failure to exhaust "all effective administrative remedies" as required by 33 C.F.R. § 52.13(b). The Board finds that the applicant did not discover the alleged error in her record until she was diagnosed with ADD in October 199x. Prior to that time, she did not know the record was in error because none of her doctors had diagnosed her disorder. Her chance to demand a hearing before the PEB had already passed when she discovered the error. The Board finds that the applicant waived her right to a formal hearing before the PEB in May 199x with respect to her dysthymic disorder. That waiver, however, does not constitute a failure to pursue an effective administrative remedy for an alleged error (failure to diagnose her alleged neurocognitive disorder or ADD) discovered in October 199x.

4. Coast Guard regulations do not require it to test members' neurocognitive abilities. Although the applicant once described herself as a slow learner, she received average performance evaluations throughout her career in the Coast Guard. There is nothing in her record to suggest that her alleged ADD rendered her unfit for duty. Therefore, the Board finds that the Coast Guard did not err when it failed to test the applicant's neurocognitive abilities.

5. The Chief Counsel also argued that the applicant's alleged neurocognitive disorder, ADD, is not a ratable disability under the PDES. Therefore, even if the Coast Guard's doctors had diagnosed this alleged disorder, the diagnosis would not have increased the percentage of the disability rating assigned to the applicant. The Board finds that the alleged neurocognitive disorder, ADD, is not listed as a ratable disability on the DVA's schedule for rating disabilities. 33 C.F.R. §§ 4.120-4.132. Therefore, even if one assumed that the applicant suffered from ADD at the time of her discharge, the applicant could not receive a higher disability rating because of it.

6. Therefore, the applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice by failing to diagnose her alleged neurocognitive disorder or by discharging her with a 10% disability rating.

7. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of former XXXXX, is hereby denied.

