

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-140

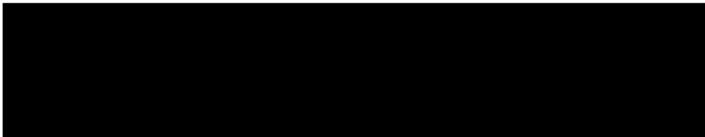
**DECISION OF THE GENERAL COUNSEL,
DELEGATE OF THE SECRETARY**

_____ I approve the recommended Order of the Board.

_____ I disapprove the recommended Order of the Board.

 x I concur in the relief recommended by the Board.

Date: August 28, 2003


General Counsel

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-140

[REDACTED]
[REDACTED]

RECOMMENDED FINAL DECISION

[REDACTED] **Deputy Chair:**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on July 23, 2002, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated August 21, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he was retired from the Coast Guard on October 18, 200x, because of his physical disabilities, instead of being discharged with severance pay. He alleged that the Coast Guard's Formal Physical Evaluation Board (FPEB) erroneously rated him as 20 percent disabled and did not provide any written explanation for the decision. He alleged that his medical records and the fact that the Department of Veterans' Affairs (DVA) has rated him as 90 percent disabled prove that the FPEB erred in evaluating his disability. As a less preferred alternative, the applicant asked to be reevaluated by a Central Physical Evaluation Board (CPEB).

SUMMARY OF THE RECORD

On May 7, 199x, the applicant enlisted in the Coast Guard. His pre-enlistment physical examination showed that he was in good health. Upon completing boot camp,

he was assigned to a cutter. He soon began experiencing increasing pain in his right heel. The health service specialist told him it was probably a bruise and prescribed Motrin. Over the next year and one-half, the applicant repeatedly sought treatment for this pain and was told to take increasing dosages of Motrin.¹ He was also told not to run, which was too painful for him anyway, and he started to gain weight.

In August 199x, the applicant complained of chronic diarrhea and was diagnosed with irritable bowel syndrome (IBS). He was referred to nutritional counseling.

On January 1, 199x, an x-ray revealed that the applicant's pain was caused by a large spur on his right heel. Surgery was recommended. On January 5, 199x, the applicant complained of having blood in his stools. The doctor indicated that the blood could be related to his long-term use of Motrin for his heel pain. On March 2, 199x, the heel spur was removed, and the applicant was restricted to light duty for two months.

On May 4, 199x, upon returning to full duty, the applicant suffered a painful spasm in his back while lifting a buffer over a door frame. He was ordered to rest for three days and to begin physical therapy. He was prescribed Aleve and a muscle relaxant. On May 19, 199x, he was reevaluated and found to be fit for duty.

In June, July, August, and September 199x, the applicant sought treatment for increasing lower back pain, for pain radiating down the front of his right leg, and for numbness and tingling in his right foot. His Coast Guard doctors diagnosed it as "lumbosacral strain" and possible nerve impingement. They variously prescribed Naprosyn, Aleve, Vicodin, Extra Strength Tylenol, and Daypro for him,² referred him to physical therapy, and limited him to "light duty."

On October 16, 199x, the applicant underwent an MRI, which revealed "[c]hronic degenerative disc disease, lower lumbar spine with transitional L5." In addition, the MRI showed at the L5 level that "the disc space is narrowed with loss of signal on T2 with a very large degenerative extradural disc protruding eccentrically to the right." On November 10, 199x, an orthopedist diagnosed him with intervertebral disc displacement without myelopathy and with sciatica. The orthopedist stated that he would need a "six month limited duty course to include activity modification, physical therapy, NSAIDS, and possible L5-S1 diskectomy and fusion" and that he should not sit for more than 5 minutes at a time, lift more than 5 pounds, run, or bend at the waist.

On December 14, 199x, the applicant was admitted to a hospital for three days complaining of chronic diarrhea, bloody stools, rectal hemorrhaging, cramping, and faintness. He had passed out from loss of blood while using the bathroom. The doctors

¹ Motrin is a non-steroidal anti-inflammatory drug (NSAID).

² Naprosyn, Aleve, and Daypro are also NSAIDs. Vicodin is a narcotic combined with acetaminophen, the active ingredient in Tylenol.

concluded that it was a flare-up of his IBS caused by his long-term use of NSAIDS. On January 6, 199x, the applicant underwent a sigmoidoscopy, which revealed an arterial/venal malformation of the rectum, and an endoscopy, which showed that he had a "sliding hiatus hernia." He was prescribed stool softeners and a high-fiber diet.

On February 10, 199x, the applicant underwent a discogram (CT scan), which revealed "transitional lumbosacral anatomy with sacralization of L5. The left transverse process of L5 asymmetrically articulates At L4-5, there is a broad-based posterior disk bulge. The patient's disk is significantly degenerated. ... The patient experiences 5/5 pain that was concordant with his contemporary lumbar back pain. ... At L5-S1, the patient has transitional anatomy. There is narrowing of the left neural foramen."

On March 11, 199x, the applicant underwent a physical examination pursuant to his evaluation for fitness for further military duty by an Initial Medical Board (IMB) in accordance with the Coast Guard's Physical Disability Evaluation System (PDES). Dr. X found that he was not fit for duty because of his lower back pain and bilateral leg weakness.

On March 26, 199x, the applicant underwent surgery on his spine for L4 spondylosis. A disc was removed (laminectomy) and his L4 and L5 vertebra were fused with metal cages. He left the hospital on March 29, 199x, for a month of convalescent leave.

On April 22, 199x, Dr. X discussed the PDES with the applicant, who told him that he had not had rectal bleeding since January 199x, that he still had pain in his right heel, and that, since his back surgery, he had suffered from back spasms and a lack of sensation in his left leg.

On May 14, 199x, the IMB issued a report outlining the applicant's conditions. It found that he had a weak and painful lower back, residual heel pain, and the rectal malformation, which was stable. It reported that because he had not yet begun postoperative physical therapy, "his ultimate level of function has not yet been determined" but that, "[b]ased on his past medical and recent surgical history, the prognosis for [him] to return to full and unlimited military service in the Coast Guard is very poor." The IMB recommended that he be referred to a Central Physical Evaluation Board (CPEB). On May 24, 199x, the applicant acknowledged the findings and recommendations of the IMB and indicated that he did not want to submit a statement in rebuttal.

On June 22, 199x, the applicant's commanding officer (CO) forwarded the IMB report to the Coast Guard Personnel Command (CGPC), concurring in the findings and recommendations. He stated that in his limited duty status, the applicant had been assigned to administrative duties such as communications watchstanding (e.g., answering phones), to avoid aggravating his condition. He stated that the applicant had "been able to perform all the limited duties we have given him. His performance and ability

to maintain a positive outlook during his medical treatment and rehabilitation has been outstanding considering his medical restrictions and limited duty status."

On July 6, 199x, the applicant underwent another physical examination pursuant to his evaluation by the IMB. He reported that he had lower back pain and numbness in his leg, that he was not sleeping well because of the pain, and that he felt tired and depressed. The doctor found that he had "good strength" but lower back pain upon raising his left leg left 30 degrees or his right leg 45 degrees and upon leaning forward from the waist 30 degrees. In addition, he found a moderately decreased range of motion in the applicant's lower back. The doctor also noted that the applicant complained of bloody stools

The CPEB determined that the applicant's condition was "not sufficiently resolved to make a final and fair finding/recommendation." On July 29, 199x, CGPC ordered the command to convene a Disposition Medical Board (DMB) to evaluate the applicant after "consultation from neurosurgery, gastroenterology, and podiatry."

On August 4, 199x, the applicant reported to Dr. X that he was feeling extremely depressed. He stated that his wife had left him, that his back pain was worse, and that he was getting very bad leg cramps. He reported having had a vague suicidal ideation. Dr. X referred him for a psychiatric evaluation and the consultations required by CGPC.

On September 1, 199x, a psychologist examined the applicant and diagnosed him with an "adjustment disorder with disturbance of mood and conduct." He stated that in addition to the effect of the physical pain, the applicant was "having difficulty adjusting to the lifestyle changes associated with his injury."

On September 9, 199x, the DMB reported that the applicant "continue[s] to complain of severe intermittent back spasms with right buttock which was unchanged from preop. He also complained of left anterior thigh numbness. He did state that his right lower extremity pain was markedly improved." The examination and tests had revealed "a moderate amount of paraspinal spasm" and "decreased sensation in the left anterior thigh." The DMB diagnosed the applicant with lumbar spondylosis, chronic pain, lateral femoral cutaneous nerve neuropathy, and post-laminectomy syndrome. It stated that overall, he was in better condition than before his surgery but that it was unlikely that he would ever be fit for full duty.

On September 20, 199x, the applicant sought treatment for his depression. The psychologist diagnosed a "major depressive disorder, single episode, moderate" and referred him for psychiatric evaluation. He was prescribed Celexa, an anti-depressant.

On September 30, 199x, the DMB forwarded its addendum to the applicant's command. It indicated that his diagnosed conditions included (1) chronic lower back

pain due to the laminectomy and fusion, (2) residual heel pain, (3) arterial/venal malformation of the rectum, and (4) an adjustment disorder. The applicant signed an acknowledgment of the findings, indicating that he did not desire to submit a statement in rebuttal. His commanding officer (CO) forwarded the DMB's findings to CGPC. The CO stated that the applicant was able to answer the phone and do some desk work, but he could not lift, stand, move rapidly, or perform other active functions required of members. The CO also stated that he had not noticed any signs of depression and that the applicant had maintained a positive outlook while on duty.

On October 28, 199x, the CPEB reviewed the applicant's case and recommended that he receive a 20-percent disability rating for his chronic lower back pain, which it analogized to VASRD codes 5299 and 5293.³ The CPEB recommended that he be separated with severance pay.⁴ On November 12, 199x, the applicant was informed of the CPEB's findings and recommendation. On November 15, 199x, after consulting with the Chief of the PDES Division in the Office of the Chief Counsel (LMJ), he rejected the CPEB's findings and recommendation and requested a hearing before the FPEB.

