


DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 1999-162

FINAL DECISION

 Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on August 11, 1999, upon the Board's receipt of the applicant's application for correction. The application was complete until September 14, 1999, the date the Board received the applicant's military record.

This final decision, dated August 17, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a yeoman second class (YN2; pay grade E-5), asked the Board to place him on the PDRL (permanent disability retired list). He was placed on the TDRL (temporary disability retired list) on ~~August 17, 1992~~, and was discharged from the Coast Guard on August 17, 1997 with severance pay. The severance pay was based on a 10% disability rating for the "left knee, other impairment, slight."

**EXCERPTS FROM RECORD AND SUBMISSIONS**

The applicant alleged that the Coast Guard committed the following errors with respect to his case.

- 1) USCG failed to provide periodic examinations while on TDRL.
- 2) USCG failed to schedule the required physical examination necessary to determine the final status in relation to TDRL.
- 3) USCG failed to provide adequate examination for final determination.
- 4) USCG used a surgical consult by an intern to determine the status of my disability for retirement.
- 5) USCG discharged me in lieu of retirement based on a negative finding from an examination by an intern that stated he did not know what he was supposed to look for.
- 6) Had the USCG ordered the periodic examinations as prescribed by law they would have determined that the condition has degraded to grade III and is irreversible at this point.
- 7) Based on the medical evidence in existence the USCG should have retired me with permanent disability instead of discharging me.

The applicant further stated as follows:

My condition has degraded over the years since my initial placement on the TDRL, not only has my left knee worsened over the past seven years

but my right knee has also continued to worsen in its condition which is the same as the left knee. I have also undergone surgery on my left knee as well as having suffered injuries to my left knee that were directly attributed to the condition of degenerative joint disease. Had I received the required periodic exams as prescribed by [law], the Medical Board would have been able to determine that my condition was continuing to degrade. Also the condition for which I was diagnosed with by the Naval Physician, Chondromalacia Patella, is a degenerative condition and will not better itself. I have been advised by a private Orthopedic Surgeon that I will need to have the left knee replaced within the next 5 years due to the continual degrading that is in effect. If I was not being considered for a prosthetic device I could understand the logic of the Medical Board's thinking that the condition had stabilized and become better in [its] condition.

The applicant claimed that the medical board and the CPEB (central physical evaluation board) failed to consider an injury to his right shoulder that occurred in 1989. He stated that he has developed degenerative arthritis in the shoulder and he recently underwent surgery on the shoulder to remove a large ossified loose body.

The applicant stated that even though he suffers from chronic migraine headaches that were diagnosed and treated by the Coast Guard in 1990, the medical board and CPEB did not consider this condition in the disability evaluation process.

The applicant submitted a rating decision from the Department of Veterans Affairs (DVA) dated March 25, 1999. The DVA increased the applicant's disability rating for the left knee from 10% to 20%, effective October 1, 1998. It also continued the applicant's 10% disability rating for the right knee. The applicant's claim for migraine headaches and bursitis in the right shoulder was denied. The DVA provided the following reasons for its rating decision:

Report from [REDACTED] General shows veteran was seen on June 5, 1998, after having sustained an injury to the left knee at work. On examination the knee was mildly tender and swollen. No deformity or discoloration. Range of motion was slightly painful. X-ray noted no identifiable abnormalities. MRI performed on June 17th showed mildly increased signal in the proximal portion of the posterior cruciate ligament which likely represents normal variation, although mild inflammation could produce a similar appearance. No evidence of posterior cruciate or collateral ligament rupture seen. Otherwise, essentially negative examination.

On VA examination veteran reported pain and stiffness especially on the left. Physical examination noted there was evidence of painful motion. There was no evidence of edema, effusion, instability, weakness, redness, or heat. There was tenderness and the veteran walked with a marked limp favoring the left knee. Range of motion findings were flexion to 106 degrees with 0 degrees extension. X-rays showed no acute fracture or dislocation. Soft tissues were unremarkable. Previous x-ray dated

September 26, 1997, noted no bony abnormality. Diagnosis arthralgia of both knees, especially bad on the left.

The applicant submitted an operative report showing that on April 23, 1996 he underwent arthroscopic surgery of the right knee for a "[t]ear of the medical meniscus right knee." His postoperative diagnosis was the same as his preoperative diagnosis.

Another operative record showed that on July 19, 1999, the applicant underwent surgery on the left knee for "[m]edial meniscal tear, left knee" and "chondromalacia". His post operative diagnosis was the same as the preoperative diagnosis.