Formal Physical Evaluation Board (FPEB)

On Monday, November 22, 199x, the applicant was sent notification to report to Coast Guard Headquarters no later than 8:00 a.m. on Monday, November 29, 199x, in order to appear before the FPEB on November 30, 199x. The notification stated that Coast Guard counsel had already been appointed to represent him before the FPEB and that "[l]ack of preparation on the part of your counsel or representative will not cause the board to be delayed." The notification contained a "Statement of Rights of Evaluatee," for the applicant to sign and return by mail or fax.

On Friday, November 26, 199x, the applicant signed the "Statement of Rights of Evaluatee," which informed him that he had a right to be present in person at the FPEB, to "challenge for cause," to present evidence, to be represented by counsel, to cross-examine witnesses, to receive a copy of the proceedings and findings, and to file a rebuttal to the recommended findings. Moreover, the statement said, "You will be granted not less than three days, excluding Sundays and holidays, prior to the date of a formal hearing in which to prepare your case. You may waive any portion of this three day period if you elect." The applicant signed the statement indicating that he needed the three-day delay to prepare his case.

On Monday, November 29, 199x, a lieutenant commander was appointed to serve as the applicant's counsel before the FPEB. He was informed by the Chief of the

³ VASRD code 5299 does not appear in the Code of Federal Regulations but it apparently is used for chronic pain syndrome. See Summary of Applicable Law, below, for the meanings of the VASRD codes.

⁴ Under 10 U.S.C. § 1201, only disabilities ratings of 30 percent or higher entitle a member to a medical retirement. Ratings of 10 or 20 percent entitle a member to severance pay. 10 U.S.C. § 1203.

PDES Division in the Office of the Chief Counsel that the applicant was seeking a 40-percent disability rating under VASRD code 5293.

Although the applicant had requested three days to prepare his case, the FPEB convened on November 30, 199x. The applicant presented written statements from his mother and his supervisor. His mother stated that his long-term goal had been to enter law enforcement and that, to that end, he had become a volunteer firefighter, learned how to scuba dive, and become certified in the use of pepper spray, in cardiopulmonary resuscitation, and as a lifeguard. She stated that he had played baseball, soccer, and football in high school and had enlisted in great physical condition.

The applicant's supervisor wrote that the applicant was unable to sit or stand for long periods but had qualified in record time as a communications watchstander. He stated that the applicant's "positive attitude and demeanor [have] remained intact but [have] lessened somewhat since the surgery." He stated that the applicant's career goals were now unattainable; that his condition had precluded his advancement from seaman to petty officer; that he had modified his home furnishings to accommodate his disability; and that he could not perform any physical activity. The supervisor stated that the CPEB's recommendation "seemed out of line considering the impact this service-related injury has had on [and] will continue to have on [his] life." He asked for the applicant to be treated fairly.

The FPEB hearing lasted more than one hour. The applicant was the only witness. In response to questions from his counsel and the three board members, the applicant discussed in detail his medical history, his pre-enlistment physical condition, his former career goals, his current physical limitations, and his daily physical therapy and pain treatment. He stated that he had pain in his lower back and buttocks every day and continuous tingling in his thigh. He stated that he sometimes had back spasms several days in a row and sometimes the spasms would go all the way to his neck, but that sometimes three or four days would pass without a spasm. He stated that he had been prescribed a TENS unit⁵ to relieve his pain. He described the precautions he had to take to avoid pain during everyday activities, such as getting out of bed, dressing, rising from the toilet, and climbing stairs. He also described various modifications he had made to his household furnishings to accommodate his disability. The applicant stated that the only exercise he could tolerate was one mile of walking per day and aquatherapy. He was not allowed to swim, could not mow his lawn or vacuum, and had great difficulty sleeping. He could not sit or stand still for very long without pain. His doctor had told him that he would need more surgery in a few years. During this discussion, the applicant mentioned that he had had a heel spur removed, but he did not state that his heel was then painful.

⁵ A TENS unit is a transcutaneous electro-nerve stimulator often used to relieve back pain.

The applicant was asked at the FPEB about his bowel problems and depression. He stated that he had blood in his stools every day because he had been prescribed high doses of NSAIDs for two years before he was ever told to take a stool softener at the same time. Therefore, he had "blown a vein" in his rectum. He stated that because the condition was under control, he was not seeking a disability rating for it.

Regarding his depression, the applicant told the FPEB that he had been depressed for months because of the radical limitation on his activities and enjoyment of work and life. He stated that, although he still went to work every day, no one really cared whether he showed up and he had "no reason to get up in the morning." Because of his poor attitude, he had been removed from phone duty at work for a while. He had lost his wife and several friends because he was such "a miserable person." He stated that the Celexa had alleviated some of his depression. At the end of the hearing, the applicant's counsel asked the FPEB to assign him a disability rating for his depression as well.

The FPEB found the applicant 20 percent disabled by his lower back pain, which it analogized to "intervertebral disc syndrome: moderate; recurring attacks," under VASRD code 5293. It did not assign him a rating for depression, provided no explanation of its findings, and recommended that he be separated with severance pay. The applicant signed a statement indicating that he intended to rebut the FPEB's findings.

On December 14, 199x, after receiving the FPEB's report, the applicant requested a 60-day extension of the 15-day period for rebutting the findings. He stated that prior to the hearing, he had not been given adequate guidance. He stated that he had tried several times to contact counsel before the hearing, but none was appointed until the day before the FPEB. Before meeting his counsel, he had not known that he could or should present medical opinions to the FPEB. Had he been able to consult counsel earlier, he would have gathered "the additional information needed for the FPEB's complete evaluation of [his] case."

On December 15, 199x, the applicant's CO forwarded his request to CGPC asking them to approve it. The CO stated that before the applicant left the station to go to Washington, no one had advised him of the importance of presenting medical opinions to the FPEB. The applicant's request for an extension was granted.

On January 27, 200x, the applicant reported to Dr. X that he had intestinal bleeding again and was still having back spasms.

Applicant's Rebuttal to the FPEB

On February 10, 200x, the applicant sent his rebuttal to the FPEB. He stated that his medical record and the new medical reports he was submitting proved that he

should be medically retired with at least a 40-percent disability rating. He stated that his condition made such basic daily activities as dishwashing, laundry, mopping, putting underwear on, getting in and out of his car, and watching a movie impossible without immense pain. He stated that he had to lie down to put on his socks and shoes, that he constantly experienced pain or tingling in his lower extremities, and that his depression continued unabated. Moreover, Dr. Y, his neurosurgeon, had said that he would need more surgery because of his epidural fibrosis; the bulging L5-S1 disc; and the misplacement of the metal cages. The rebuttal included the following new reports:

1. Dr. Y, a neurosurgeon at the [REDACTED], noted that there might have been cerebrospinal fluid leakage during the applicant's 10-hour surgery and that his "symptoms suggest meralgia paresthetica related to the length of the operation and the numbness in that lateral femoral cutaneous nerve distribution has not improved." He noted that the applicant was significantly stiff and concluded that he had three persistent, prominent problems: a severely limited range of motion in his back due to musculoskeletal pain; intermittent shooting pains in his legs; and right leg pain, "which suggest the possibility of persistent nerve root compression but is indicative of radicular dysfunction." He noted that the metal cages were positioned more posteriorly than usual and concluded that the applicant fit the 5295 VASRD code for lumbosacral strain "given the severe limited range of motion of his back and the musculoskeletal symptoms."

2. Dr. Z, a spine physiatrist at [REDACTED], stated that the applicant reported having almost constant pain, which became severe when he tried to do chores, get in or out of bed, or dress himself. Upon examination, Dr. Z reported, the applicant stood "slightly flexed forward at the waist in a very guarded manner." Dr. Z found a "minimal range of motion in the lumbar spine" as the applicant could not bend sideways or, bending forward, touch lower than his thighs. He noted that this limitation was "severe." Dr. Z noted several ways in which the applicant's legs, knees, and hips either could not move without pain or were notably weak. He noted that the applicant was very stiff but did not show any "facial grimacing or exaggeration of pain or pain behavior." Dr. Z concluded that he "quite clearly has a severe pathology contained within the lower lumbar spine" but that his condition might improve somewhat "with a proper rehabilitation exercise program." Dr. Z stated that the applicant's condition does not exactly match any of the VASRD codes: "He has [a] much more serious condition than intervertebral disc syndrome ... [or] lumbosacral strain."

3. On January 25, 200x, the applicant underwent another MRI, whose results he submitted with his rebuttal to the FPEB. The MRI showed "a considerable amount of enhancing [scar] tissue partially encircling the L5 nerve roots consistent with considerable post-surgical fibrosis. There is a small posterior disc bulge but there is no evidence of recurrent disc herniation. There is some signal misregistration associated with the Ray threaded infusion cages. There are degenerative changes identified involving

the endplate of L4 and the superior endplate of L5." The MRI also revealed a "slight posterior disc bulge" at the L5-S1 level and "partial sacralization of the L5."

4. On January 30, 200x, the applicant's primary Coast Guard doctor, Dr. X, wrote an addendum to the DMB report in which he stated that the applicant "has persistent/daily moderate to severe low back pain" and that Dr. Z, "a specialist in the field of back injury," concluded that the applicant "has a much more significant condition than previously assigned." Dr. X stated that the "considerable post-surgical epidural fibrosis encircling the L5 nerve roots" was of particular concern. Dr. X stated that none of the doctors who had treated the applicant ever inferred that his symptoms were exaggerated or feigned. He stated that a Waddell's test had shown that the applicant was neither exaggerating nor feigning his pain.

5. The applicant also submitted a scholarly article on the causal relationship between lumbar epidural fibrosis and patients' recurrent radicular pain following surgery on herniated lumbar intervertebral discs. The study of 197 post-surgical patients showed that "the probability of recurrent pain increases when scar score increases."

On February 11, 200x, the applicant's CO forwarded his rebuttal by mail to the FPEB, stating that he and others at the command had "observed limitations of his flexibility, movement and agility that are consistent with representations made by [the applicant about his pain] since the start of the physical evaluation process."

On March 3, 200x, a one-person Physical Review Council (PRC) concurred with the findings and recommended disposition of the FPEB on November 30, 199x. On March 10, 200x, the Chief Counsel approved the proceedings as "in accepted form" and "technically correct." On March 13, 200x, the Commander of CGPC approved the applicant's discharge with a 20-percent disability rating and severance pay. On March 17, 200x, CGPC ordered that the applicant be discharged on April 14, 200x.

On March 20, 200x, the applicant's XO sent Dr. X an email asking whether all of his conditions were properly documented and whether the new medical evidence did not warrant consideration of ratings under additional VASRD codes.

On March 23, 200x, CGPC sent a message to the applicant's command, stating that his rebuttal had been considered by the FPEB on March 9, 200x, but the FPEB found that it did not support a change to its prior findings and recommendation. It stated that "this message constitutes the notice, referenced in paragraph 5.D.2.c. of [the PDES Manual], that the FPEB considered the rebuttal." CGPC stated that although the applicant had requested that the FPEB make specific findings, the FPEB was not required to make findings apart from those specified in the PDES Manual and that no such explanation would be forthcoming. However, the case would again be reviewed by the PRC.

On March 24, 200x, Dr. X informed the applicant's command that, upon the order of CPGC, he could not help the applicant evaluate whether additional VASRD codes should apply in light of the new medical evidence in the applicant's rebuttal.

On March 28, 200x, the applicant complained of having a migraine headache that would not stop. The doctor prescribed Fioricet for his headaches. In addition, an EKG revealed that the applicant had a "prominent" heart but no evidence of active disease.

At a psychiatric evaluation on March 29, 200x, the applicant complained of feeling depressed and irritable and having low energy, crying spells, low motivation, and poor sleep. The psychiatrist noted that he was being treated for depression with Celexa, which he decided to "augment" with Pamelar, another anti-depressant.

On March 29, 200x, the applicant's XO wrote a memorandum to the CO about the applicant's situation. He pointed out that the applicant's counsel was appointed and first saw his medical record on the day before the FPEB. On that day, the counsel told the applicant that he should try to obtain statements in support of his allegations. In the short time available, the applicant was only able to get statements from his supervisor and his mother. The counsel failed to request a delay in the proceedings, as permitted under Article 5.B.2.b. of the PDES Manual. The XO further stated that both Dr. X and the applicant's counsel had refused to help the applicant further.

On March 30, 200x, the applicant asked to be retained on active duty pending a "full and fair hearing" in accordance with 10 U.S.C. § 1214. On the same day, his CO forwarded the request to CGPC, recommending approval.

Applicant's Appeal to the Physical Review Council (PRC)

On March 31, 200x, the applicant sent a letter to the PRC, stating that he had been rated under only one of the disabilities that made him unfit for duty, some of which were diagnosed after the FPEB met, and that his records proved that his condition was severe, meriting a higher disability rating. He also stated that he was never granted a full and fair hearing.

The applicant also told the PRC that the FPEB had never seen some of the new information in his rebuttal since it was received by CPGC on February 17, 200x, but according to a letter CGPC sent to a congressman,⁶ the FPEB considered only a partial rebuttal package erroneously submitted by his Coast Guard counsel on February 9, 200x. He stated that he had given a draft rebuttal to his counsel and specifically told him not to give the incomplete package to the FPEB. He stated that the draft rebuttal

⁶ In response to an inquiry about the applicant's case from a congressman's office, CGPC stated that "[o]n February 9, 200x, [the applicant] submitted new medical information. The FPEB considered the new information, but did not change their recommended findings."

his counsel allegedly gave to the FPEB did not include his diagnoses of severe epidural fibrosis, disc bulge at L5-S1, and new degenerative changes at L4-L5 and L5-S1 or his command's endorsement.

The applicant stated that at the FPEB hearing on November 30, 200x, his Coast Guard counsel had advised him that he had to pick just one code, rather than ask the FPEB to consider several that applied, because disability ratings are not added. His counsel failed to tell him that ratings may be. The applicant alleged that his counsel had also wrongly advised him to withhold information about his depression from the FPEB because it "would be looked down on by the board and I would be negatively stereotyped."

The applicant stated that his counsel also told him that information about how his disabilities would affect his future employment was irrelevant to the FPEB. He presented evidence showing that, before enlisting, he had worked as a police cadet for 6 years, a volunteer fireman for 8 years, and a lifeguard for 3 years, and had received an Associate's degree in criminal justice. He pointed out that his disabilities had already severely affected his employment since he had not been allowed to advance beyond seaman because of his disabilities.

The applicant stated that his counsel had said that, because most people with spinal fusions get better, the FPEB always awarded just a 20-percent disability rating in such cases. He repeated his request for a full and fair hearing. He also asked that new people be assigned to decide his case since "[n]o one likes to overturn their own findings and admit they were wrong." The applicant asked the PRC to rate him under a variety of VASRD codes.

The applicant's CO forwarded his appeal to the PRC with a letter noting that he concurred in the applicant's request to retain him on active duty pending further PDES processing and recommending that a PRC with new members be asked to provide a fresh review of the FPEB's findings and recommendation and that the new review not be constrained by the narrow "clearly erroneous" standard.

On April 4, 200x, the Chief of the Office of General Law (LMJ) sent a memorandum to the PRC asking it to review the applicant's appeal. He pointed out that Department of Defense Directive 1332.39, "Application of the Veterans Administration Schedule for Rating Disabilities," provided that VASRD codes 5292 and 8500 (series) should be applied in lieu of 5293 when a disc has been removed by surgery. He also pointed out that "if a condition is not presently stable and may be susceptible to change, assignment to the temporary disability retirement list [TDRL] may be a consideration."

Also on April 4, 200x, the Chief of LMJ sent the applicant's command an email stating that the applicant had no right to counsel in preparing his rebuttal. He further

stated that the command's endorsement to the IMB report "is the only balance at this most important [CPEB] stage ... [because it places] the medical evaluation and member's input into the context of the member's ability to perform military duties. ... For example, if a member's condition and ultimate status and rating revolves around a condition being mild, moderate, or severe, the command statement about what duties the member can, or can not, perform, addressing specific limitations ... may be key to determining if the member does not have a ratable disability, has a ratable disability compensated by severance pay, or has a ratable disability which will result in temporary or permanent retirement." The Chief of LMJ further stated that he could not explain any disability rating decision "but at best may only speculate about a particular CPEB, FPEB, or PRC decision as no rationale is ever published."

On April 5, 200x, CGPC informed LMJ that, although the applicant's case had already been considered by a CPEB, FPEB, and PRC, due to a technical error, CGPC had decided to convene a second PRC to review the case "even though not legally required to do so." CGPC stated that entirely different officers were assigned to serve on each of the boards, yet the boards' findings were consistent.

On April 7, 200x, the Chief of LMJ, which oversees the attorneys who represent members before the FPEB, sent an email to the applicant's XO and CO alleging that the applicant's case had been handled "professionally and thoroughly." However, he stated, based upon the applicant's dissatisfaction, he had decided to reverse a three-year policy of not responding to telephone calls from members' commands asking for help since a command's observations regarding the member's fitness for duty are so important. He also stated that at the time of the FPEB, only the applicant's back condition made him unfit for duty and so only the back condition was rated as a disability. He stated that the applicant's depression did not make him fit for duty because at the time of the FPEB, it had not been treated for at least six months without improvement. He also pointed out that the applicant's fibrosis was not known until after the FPEB.

On April 10, 200x, the applicant's discharge was delayed pending further review of his case by the PRC. In addition, CGPC responded to his letter of March 30, 200x, and stated that the FPEB held on November 30, 199x, had constituted the applicant's full and fair hearing.

On April 12, 200x, Dr. X reported that the psychiatric evaluation had revealed that the applicant had "major depression," that his anti-depressant dosage had been increased, and that he was receiving twice weekly counseling. In light of tests showing that the applicant had an enlarged heart and "moderate diastolic hypertension," Dr. X had the applicant undergo an echocardiogram.

On April 13, 200x, the applicant's XO requested another physical examination of the applicant to determine whether there had been any significant changes in his condi-

tion. Dr. X reported that he was very concerned about the applicant's mental and physical health. He stated that the applicant had an "antalgic gait" (modified to prevent pain) and had reported that his pain was now as bad as it had been before his surgery. He also continued to complain of severe headaches.

Also on April 13, 200x, LMJ sent an email to the applicant's CO, stating that, under Chapter 2.C.2.a., only the degree of the member's unfitness to perform the duties of his office, grade, rank, or rating is considered in the determination of his disability rating. He further stated that whether the effect of a disability on a member's fitness is mild, moderate, or severe is a judgment call "made in the context of a member's actual limitation to perform [Coast Guard] functions and not solely as a function of a physician's diagnosis."

On April 14, 200x, the DMB issued an addendum to its report to address the applicant's mental health. It stated that, initially, the applicant was initially diagnosed with an adjustment disorder because "the duration of this depressive symptoms did not exceed what was thought to be a reasonable time frame given his life circumstances." However, he had "continue[d] to experience a severe amount of depressive symptoms that include irritability, anergia, anhedonia, social isolation, fluctuating appetite, initial insomnia, crying spells, dysphoric mood and poor concentration." The DMB concurred with the psychiatrist that the applicant had a "major depressive disorder, single episode, moderate" and stated that the condition rendered him unfit for duty.

On April 17, 200x, the applicant sought treatment for right heel pain that had returned since the removal of the heel spur. His orthopedist noted that he had another heel spur on his right heel, which had produced chronic plantar fasciitis. The orthopedist also noted that a spur was forming on the left heel. On April 18, 200x, a podiatrist found that the applicant had bilateral heel spurs but recommended against surgery until the pain was so bad he could not walk. Dr. X found that the pain from the spurs and plantar fasciitis was sufficiently severe to make him not fit for duty.

On April 18, 200x, the applicant was evaluated by a cardiologist, who reported that he had an enlarged heart, a history of hypertension, and left ventricular hypertrophy, which is rare for a young adult. The cardiologist recommended that the applicant's blood pressure be controlled "much more aggressively."

On April 24, 200x, the applicant's command informed CGPC that there was new information about the applicant's heart condition, that Dr. X would prepare an addendum to the DMB report, and that the command would forward another endorsement. CGPC postponed the review of the applicant's case by a second one-person PRC pending receipt of the report from Dr. X. CGPC stated that, based on all the new medical information, the second PRC could concur in the FPEB's findings or, if the PRC found the new information significant, refer the case back to the FPEB.