The applicant indicated in his statement that he is seeking increased ratings from the DVA and is appealing its decision denying his claim for migraine headaches and bursitis of the right shoulder.

### **Military and Medical Records**

The applicant's military medical record showed that in May 1990 the applicant complained about both of his knees. There was also a mention of migraine headaches in this medical entry, and it stated that the applicant complained about his shoulder, which he alleged was injured in 1989. He was assigned exercises for the shoulder.

On November 20, 1991, the applicant underwent an arthroscopy of the left knee. The post operative diagnosis was "torn anterior cruciate ligament (ACL) torn lateral meniscus, left knee."

The applicant's medical record also contains several entries about the right knee. On April 27, 1992, the applicant was diagnosed as having chondromalacia of the right knee

On January 24, 1992, the applicant had arthroscopic surgery again on the left knee to rule out an ACL tear. His preoperative diagnosis was listed as: "1) Grade I chondromalacia of the medial tibial plateau and medial femoral condyle and 2) Complete left ACL tear but functionally normal."

A medical board (MB) met on March 26, 1992 and diagnosed the applicant as having "bilateral chondromalacia patellae, recalcitrant to therapy, DNEPTE. . . ." It was the opinion of the MB that the applicant was unable to perform the duties of his rate and rating. The MB referred his case to the central physical evaluation board (CPEB) for final adjudication. The applicant did not disagree with the medical board.

On June 17, 1992, the CPEB met and found the applicant not fit to perform the duties of his rate, and recommended that he be placed on the TDRL with a 30% disability rating. The CPEB diagnosed the applicant as having "Knee-Other impairment of - Severe-Left". On June 29, 1992, after counseling by an attorney, the applicant accepted the findings of the CPEB. He was placed on the TDRL, effective August 17, 1992.

In November 1995, a letter was sent to the applicant advising him that a second periodic examination had been scheduled for him during the month of December 1995 at [REDACTED] Hospital. There is no indication in the record that the applicant received this letter or that he underwent the examination. Neither is there any evidence in the record that the applicant had a first periodic examination.

On August 26, 1997, the applicant was advised that his third and final periodic examination was scheduled for September 1997 at [REDACTED] Veteran Medical Center. On September 25, 1997, the applicant was examined at [REDACTED] Veteran Medical Center. The physician's impression of the applicant's condition was that of "chronic bilateral knee pain [consistent with] history of chondromalacia." The medical report also indicated that the applicant had no problem with flexion and extension and no swelling. The medical report stated that surgical intervention was not needed and that the applicant could follow-up as necessary.

After the medical examination, the applicant's case was referred to the CPEB for final determination. On September 30, 1997, the CPEB found the applicant to be unfit to perform the duties of his rate and recommended that he be separated with severance pay with a 10% disability rating based on a diagnosis of "left knee, other impairment of: slight." On October 12, 1997, after consulting with counsel on whether to accept or reject the findings of the CPEB, the applicant, by signature, accepted the findings of the CPEB. The Chief Counsel found that the CPEB proceedings were in acceptable form and technically correct, the findings were supported by the evidence of record, and the record supported the recommended disposition (discharge with severance pay).

On October 24, 1997, the Commandant approved the findings of the CPEB and directed that the applicant be removed from the TDRL and that he be separated with severance pay. On November 6, 1997, the applicant was notified by letter that he had been removed from the TDRL and discharged from the Coast Guard with severance pay, effective August 17, 1997.

#### Views of the Coast Guard

The Chief Counsel recommended that the Board deny relief in this case. He stated that "[the applicant] affirmatively waived his rights to further proceedings in the Physical Disability Evaluation System (PDES) including a Formal Physical Evaluation Board hearing." Therefore, his failure to exhaust his intra-service administrative remedies should be a bar to relief from the Board. The Chief Counsel quoted the following from Barnett v. International Business Machine Corp., 885 F. Supp. 581, 588 (S.D.N.Y. 1995): "[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."

The Chief Counsel noted that the applicant had legal counsel appointed to advise him with respect to the CPEB findings. The Chief Counsel stated there is a presumption that the legal counsel performed his assigned duty and that the applicant has not submitted any evidence that he was not counseled about his rights with respect to the CPEB findings and recommendation or the PDES process.