On May 1, 200x, the DMB issued another addendum to address the cardiologist's diagnosis, the depression, the plantar fasciitis, and the headaches. It stated that, since the FPEB had not had that information before it, the PRC should remand the applicant's case to the FPEB for reconsideration. Moreover, the DMB pointed out, two other diagnoses were not included in its original report: (1) lumbar degenerative disease at L4-S1, posterior disc bulge at L5-S1, lumbar spondylosis and (2) lateral femoral cutaneous nerve neuropathy. The DMB reported that the applicant's physical condition "severely limits his ability to perform basic functions required of all Coast Guard personnel" and that he could not bend over, lift more than 15 pounds, stand still for more than a few minutes, sit for more than 30 minutes, walk for more than a short distance, serve on a vessel in motion, or move rapidly without experiencing pain and risking reinjury. The DMB reported that the applicant's major depressive disorder "functionally impair[ed] the patient from performing his required duties" and that his recurrent plantar fasciitis also rendered him unable to perform his duties. The DMB stated that the applicant could answer phones and keep records for short periods but had to take "breaks of significant frequency and duration. Due to pain, medication and depression, [he] has experienced difficulty concentrating and maintaining focus." The DMB also pointed out that because of his enforced inactivity, the applicant's weight had increased to 286 pounds. The DMB stated that the applicant's command had had "ample opportunity" to observe his daily behavior and found that "his range of motion and physical limitations are consistent with his representations regarding physical limitations and pain." It summarized his ailments as follows:

1. Chronic Pain Syndrome/Intervertebral Disc Syndrome, S/P L4-L5 Fusion/Laminectomy
2. Hypertension with Left Ventricular Hypertrophy
3. Major Depressive Disorder
4. Recurrent Headaches
5. Bi-lateral Heel Pain secondary to heel spurs-Recurrent
6. Plantar Fasciitis-Recurrent
7. Rectal A/V Malformation-Stable
8. Lumbar Degenerative Disease at L4-S1, posterior disc bulge at L5-S1, Lumbar spondylosis
9. Lateral Femoral Cutaneous Nerve Neuropathy

On May 3, 200x, another PRC officer again concurred with the findings and recommendation of the FPEB on November 30, 199x. However, on May 9, 200x, the Chief Counsel reported that the proceedings were not in accepted form and were not technically correct. He found that the preponderance of the evidence in the record did not support the findings and explained his findings with the following comments:⁷

3. [Under the guidelines in DoD Instruction 1332.39], residual lumbar pain with radiculopathy should be rated under VASRD Code 5295 and the relevant code for neurological

⁷ The applicant was not provided a copy of this memorandum until it was added to the BCMR case file in May 2003 upon inquiry by the Board's staff as to the whereabouts of the Chief Counsel's comments, which were cited as an attachment to the FPEB's report.

impairment. ... [A] separate rating for neurological impairment is justified when there exists x ray evidence of a pathology that is additional to the painful limitation of motion. Since the medical diagnosis does not indicate any atrophy or muscle spasm, the disability of painful limitation would be rated at 10% under VASRD Code 5295. The neurological impairment would be separately rated either at 10% or 20% in accordance with the schedule for rating the sciatic nerve impairment under VASRD Code 8520. The impairment of the sciatic nerve is predicated upon the medical diagnosis of weakness of right knee flexion and extension, dull pain and shooting pains in the right leg, and neuropathy in the left lateral femoral cutaneous nerve distribution which is evidenced by numbness and diminished nerve prick. ... Since a neuropathy is usually progressive, the 20% rating would be warranted under the reasonable doubt provision contained in Article 9.A.3.b. of [the PDES Manual]. ... Since the sciatic nerve originates in the L4/L5 lumbar loin and the S1/S2/S3 sacral elements, it is likely that the fibrosis at the L4/L5 level is producing a tethering of the sciatic nerve route and that this tethering is contributing to the nerve impairment.^[8] ...

4. All of the evidence of record, including [the applicant's] submissions through 1 May 200x have been reviewed. The diagnosed depression, bilateral heel pain secondary to heel spurs, and the headaches were not considered unfitting by the examining physician. ... The plantar fasciitis-recurrent, the rectal A/V malformation and the hypertension with left ventricular hypertrophy are not conditions that render [the applicant] unfit for duty. Hence, these medical diagnoses are not ratable under paragraph 2.c.3.a.(3)(a) [of the PDES Manual].

• • •

6. Based on the above analysis and the record regarding [the applicant's] spine injury combined with the guidance on resolving reasonable doubt in favor of the member, the current level or extent of [his] injury would permit a finding of a combined 10% and 20% rating (VASRD 5295 and 8520) resulting in a determination of 30% disability. Since his condition could either improve or worsen, the circumstances would permit placing [him] on the temporary disability retired list and reevaluating his condition in approximately 12-18 months. ...

On May 31, 200x, the Commander of CGPC returned the case to the FPEB for reconsideration. He stated that based upon his review and upon the advice of the Chief Counsel, he had some doubt about the FPEB's decision in light of the DoD guidelines.

On July 31, 200x, the FPEB reported that it had reviewed the new information and discussed "the option of rating [the applicant] under VASRD codes 5295 and the appropriate 8500 series code." The FPEB recommended that he be rated as 10% disabled under code 5295, for "lumbosacral strain; with demonstrable pain on spinal motion associated with positive radiographic findings," and 10% disabled under code 8520 for "neuritis; sciatic nerve, paralysis of; incomplete, mild." The FPEB stated that the ratings should "replace the original VASRD code 5293 and are not in addition to that original rating."

⁸ The source of the Chief Counsel's medical speculation is not clear from the record.

On August 24, 200x, the applicant was notified of the FPEB's new findings. He responded to the chief PDES attorney within LMJ that he should have been rated as 20 percent disabled under VASRD code 5295 and 10 percent disabled under code 8520, for a combined rating of 30 percent. He stated that he should be put on the TDRL. On August 30, 200x, he asked to appeal the FPEB's findings to the PRC. He stated that, based on its failure to address his other disabilities, he believed that the FPEB did not consider the May 1, 200x, addendum to the DMB. He stated that he believed that he was entitled to a 60-percent rating but, to try to "bring this case to a close," would accept lower ratings. His request was forwarded to the PRC.

On September 26, 200x, the PRC concurred with the FPEB. On September 27, 200x, the Chief Counsel indicated that the proceedings were in an accepted format and technically correct and that the preponderance of the evidence supported the findings. On October 2, 200x, the Commander of CGPC approved the FPEB's findings and recommendation and ordered that the applicant be discharged with severance pay. On October 4, 200x, CGPC ordered the command to discharge him on October 18, 200x.

On October 12, 200x, the applicant was treated for acid reflux disease, which was keeping him awake at night. The doctor noted that it might be related to the hiatal hernia that was detected by an endoscopy on January 5, 199x. He prescribed Prilosec.

On October 18, 200x, the applicant was honorably discharged with a 20-percent disability rating and \$10,276.80 in severance pay.

Decision of the DVA

On October 19, 200x, the applicant applied to the DVA for disability benefits. On October 10, 200x, the DVA informed him that it had assigned him a 90-percent combined disability rating for his conditions dating from the date of his discharge from the Coast Guard. The combined rating was based on the following ratings for his separate medical conditions, all of which the DVA found to be "service connected":

- 60 percent disabled by a laminectomy and fusion with radiculopathy at the L4-5 vertebrae of the spine (VASRD code 5293);
- 30 percent disabled by major depressive disorder (code 9434);
- 30 percent disabled by bilateral heel spurs with plantar fasciitis;
- 10 percent disabled by hypertension;
- 10 percent disabled by gastro-esophageal reflux disease; and
- 10 percent disabled by arterial/venal malformation of the rectum with chronic bleeding and diarrhea.

The DVA stated that he did not receive a 100-percent combined disability rating because when no single condition is rated as 100 percent disabling, a combined 100-percent rating may not be assigned unless the veteran "is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities."

The DVA examiner who saw the applicant in January 200x stated that the applicant had a "markedly restricted range of motion" and that he met the maximum, 60-percent rating for his back condition. Because the applicant's degenerative disc disease would not reverse itself and was unlikely to improve, the rating was permanent.

Regarding the applicant's depression, the DVA stated that he was receiving ongoing treatment for his "major depressive disorder." The applicant told the DVA examiner in January 200x that he had already lost one job because of his difficulty concentrating, poor motivation, and irritability, and was currently working two part-time jobs. The DVA stated that a 30-percent disability rating under VASRD code 9434 was appropriate "whenever there is occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks."

Regarding the applicant's heel spurs, the DVA stated that x-rays revealed a small bony spur on the right heel and "an irregular protuberance on the left os calcis" that made the heels tender, prevented him from bearing weight, and contributed to his limp. Because there is no VASRD code for heel spurs, the DVA rated the applicant as 30 percent disabled under an analogous code, 5276, since the spurs caused "pain on manipulation and use" of his feet. The DVA noted that the spurs might not be permanent.

VIEWS OF THE COAST GUARD

On February 6, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant the requested relief. He based his recommendation in part on a memorandum on the case prepared by CGPC. The advisory opinion and CGPC's memorandum are attached below.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On February 10, 2003, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. On February 25, 2003, the Board received the applicant's response. The applicant argued that the Coast Guard was wrong to say that he should not have received the same or a similar disability rating from the Coast Guard as from the DVA. He stated that he applied to the DVA within two weeks of his discharge and submitted only the evidence seen by the Coast Guard, so the Chief Counsel's argument that his condition might have worsened prior to the DVA's determination is false. The applicant also objected to the Chief Counsel's

repeated assertion that he was performing his duties well, since he was assigned to very limited duties—light desk work—and was only able to perform that work when he was well enough to do so. He alleged that the Chief Counsel’s advisory opinion falsely suggests that he was successfully completing all of a seaman’s normal duties.⁹

SUMMARY OF APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be “unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay” may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, “at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.” Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that “[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it.”

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

VASRD code 5293 is for intervertebral disc syndrome. Possible ratings are 60% for “[p]ronounced: with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm”; 40% for severe: recurring attacks with intermittent relief; 20% for moderate: recurring attacks; 10% for mild; and 0% for posteroperative, cured.

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

VASRD code 8520 is for paralysis of the sciatic nerve. Possible ratings are 80% for “[c]omplete: the foot dangles and drops, no active movement possible of muscles

⁹ Subsequent to this response, the applicant sought and was granted a three-month extension. On May 29, 2003, he submitted copies of many email messages and other documents related to his case, which were not previously in the record and which are included in the summary of the record above. The Chief Counsel was sent copies of these documents on May 30, 2003, and invited to respond. On June 13, 2003, the Chief Counsel informed the BCMR that he would not respond or change the advisory opinion in response to the new evidence.

below the knee, flexion of knee weakened or (very rarely) lost”; 60% for incomplete but “[s]evere, with marked muscular atrophy”; 40% for moderately severe; 20% for moderate; 10% for mild.

VASRD code 5276 is for acquired flatfoot, but it was used by the DVA to rate the applicant’s heel spurs and plantar fasciitis because the symptoms—pain on use and manipulation of the foot—are similar. Possible ratings are 50% for bilateral and 30% for unilateral if the condition is pronounced with “extreme tenderness of plantar surfaces of the feet”; 30% for bilateral and 20% for unilateral if the condition is severe; 10% for a moderate condition, whether bilateral or unilateral; and 0% for mild, when treatment relieves the symptoms.

VASRD code 9434 is for major depressive disorder and VASRD code 9440 is for chronic adjustment disorder. Possible ratings for these disabilities are 100% for “[t]otal occupational and social impairment”; 70% for “[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, ...”; 50% for “[o]ccupational and social impairment with reduced reliability and productivity”; 30% for “[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform”; 10% for “[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency ... during periods of significant stress”; 0% for a condition that has been diagnosed but whose symptoms do not interfere with occupational and social functioning.

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

DoD Instruction 1332.39

Paragraph 6.4 defines pyramiding as “the application of more than one rating to any area or system of the body when the total functional impairment of that area or system is adequately reflected under a single appropriate code.” Paragraph 6.9 states that if a condition is not listed in the VASRD, it is rated by analogy to a condition that is “symptomatically similar.”

Paragraph E2.A1.1.19.6. of Enclosure 2 to the instruction states that “[r]esidual lumbar pain with radiculopathy should be rated as 5295 and the relevant code for neurological impairment.”

Paragraph E2.A1.1.20.2. of Enclosure 2 states that “[d]emonstrable pain on spinal motion associated with positive radiographic findings shall warrant a 10 percent rating. If paravertebral muscle spasms are also present, a 20 percent rating may be awarded. Such paravertebral muscle spasms, however, must be chronic and evident on repeated examinations.”

Enclosure 3 to the instruction states that plantar fasciitis should be rated by analogy to VASRD codes 5399 and 5310 (motion and function of the plantar).

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

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

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

Provisions of the PDES Manual (COMDTINST M1850.2C)

The PDES Manual governs the separation of members due to physical disability. Chapter 3 provides that an IMB of two medical officers shall conduct a thorough medical examination, review all available records, and issue a report with a narrative description of the member’s impairments, an opinion as to the member’s fitness for duty and potential for further military service, and if the member is found unfit, a referral to a CPEB. The member is advised about the PDES and permitted to submit a response to the IMB report.

Chapter 3.I.7. provides that before forwarding an IMB report to the CPEB, the member’s CO shall endorse it “with a full recommendation based on knowledge and observation of the member’s motivation and ability to perform.” The endorsement must include a summary of the duties normally associated with the member’s grade or rating and a statement regarding the member’s ability to perform those duties.

Chapter 4 provides that a CPEB, composed of at least one senior commissioned officer and one medical officer (not members of the IMB), shall review the IMB report, the CO’s endorsement, and the member’s medical records. Chapter 4.A.5.7. provides that if the CPEB finds that the evidence is insufficient for a proper determination, it will return the case to the member’s command for a Disposition Medical Board (DMB) to amplify the record.

Chapter 2.C.2.a. provides that the “sole standard” that a CPEB or FPEB may use in “making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service.”

Chapter 2.C.10.a.(2) provides that the CPEB or FPEB will consider a medical condition to be “permanent” when “[a]ccepted medical principles indicate the defect has stabilized to the degree necessary to assess the permanent degree of severity or percentage rating” or if the “compensable percentage rating can reasonably be expected to remain unchanged for the statutory five year period that the evaluatee can be compensated while on the TDRL.” Under Chapter 8, if the CPEB (or the FPEB) determines that a member is unfit for duty and the condition may not be permanent but is at least temporarily greater than 30 percent, the member may be placed on the temporary disability retired list (TDRL) for a maximum of five years. Chapter 8.A.2. provides that the TDRL “safeguards members from being permanently retired with a condition that is not stable and could result in a higher disability rating.” While on the TDRL, a member’s case is periodically reviewed by the CPEB to determine if his condition has stabilized so that a permanent rating may be assigned (or he may be found fit for duty if he recovers).

Chapter 2.C.3.a.(3)(a) provides that, if a CPEB (or subsequently an FPEB) finds that the member is unfit for duty because of a permanent disability, it will

propose ratings for those disabilities which are themselves physically unfitting or which relate to or contribute to the condition(s) that cause the evaluatee to be unfit for continued duty. The board shall not rate an impairment that does not contribute to the condition of unfitness or cause the evaluatee to be unfit for duty along with another condition that is determined to be disqualifying in arriving at the rated degree of incapacity incident to retirement from military service for disability. In making this professional judgment, board members will only rate those disabilities which make an evaluatee unfit for military service or which contribute to his or her inability to perform military duty. In accordance with the current VASRD, the percentage of disability existing at the time of evaluation, the code number and diagnostic nomenclature for each disability and the combined percentage of disability will be provided.

Chapter 2.C.3.a.(3)(a)1. states that “[w]hen rating a condition which does not appear in the VASRD, the board shall rate by analogy.”

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

Chapters 4.A.13.a. and b. provide that the Commandant shall appoint legal counsel to inform each member of the recommendation of the CPEB and to assist each member in responding to the recommendation by advising him of his rights and the PDES. Chapter 4.A.14.c. provides that the member has the right to reject the CPEB’s recommendation and demand a formal hearing by the FPEB in accordance with 10

U.S.C. § 1214. Under Chapter 4.A.14.d. the member must reject or accept the CPEB's "offer" within 15 days of notification by the legal counsel.

Chapter 5.A.4. provides that an FPEB convened under 10 U.S.C. § 1214 normally consists of three officers, one of whom is a medical officer and none of whom have served on the member's CPEB. Chapter 5.A.4.g.(1) provides that "[n]ormally, legal counsel for the evaluatee is assigned in accordance with paragraph 4.A.13.a." Chapter 5.A.6. provides that the member has, *inter alia*, the right to have no less than 3 working days notice of the time and place of the hearing, to be represented by legal counsel, and to submit documentary and medical evidence and to call witnesses. Under Chapter 5.C.8., telephone testimony is allowed.

Chapter 5.B.2.a. provides that the "evaluatee and legal counsel for the evaluatee will be notified of the date of the convening of a formal board for preparation of the case. Legal counsel of the evaluatee may examine all records and papers pertaining to the case." Chapter 5.B.2.b. provides that "[s]hould legal counsel recognize a need for a delay in the presentation, a written request will be submitted to [CGPC]."

Chapter 5.C.11.a. provides that the FPEB shall issue findings and a recommended disposition of each case in accordance with the provisions of Chapter 2.C.3.a. (see above). The applicant has three days in which to decide whether to file a rebuttal and 15 working days in which to file the rebuttal. The rebuttal "may include substantial existing evidence, which by due diligence, could not have been presented before disposition of the case by the FPEB." Chapter 5.D.2.c. provides that the FPEB will inform the member or his counsel, normally within 15 working days, whether the rebuttal supports a change in the FPEB's determinations. If the FPEB concurs in the rebuttal, it prepares a new report in accordance with Chapter 2.C.3.a.

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

Chapter 1.B.4. provides that the Chief Counsel will review the actions of the CPEB, FPEB, and PRC to ensure legal sufficiency. Chapter 1.D.10. states that if the

Chief Counsel finds that those actions were legally insufficient, the record is returned to the entity that committed the error for corrective action. If no legal insufficiency is found, the Chief Counsel forwards the case to the Chief of the Administrative Division of CGPC for final action. If the Chief has doubts concerning a particular case, he returns it to the appropriate board with an explanation.

Chapter 5.D.7. provides that “[w]henver there is any significant change in the evaluatee’s status or physical condition before final action is taken, the evaluatee’s commanding officer shall promptly notify [CGPC].” Chapter 2.A.11. provides that such significant changes or newly diagnosed conditions are evaluated by a DMB.

Chapter 9.A.1. states the following:

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

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

FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that he never received a full and fair hearing in accordance with 10 U.S.C. § 1214 because counsel was not appointed for him until the day before the hearing. The record indicates that no counsel was appointed to help the applicant prepare for the FPEB until November 29, 199x, the day before the hearing. Under Chapters 5.A.6. and 5.B.2.a. of the PDES Manual, the applicant had a right to counsel to assist him in preparing and presenting his case to the FPEB. Although the PDES Manual does not specify a time by which counsel must be appointed, four matters of record indicate that the Coast Guard had an acknowledged duty to appoint counsel significantly earlier than it did in the applicant’s case:

(a) First, Chapter 5.A.4.g.(1) of the PDES Manual states that the Coast Guard counsel assigned for the FPEB shall “normally” be assigned in accordance with Chapter 4.A.13.a. Chapter 4.A.13.a. concerns the appointment of counsel for a member’s review of the findings and recommendation of the CPEB, an event which usually happens a few weeks before the FPEB. In the applicant’s case, although counsel was assigned to assist the applicant with the results of the CPEB, that person was not assigned to assist him with the FPEB.

(b) Second, on November 22, 199x, a week before the FPEB, CGPC sent the applicant a form letter informing him (erroneously) that Coast Guard counsel had already been appointed for him. This statement indicates that the Coast Guard has acknowledged a duty to assign counsel, and normally assigns counsel, to members going before the FPEB at least one week before the hearing.

(c) The same form letter was sent with an enclosed “Statement of Rights of Evaluatee,” informing the applicant that he had a right to counsel and a right to at least three working days to prepare his case. The form letter stated that “[l]ack of preparation on the part of your counsel or representative will not cause the board to be delayed.” These statements in close conjunction indicate that a member is supposed to have the assistance of counsel at least during those three working days. The applicant indicated on the form that he would not waive those three working days, but the Coast Guard did not assign him counsel until the day before the FPEB.