The Chief Counsel stated that "although the Coast Guard may have failed to provide Applicant with the periodic evaluation as required by statute and Coast Guard regulations, such error was harmless." Pursuant to 10 U.S.C. § 1210(a), the Coast Guard was required by law and its own regulations to examine the applicant at least once every 18 months during his five-year placement on the TDRL. In addition, the Coast Guard was required to examine the applicant not less than 12 months prior to the 5-year expiration of TDRL placement.

The Chief Counsel stated that it is unclear why the applicant received only one examination while on the TDRL. He noted, however, that the applicant moved at least once during his tenure on the TDRL. The Chief Counsel stated that although the applicant alleges that he kept in telephone contact with the Coast Guard, he offered no proof of his claim. The Chief Counsel further stated that the applicant offered no evidence that the Coast Guard was to blame for the alleged errors in scheduling. He stated that it is at least plausible that the Coast Guard made the "reasonable efforts" required by regulation to locate him and schedule him for his periodic and final examinations in accordance with the regulation.

The Chief Counsel stated that the applicant's contention that his condition worsened while on the TDRL is speculative. He stated that the applicant presented no evidence that he was suffering from grade III chondromalacia during the five years he spent on the TDRL. The Chief Counsel stated that the evidence offered by the applicant that he suffers from grade III chondromalacia comes from a medical report dated July 19, 1999, almost two years after he was discharged from the Coast Guard.

The applicant offered no proof beyond his allegation that his physical evaluation was inadequate or that his evaluator was unqualified. The Chief Counsel stated that to the contrary, the evidence supports the conclusion that the applicant received a thorough evaluation at the [REDACTED] Veterans Medical Center. The Chief Counsel stated that the physician who examined the applicant is presumed to have carried out his duty in a lawful and correct manner and that the applicant has offered nothing to rebut this presumption.

The Chief Counsel's stated that the applicant's allegations that the Coast Guard failed to rate an injury to his shoulder or a migraine condition are wholly without merit. The Chief Counsel stated that the applicant did not provide any evidence of these conditions rendered him unfit for duty. He noted that the DVA denied applicant's claim for a service connected disability for right shoulder bursitis and migraine headaches.

#### **Applicant's Response to the Views of the Coast Guard**

On April 17, 2000, the Board received the applicant's response to the views of the Coast Guard. He stated that the Coast Guard admitted that he did not receive the periodic examinations, as required by law.

The applicant contended that the physician who performed his only TDRL periodic examination did not know why he was there "and [the doctor] was not qualified to make the determination requested by the Coast Guard." The applicant

stated that the examination took place in a surgical consult clinic and that the narrative is written as such.

The applicant stated that he never waived his rights to further disability evaluation proceedings. He stated if he had been presented with the option to disagree with the CPEB findings, he would have done so. The applicant asked to be given copies of the documents showing that he waived his rights to further physical disability evaluation proceedings.

### APPLICABLE LAW AND REGULATIONS

Section 1210 of title 10 of the United States Codes stated the following:

(a) A physical examination shall be given at least once every 18 months to each member of the armed forces whose name is on the temporary disability retired list to determine whether there has been a change in the disability for which he was temporarily retired. He may be required to submit to those examinations while his name is carried on that list. . . .

(b) The Secretary concerned shall make a final determination of the case of each member whose name is on the temporary disability retired list upon the expiration of five years after the date when the member's name was placed on that list. If, at the time of that determination, the physical disability for which the member was carried on the temporary disability retired list still exists, it shall be considered to be of a permanent nature.

Chapter 8-A-2. of COMDTINST M1850.2B states that "placement on the TDRL does not guarantee the member permanent disability retirement. Therefore, members whose disabilities have not stabilized to a degree where permanent disposition is warranted will be placed on the TDRL, provided they otherwise are qualified for physical disability retirement."

Chapter 8-A-3. of COMDTINDT M1850.2B states that "after a member has completed a periodic physical evaluation required by section 8-C. [the CPEB] may also recommend removal from the TDRL by recommending separation with severance pay, permanent retirement or a finding of "Fit for Duty."

Chapter 8-A-5. of COMDTINST M1850.2B states that "[m]embers who have been on the TDRL for five years or who have undergone their final periodic physical examination prior to the expiration of the TDRL period may not be continued on the TDRL and must be considered for permanent disposition and all remaining disabilities will be rated permanent."

Chapter 8-C-3. of COMDTINST M 1850.2B states, in pertinent part, as follows:

[I]t is imperative that the member be examined and evaluated in accordance with the VA physician's Guide for Disability Evaluation

Examinations for each and every disability or impairment existing at the time of temporary retirement. The examination shall also include an evaluation of any impairments which have been incurred or become manifest since temporary retirement, even though the latter may not entitle the evaluatee to additional benefits.