(d) Chapters 5.A.6. and 5.C.8. of the PDES Manual allow a member to present documentary evidence, medical test results, videotapes, etc., at an FPEB hearing. The member is also allowed to present witnesses in person or by telephone who have knowledge of his condition. Gathering such evidence and arranging for the appearance or telephone availability of witnesses takes time and can hardly be managed the afternoon before the hearing when the member is hundreds of miles from home at Coast Guard Headquarters.

3. Therefore, the Board finds that under the provisions of the PDES Manual and by acknowledged practice, the Coast Guard had a duty to provide the applicant with counsel to assist him in preparing for the FPEB at least three working days before the hearing, if not earlier. In *Powell v. Alabama*, 287 U.S. 45, 71 (1932), the Court held that the duty to appoint counsel “is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.” Although the right to counsel of the plaintiffs in *Powell* was a constitutional right and their lives were at stake, unlike the case at hand, the principle is the same: The right to counsel includes the right to the timely assistance of counsel in pre-

paring for a hearing.¹⁰ Therefore, the Board finds that the Coast Guard erred and failed properly to discharge its duty to appoint counsel in accordance with Chapter 5.A.6. of the PDES Manual when it waited until the day before the FPEB hearing to assign counsel for the applicant.

4. The applicant's Coast Guard counsel failed to request a delay of the proceedings, as allowed under Chapter 5.B.2.b. of the PDES Manual. The record indicates that on Friday, November 26, 199x, the applicant affirmatively indicated that he would not waive his right to three working days to prepare his case. There is no evidence in the record that he received the notice before that date, and the record is clear that he had not been appointed counsel for the FPEB by that date. The transcript indicates that the matter was never raised at the hearing. The reason the counsel failed to raise the issue is not in the record. However, the Board notes that the applicant had been told by CGPC that "[l]ack of preparation on the part of your counsel or representative will not cause the board to be delayed." This authoritative statement essentially belies the existence of Chapter 5.B.2.b. and tells the member that requesting more time to prepare for an FPEB hearing with the assistance of counsel would be futile.

5. As the Chief Counsel argued, however, the applicant bears the burden of showing that he was prejudiced by the Coast Guard's error in failing to appoint counsel until the day before the hearing.¹¹ On the afternoon before the FPEB, the applicant was able to muster corroborating statements only from his mother and supervisor. It is now unknown what other documentary evidence the applicant's counsel might have assisted him in gathering had the Coast Guard assigned him to help the applicant in a timely manner. It is also unknown what oral testimony the counsel might have elicited to prove the severity of the effect of his condition upon his ability to perform his duties had there been time to arrange for witnesses to appear either in person or by telephone. The applicant was later able to gather significant medical evidence for his rebuttal to the FPEB's recommendation, but this rebuttal material was reviewed by the FPEB on March 9, 200x,¹² thereby curing any error arising from its not being presented at the hearing. The applicant has not submitted any evidence to this Board that was not reviewed by the FPEB prior to his discharge with the recommended 20-percent disability rating and that could have, with more preparation time, been submitted to the FPEB. Therefore, he has failed to prove that the FPEB was prevented from considering relevant evidence

¹⁰ In fact, the applicant is arguably better placed in this respect than were the plaintiffs in *Powell* since the Constitution makes no mention of how early counsel must be appointed, whereas language in the PDES Manual indicates that a timely appointment to assist preparation for the hearing is required.

¹¹ 33 C.F.R. § 52.24(b). See also *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *United States v. Wiley*, 47 M.J. 158, 160 (199x).

¹² Although the applicant alleged that the Coast Guard told a congressman in a letter that the FPEB had reviewed his rebuttal on February 9, 200x, before it was complete, the letter is not in the record. Moreover, CGPC's message to the applicant's command on March 23, 200x, stated that the FPEB reviewed the rebuttal on March 9, 200x, after the complete rebuttal had been received.

before it made its final recommendation in July 200x. The Board concludes that the applicant has not proved that the Coast Guard's failure to appoint him counsel in a timely manner prejudiced him in the final determination by the FPEB.

6. The applicant alleged that the Coast Guard erred in discharging him with a 20-percent combined disability rating. He argued that the medical evidence in the record and the DVA's decision to rate him as 90 percent disabled prove that the 20-percent rating is too low. As the Chief Counsel argued, the Coast Guard and the DVA assess disability ratings by different standards even though both use the VASRD. Under Chapter 2.C.2.a. of the PDES Manual, a CPEB or FPEB considers only the extent to which a member's disabilities render him unfit to perform the duties of his rate, whereas the DVA considers the extent to which a veteran's disabilities render him unable to work in civilian life.¹³ However, while the DVA's decision does not, by itself, prove that the 20-percent rating is erroneous, the Board finds that the 90-percent rating—which was based on his Coast Guard medical records and a physical examination of the applicant in January 200x, just three months after his discharge—is sufficient to overcome the presumption of administrative regularity accorded Coast Guard records.¹⁴ However, the applicant still bears the burden of proving that the 20-percent rating was erroneous by a preponderance of the evidence. Moreover, in weighing evidence, the Board gives significant deference to the professional assessments of the members of a duly constituted board such as the FPEB, one of whom was a physician.

7. The record shows that the applicant applied to the DVA the day after his discharge and that the DVA's decision was based on his Coast Guard medical records and on an examination in January 200x, just three months after his discharge. Therefore, the Board rejects CGPC's argument that the 90-percent rating the DVA awarded in October 200x, which was retroactive to the date of his discharge, was based on post-discharge deterioration of the applicant's condition.

8. Although the Coast Guard and the DVA apply the VASRD with different standards, this does not explain why the ratings are so disparate. While a person such as the applicant, with a painful back condition that allows a very limited range of motion, may be able to perform many civilian jobs, such a person is clearly extremely unsuited for the strenuous physical work normally performed by Coast Guard seamen

¹³ 38 C.F.R. § 4.1.

¹⁴ 33 C.F.R. § 52.24(b). See BCMR Dkt. No. 200x-194 (holding that "[o]nce the applicant has rebutted the presumption of regularity by presenting at least some 'clear, cogent, and convincing' evidence—i.e., not just a general character reference but evidence that specifically and convincingly contradicts his rating officials' marks and comments—the Board weighs the evidence in the record and determines whether the applicant has met his burden of proof—the preponderance of the evidence ..."). See also *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that "absent strong evidence to the contrary," the court presumes that government officials have acted correctly).

—work that the applicant was ably performing while assigned to a cutter during his first two years on active duty. Therefore, arguably, the applicant's conditions and physical limitations would render him much more unfit for his Coast Guard duties than for civilian employment and would justify a higher disability rating under the standard in Chapter 2.C.2.a. of the PDES Manual. The Board notes that during his last year in the Service, the applicant's duties were severely limited to communications watchstanding—i.e., answering phones—at a shore unit, and his sciatica even prevented him from performing desk work for long durations.

9. Under paragraph E2.A1.1.19.6. of DOD Instruction 1332.39—which is not legally binding on the Coast Guard but is nonetheless used by the Service as guidance in the evaluation of disabilities—post-operative, residual lumbar pain is rated by analogy to lumbosacral strain (VASRD code 5295) and “the relevant code for neurological impairment.” As the Chief Counsel noted in his memorandum on the proceedings dated May 3, 200x, since the applicant's primary neurological impairment is sciatica, the relevant VASRD code is 8520. The Chief Counsel then stated that a 10-percent rating was proper under VASRD code 5295 because, he alleged, the applicant had not been diagnosed with muscle spasm. However, the applicant had consistently complained of muscle spasms since his surgery and discussed them at length at the FPEB hearing. Moreover, the DMB's report dated September 9, 199x, states that both a physical examination and tests had revealed “a moderate amount of paraspinal spasm.” Paragraph E2.A1.1.20.2. of DOD Instruction 1332.39, states that “[i]f paravertebral muscle spasms are also present, a 20-percent rating may be awarded.” It goes on to say that the spasms should be chronic and proved by examination. In addition, the VASRD itself assigns a 20-percent rating for “muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral in standing position.”

10. There is plenty of evidence in the record regarding the range of motion in the applicant's back: The doctor who examined the applicant for the DMB on July 6, 199x, found a “moderately decreased range of motion” in his back. The applicant himself reported at the FPEB hearing that he could not bend over even to wash dishes without back pain and had to lie down to put on his socks and shoes. After an MRI on January 25, 200x, revealed increasing degenerative changes in and around his spine, Dr. Y, a neurosurgeon at a [REDACTED] clinic for lower back pain, noted that the applicant's range of motion was “severely limited,” and Dr. Z, a spine physiatrist at [REDACTED], stated that the applicant had a “minimal range of motion in the lumbar spine.” Both of these doctors noted that the applicant's stance was stiff or guarded, and Dr. X, his primary Coast Guard physician, noted on April 13, 200x, that the applicant had developed an “antalgic gait” (modified to prevent pain). Dr. Z found that the applicant had a “much more serious condition than intervertebral disc syndrome ... [or] lumbosacral strain.” Furthermore, the applicant had passed a Waddell's test, indicating that he was not feigning or exaggerating his pain.

11. The applicant alleged that he should have received a disability rating for his depression, bilateral heel spurs, and plantar fasciitis. On April 14, 200x, in its first addendum, the DMB concurred with the report of a psychiatrist that the applicant's major depressive disorder, which had first been diagnosed in September 199x, rendered him unfit for duty. In its second addendum, dated May 1, 200x, the DMB stated that the applicant's depression contributed to his "difficulty concentrating and maintaining focus." In addition, on April 17, 200x, an orthopedist had discovered recurrent, bilateral heel spurs reforming and causing chronic plantar fasciitis, and Dr. X found that the pain from the heel spurs and plantar fasciitis was sufficiently severe to make the applicant not fit for duty. Anomolously, however, in his memorandum on the case dated May 3, 200x, the Chief Counsel reported to the Commander of CGPC that the depression, heel spurs, and plantar fasciitis had not been found to make the applicant unfit for duty, which statements cast significant doubt upon the completeness of the record.

12. In its final report dated July 31, 200x, the FPEB made no mention of the applicant's depression, heel spurs, or plantar fasciitis. Under Chapter 2.C.3.a.(3)(a) of the PDES Manual, the FPEB rates only "those disabilities which make an evaluatee unfit for military service or which contribute to his or her inability to perform military duty." Therefore, this Board must assume either that the record before the FPEB was incomplete in July 200x or that the FPEB chose to reject, without explanation, the DMB's and the applicant's doctors' findings that these conditions did render him unfit for duty.

13. The applicant's headaches, hypertension, rectal malformation, and gastro-esophageal reflux were not found to be so severe as to render him unfit for duty, and he has not submitted evidence to show that those conditions interfered with his performance of duty. Regarding his IBS, the applicant himself told the FPEB that because the problem was under control, he was not seeking a rating for that condition.

14. In his advisory opinion to the Board, the Chief Counsel stated that the evidence indicates that until his discharge, the applicant capably performed all of the duties assigned to him and that he maintained a very positive mental attitude. However, as stated in finding 8 above, during his last two years in the service, the applicant's duties were radically limited to answering phones and light desk work. Showing up for such work daily does not mean that a seaman is only mildly or moderately unfit for the duties of his rate, in accordance with Chapter 2.C.2.a. of the PDES Manual, as seamen's work is normally quite physical. Moreover, the only evidence supporting the Chief Counsel's allegation about the applicant's attitude is the CO's written endorsements to the DMB and to the applicant's rebuttal to the FPEB. Those endorsements were written in the fall of 199x and the winter of 200x, well before the DMB found that his major depressive disorder was interfering with his concentration and making him unfit for duty.

15. In assigning the applicant a 10-percent disability rating under VASRD code 5295 and a 10-percent rating under 8520, for a 20-percent combined rating, the FPEB in effect rejected or ignored the findings of the DMB regarding his back spasms, depression, heel spurs, and plantar fasciitis. In addition, the rating contradicts Dr. Z's finding in January 200x that the applicant "has [a] much more serious condition than intervertebral disc syndrome ... [or] lumbosacral strain." The FPEB provided no explanations for its decision. The Chief Counsel told the applicant's command on April 4, 200x, that the FPEB never issues any rationale for its decisions. This is consistent with the BCMR's own experience with FPEBs. However, Chapter 2.C.3.a.(3)(a)1. of the PDES Manual expressly requires the FPEB to issue an "amplifying statement, setting forth the basis for its findings and recommendations" "[w]hen the basis for its findings and recommended disposition is not readily apparent from the documents of record." The fact that the FPEB is known by the Chief Counsel's office never to issue such amplifying statements suggests a habitual, willful disregard of the regulation. The Board notes that in the Navy, FPEBs regularly provide written rationales for their findings when members object to their recommendations.¹⁵

16. The Board finds that given the contrary information and opinions of the DMB and the several physicians who actually examined and/or treated the applicant on an ongoing basis, as well as the absence of any amplifying information from the FPEB to explain its determination that he should receive a 10-percent rating under VASRD code 5295, despite the DoD guideline indicating that a member testing positive for back spasms (as the applicant had) is eligible for a 20-percent disability rating under that code, the basis for the FPEB's findings was clearly "not readily apparent from the documents of record." Thus, it was required, under Chapter 2.C.3.d of the PDES Manual, to issue an amplifying statement. The failure to issue such a statement has worked a significant injustice on the applicant by leaving him uncertain of the basis for the rating decision. Moreover, it leaves the Board uncertain as to whether the DMB's two addenda and the degenerative nature of the applicant's sciatica, disc disease, and epidural fibrosis were, in fact, considered and whether any reasonable doubt was resolved in the applicant's favor, as required under Chapter 9.A.1. of the PDES Manual. The Board notes that, under Chapter 9.A.8. of the PDES Manual, if the FPEB actually found, contrary to the DMB, that the applicant's heel spurs, plantar fasciitis, and major depressive disorder did not interfere with his performance of duty or meet even the lowest VASRD ratings for those conditions, it could still have included them in the report by rating them as zero percent disabling.

¹⁵ SECNAVINST 1850.4E, Enclosure (4), Part 3, para. 4340, provides that if a member objects to the findings and recommendation of a Navy FPEB in its report under paragraph 4334, the FPEB shall prepare a "rationale" with the basis for its findings "[s]ince it is essential that the record clearly reflects facts sufficient to form the basis for the findings."

17. The Board starts such a case presuming that FPEB members have acted correctly.¹⁶ In this case, however, the FPEB's (a) thrice repeated refusal to provide an amplifying statement in disregard of Chapter 2.C.3.a.(3)(a)1. of the PDES Manual; (b) failure to mention three medical conditions (major depressive disorder, recurrent bilateral heels spurs, and recurrent plantar fasciitis) that the DMB and examining physicians had expressly found to render him unfit for duty; and (c) determination that he should receive a 10-percent rating under VASRD code 5295 despite the DoD guideline indicating that a member testing positive for back spasms (as the applicant had) is eligible for a 20-percent disability rating under that code, have largely undermined the Board's confidence in the FPEB's determination, notwithstanding the fact that that determination survived the one-officer PRC's review as not being "clearly erroneous" and the Chief Counsel's final determination that it was "technically correct." The Board finds that the applicant has proved by a preponderance of the evidence that he was denied due process when the FPEB refused to explain its decision to rate only his back condition and sciatica with a combined 20-percent rating, contrary to the preponderance of the medical evidence in the record.

18. The applicant asked this Board to assign him outright a higher disability rating. However, the BCMR is not a medical board and is not well positioned to repair the deficiencies in the FPEB's work (as cited in finding 17 above) so as to arrive at a proper combined disability rating encompassing each of his many conditions. The record indicates that, at the time of his discharge, the applicant had degenerative sciatica, increasing epidural fibrosis, degenerative disc disease, and growing heel spurs. The doctors reported that both his back condition and heel spurs would worsen so as to require more surgery. In light of the deficiencies in the FPEB's work and the apparently unstable nature of the applicant's medical conditions, the Board finds that his record should be corrected so as to place him on the TDRL (as the Chief Counsel recommended on May 3, 200x) as of the date of his discharge with (a) a 20-percent rating under VASRD code 5295, since the applicant had been diagnosed with severe limitation of range of motion in his lumbar spine and with back spasms by the DMB on September 9, 199x, and (b) a 20-percent rating under VASRD code 8520, since the applicant's sciatica was causing weakness in his right knee, dull and shooting pains in his right leg, and numbness in his left thigh, and it was expected to worsen. Under the table and instructions for combining disability codes at 38 C.F.R. § 4.25, these two individual ratings combine for a 40-percent total disability rating. Placing the applicant on the TDRL will allow the Coast Guard to reevaluate his several conditions by physical examination, another CPEB, and an FPEB, if necessary.

19. The applicant made numerous allegations with respect to the actions and attitudes of various officers involved in his PDES processing. Those allegations not

¹⁶ 33 C.F.R. § 52.24(b).

specifically addressed above are considered to be without merit and/or not dispositive of the case.

20. Accordingly, the applicant's request should be granted in part by placing him on the TDRL with the disability ratings discussed in finding 18. The Coast Guard should expeditiously proceed with processing the applicant in accordance with the rules for members on the TDRL in the PDES Manual.

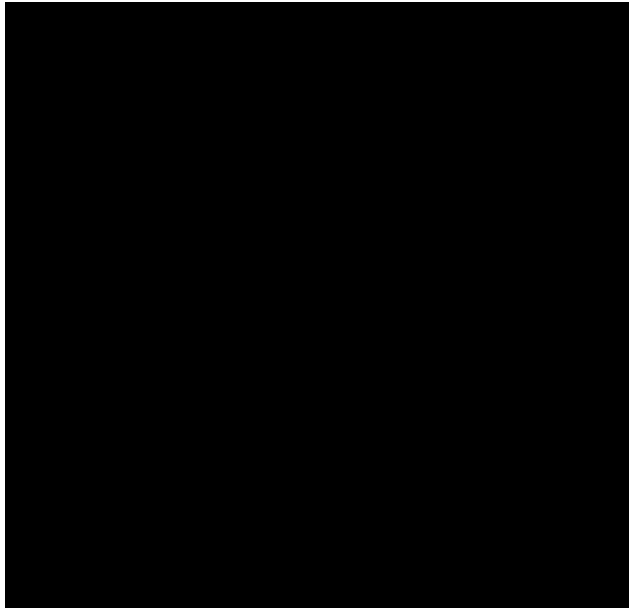
[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED] USCG, for correction of his military record is granted as follows:

His record shall be corrected to show that in lieu of his separation with severance pay on October 18, 200x, he was placed on the Temporary Disability Retired List (TDRL) with a combined disability rating of 40 percent, based on a 20-percent rating under VASRD code 5295 and a 20-percent rating under VASRD code 8520.

The Coast Guard shall expeditiously proceed with processing the applicant in accordance with the rules for members on the TDRL in the PDES Manual.





5420/3

MEMORANDUM

From : [REDACTED] CDR
Chief Counsel

Reply to
Attn of: G-LMI
[REDACTED]

To: Chairman, Board for Correction
of Military Records (C-60)

Subj: ADVISORY OPINION IN CGBCMR DOCKET NO. 2002-140 (XXXXX)

Ref: (a) Applicant's DD Form 149 filed 26 Oct 2002

1. I adopt the facts and analysis provided by Commander, Coast Guard Personnel Command (CGPC) in enclosure (1) and request that you accept his comments and my following additional comments as the Coast Guard's advisory opinion recommending denying relief in subject case for lack of merit and proof.

2. Case Summary: Applicant is a former Seaman (SN, Pay Grade E-3), United States Coast Guard. On 18 October 200x, he was discharged from the Coast Guard with severance pay and a disability rating of 20%. He requests that the Board for Correction of Military Records (BCMR) change his discharge to a permanent medical retirement with a disability rating to be determined by the BCMR. Alternatively, the Applicant requests a *de novo* hearing before the Central Physical Evaluation Board (CPEB).