Chapter 8-C-4. of COMDTINST M1850.2B states the following with respect to the report of periodic physical examination:

The report of periodic physical examination shall be legibly prepared in letter or narrative summary form. It should contain an accurate report of all clinical evaluations and laboratory studies. In particular, every physical impairment and the extent of the impairment should be clearly stated. The physical examination need not contain a review of all previous examinations, since these are already a matter of record. However, pertinent previous evaluations maybe referenced and attention invited to them. . . .

### 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 over this matter pursuant to section 1552 of title 10, United States Code. The application is timely.
2. The applicant has not submitted sufficient evidence to show that the medical evaluation that he received on September 25, 1997 was improperly performed or that the diagnosis was in error or unjust. The Coast Guard conceded, as the applicant alleged, that the applicant did not receive the periodic examinations, at 18 month intervals, as required by law and regulation. However, the applicant has not demonstrated how this failure injured him. If his condition had worsened over the course of the 5-year period that he remained on the TDRL, the worsening of his condition would have been observed in the final periodic examination, which was performed on September 25, 1997.
3. As stated above, the applicant has not presented any evidence contemporaneous with the September 25, 1997 examination which calls into question the integrity of the examining physician's findings. The applicant submitted a report from the DVA dated March 25, 1999. The DVA report stated that the applicant was seen at a local hospital on June 5, 1998, "after having sustained an injury to the left knee at work." This report indicates that the applicant aggravated his knee, after his discharge from the Coast Guard, while working. The evidence that the applicant underwent surgery on his left knee on July 19, 1999, is not persuasive evidence that the findings of the final periodic examination were in error or unjust. The evidence shows that this surgery occurred after the applicant either aggravated or re-injured the left knee after his discharge from the Coast Guard.

4. The applicant complained that the examining physician was an intern who did not know what he was supposed to do. However, the applicant has not presented any evidence to support his contention. Moreover, the statute and the regulation require only that the examining physician be a medical officer.

5. The applicant alleged that the CPEB failed to take into consideration the injury to his right knee, the injury to his right shoulder (1989) that has developed degenerative arthritis, and the migraine headaches, which were diagnosed in 1990. The applicant's medical record does show that he complained about his right knee while on active duty, and that he complained at least once about his shoulder. The Board can only conclude that since these conditions were not a part of the disability evaluation process, they did not cause the applicant to be unfit to perform the duties of his rate. Other than his statement that these conditions should have been considered by the CPEB, the applicant has not presented any evidence that these conditions caused him to be unfit to perform the duties of his rate.

6. According to Chapter 8-C-3 of COMDTINST, there was no requirement that the physician performing the applicant's final periodic examination evaluate the applicant for a disability to his right knee, to his right shoulder, or for migraine headaches. This provision states in pertinent part: "[I]t is imperative that the member be examined and evaluated . . . for each and every disability or impairment existing at the time of temporary retirement. The examination shall also include any impairments which have become incurred or become manifest since temporary retirement, even though the latter may not entitle the evaluatee to additional benefits." The right knee condition, shoulder injury, and migraine headaches existed prior to the applicant's placement on the TDRL, and apparently were not judged to render the applicant unfit, since they were not rated prior to the applicant's temporary retirement. Other than the conditions already mentioned, the applicant has not shown that he had other impairments that were incurred or became manifest after his temporary retirement.

8. Moreover, the applicant waived his right to a formal hearing before a physical evaluation board. He also agreed with the findings and recommendation of the CPEB that he should be discharged from the Coast Guard with severance pay based on a disability rating of 10% to the left knee. The record shows that he received counseling from an attorney before consenting to the CPEB findings and recommendations. The applicant requested a copy of the document that shows he consented to the CPEB findings and recommendation. If the applicant still desires copy of this document he should submit a request for it to the Coast Guard.

9. Although ratings by the DVA are not determinative of issues involved in military disability retirement cases, the Board notes in this case that the DVA's ratings of the applicant's service-connected injuries are not significantly different from those of the Coast Guard. Effective October 1, 1998, the DVA increased the applicant's disability rating for the left knee to 20% and continued the disability for the right knee at 10%. The DVA denied service connection for the right shoulder and for migraine headaches.

10. Accordingly, the Board finds that the applicant's request for relief should be denied.



ORDER

The application of  
of his military record is denied.

, USCG, for correction