- a. The application is timely.
- b. On March 2, 199x, the Applicant underwent surgery to remove a large heel spur.
- c. In May 199x, the Applicant injured his back while lifting a floor buffer at his unit.
- d. On March 26, 199x, the Applicant underwent back surgery at the National Naval Medical Center, Bethesda, Maryland. An L4 decompressive laminectomy, bilateral L4-L5 facetectomy, and L4-L5 fusion was performed without complications.
- e. On September 30, 199x, a Disposition Medical Board (DMB) diagnosed the Applicant with (1) chronic pain syndrome, post laminectomy S/P L4-L5 fusion, (2) residual right heel pain following the surgical removal of a heel spur, (3) rectal A/V malformation, and (4) adjustment disorder with disturbance of mood and conduct. The DMB recommended the matter be referred to the CPEB.
- f. On October 28, 199x, the CPEB found the Applicant unfit to perform the duties of his rate, diagnosing him with chronic pain syndrome post L4-L5 fusion, rated as intervertebral disk syndrome: moderate recurring attacks under Veterans Affairs Schedule for Rating Disabilities (VASRD) codes 5299 and 5293 at a disability of 20%. The CPEB recommended separation from the Coast Guard with severance pay.

g. The Applicant rejected the findings of the CPEB. He filed a rebuttal to the findings and the matter was referred to a Formal Physical Evaluation Board (FPEB). The Applicant was assigned counsel and personally appeared before the FPEB.

h. On November 30, 199x, the FPEB found the Applicant “unfit for continued duty by reason of physical disability” with a disability rating of 20% under VASRD code 5293.

i. On May 31, 200x, Commander, CGPC rescinded his initial approval of the findings of the FPEB, and ordered the FPEB to reconsider the Applicant’s case. In its reconsideration the FPEB found the Applicant unfit for continued duty with a disability rated at 20% (10% under VASRD code 5295 and 10% under VASRD code 8520) and recommended his separation from the Coast Guard with severance pay.

j. The Applicant again filed a rebuttal of the new findings of the FPEB. The matter was again referred to the PRC. On September 26, 200x, the PRC concurred with new findings of the FPEB and certified that the proceedings of the FPEB were technically correct.

k. On October 2, 200x, Commander, CGPC approved the findings and recommendations of the FPEB and directed that the Applicant be discharged for physical disability with severance pay.

l. On October 18, 200x, the Applicant was discharged for physical disability, with severance pay.

m. On October 10, 200x, the Applicant received a disability rating of 90% from the Department of Veterans’ Affairs (DVA). The rating was based on several allegedly service-connected disabilities.

n. Citing the rating decision of the DVA, the Applicant alleges that the findings of the CPEB and the FPEB were “arbitrary and capricious,” and that the Coast Guard denied him adequate due process of law. He also alleges that he was denied affective assistance of counsel.

o. The Board should deny Applicant relief.

2. Analysis:

a. *The Applicant’s rating decision from the Department of Veterans Affairs has no bearing on the Coast Guard’s medical findings.*

(1) The Applicant’s allegation of error on the part of the Coast Guard for its failure to properly rate him is without merit. Except for the rating decision of the DVA, the Applicant provides no evidence that the Coast Guard’s Physical Disability Evaluation System (PDES) committed error in rating his medical condition. The Applicant asserts that the DVA rating decision proves that his condition met every indicia of at least a 40 % disability rating by the Coast Guard, including documentation of persistent pain, constant medication, an inability to stand or sit for long periods of time, and major depressive disorder. He argues that the DVA’s rating decision of 90% for his condition substantiates error with respect to the Coast Guard’s disability rating. The sole basis for a physical disability determination in the Coast Guard was (and is) unfitness to perform duty. COMDTINST M1850.2A, Article 2.C.2.c; 10 U.S.C. § 1201. Any long-term diminution in the Applicant’s earning capacity attributable to his military service is properly a matter for the DVA, not the Coast Guard or the BCMR. The Applicant has failed to prove by a preponderance of the evidence that the Coast Guard’s decision to discharge him with 20% disabled was in error or unjust.

(2) The DVA rating decision submitted by Applicant is not determinative of the issues involved in military disability retirement cases. Lord v. United States, 2 Ct. Cl. 749, 754 (1983), quoted in CGBCMR Dkt. No. 33-96. The DVA determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his rate and specialty because of a physical disability. Id. Any long-term diminution in his earning capacity attributable to his military service is properly a matter for determination by the DVA, not the Coast Guard nor the BCMR. Therefore, Applicant has failed to prove by a preponderance of the evidence that the findings of the PDES were in error or unjust.

(3) The procedures and presumptions applicable to the DVA evaluation process are fundamentally different from, and often more favorable to the veteran, than those applied under the Coast Guard's PDES. The DVA is not limited to the time of the Applicant's discharge. If a service-connected condition later becomes disabling, the DVA may award compensation on that basis. The DVA's subsequent finding that the Applicant was 90% disabled due to a combination of disorders is not binding on the Coast Guard nor indicative of differing or conflicting medical opinions between Coast Guard and DVA medical officials.

(4) Notwithstanding the fact that the Applicant contends that the Coast Guard PDES should have rated his disability at 40% or higher, it should be noted that throughout the PDES procedure the Applicant's command confirmed that the Applicant capably performed all of the duties assigned to him and that he maintained a very positive mental attitude.

b. Applicant was provided effective assistance of assigned counsel.

(1) Applicant alleges that his assigned counsel before the FPEB did not adequately or effectively assist him. As a threshold issue, the Applicant has no constitutional right to effective counsel in an administrative hearing. Boruski v. S.E.C. 340 F.2d 991, 992 (2d Cir.), cert denied, 381 U.S. 943 (1965). Understanding that there is no common law standard of review for an allegation of ineffective assistance of counsel before an administrative proceeding, the BCMR should apply a lesser standard of review than that established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 689 (1984). The Strickland standard applies to a claim of ineffective assistance of counsel in a criminal trial where the 6th Amendment right to counsel has attached, and a defendant may be deprived of life or liberty. Therefore, the BCMR should look to the Strickland standard only for general guidance in reviewing Applicant's allegation in an administrative proceeding.

(2) Strickland stands for the proposition that the Applicant bears the heavy burden of establishing ineffective assistance of counsel. The Applicant's counsel is strongly presumed to have been effective. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. 668, 689 (1984). In Strickland, the U.S. Supreme Court articulated the following standard for evaluating claims of ineffective assistance of counsel in a criminal proceeding: (1) First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment¹⁷. (2) Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Failure to meet both prongs of this test is fatal to Applicant's claim. Strickland, supra, at 687. See also United States v. Gibson, 46 MJ 77, 78 (199x); United States v. Scott, 24 MJ 186 188 (CMA 1987).

¹⁷ As previously cited, the Applicant in this matter has no 6th Amendment right to counsel.

(3) In evaluating the Applicant's claim of ineffective assistance of counsel, the BCMR should examine Applicant's allegations, the government response and the record. United States v. Boone, 42 MJ 308, 313 (1995). Additionally, Strickland allows, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." United States v. Willey, 47 M.J. 158, 160 (199x)(quoting Strickland, 466 U.S. at 697). In this case, the Applicant has not specifically shown how the alleged errors of his counsel prejudiced him to the extent that he was deprived of a fair hearing before the FPEB. Without further evidence, the Board should summarily dismiss the Applicant's claim of ineffective assistance counsel per Willey.

(4) The Applicant bases his claim of ineffective assistance counsel on the allegation of having too little time with his assigned counsel to prepare his case for the FPEB. He states that he met with his counsel for a total of a few hours, seemingly inferring that this limited length of contact did not provide his counsel with sufficient information to represent him. Having the burden to prove this allegation, the Applicant has failed to point to anything in the record to support it. There is no basis to conclude ineffective assistance of counsel based solely on the fact that the Applicant had only a "brief" meeting with his assigned counsel. Strickland supra. An assertion of ineffective counsel based on frequency of interaction alone, with no other supporting or amplifying evidence, is insufficient as a matter of law to prove ineffective assistance of counsel. Therefore the Applicant's allegation of ineffective assistance of counsel based on the length of contact fails the Strickland test.

c. Applicant received the full benefit of his procedural rights including his right to counsel.

(1) The Applicant received the full benefits of the procedural rights provided by the PDES Manual, COMDTINST M1850.2C. Specifically, the Applicant was provided a full fair and impartial hearing to review his medical record and review any additional matters he wished to present to the FPEB. The Applicant was assigned counsel pursuant to PDES Manual, Art.5.A.6.a. The Physical Review Council (PRC) confirmed the findings and recommendations of the FPEB. Therefore, the Coast Guard did not commit any error in administering the Applicant's procedural rights.

d. Applicant has failed to prove by a preponderance of the evidence that the Coast Guard did not follow establish procedures or that Applicant failed to receive the due process owed him.

(1) The Coast Guard properly followed all the procedures as required by the PDES Manual, COMDTINST M1850.2C. The Applicant was afforded a physical examination by a DMB. The DMB referred the matter to the CPEB. The Applicant filed a rebuttal to the findings of the CPEB and the matter was referred to the FPEB. The Applicant then filed a rebuttal to the findings of the FPEB. Subsequently, the matter was returned to the FPEB for reconsideration. The PRC reviewed and confirmed the findings and recommendations of the FPEB.

4. Based on my review of the record, it is my opinion that the Coast Guard did not commit any error or injustice and properly followed its own regulations when it discharged the Applicant with severance pay and a disability rating of 20%.

5. Recommendation: The Coast Guard therefore recommends that the Board deny relief in this case.

Encl: (1) CGPC letter 5420 undated 09 December 2002
(2) Applicant's Service Record
(3) Applicant's Health Record

U.S. Department
of Transportation

United States
Coast Guard



Commander
United States Coast Guard
Personnel Command



5420

MEMORANDUM

From : [REDACTED]
CGPC-c

Reply to [REDACTED]
Attn of: [REDACTED]

To: Commandant
(G-LMJ)

Subj: PROGRAM INPUT ON CGBCMR APPLICATION (XXXXX)

Ref: (a) CGBCMR Application 2002-140

1. Comments on the application contained in reference (a) are attached as enclosure (1).
2. I recommend no relief be granted.

#

Enclosures (1) Comments concerning CGBCMR Application 2002-140
:

Enclosure 1 - CGBCMR 2002-140

RELIEF REQUESTED BY APPLICANT:

1. The applicant requests his 20% disability rating increased to 90 %, and that his separation for physical disability be changed to disability retirement. As an alternative, he requests that a new CPEB be convened to hear his case, excluding the findings of his previous CPEB's and board member's involved in his previous CPEB.

APPLICANT'S STATED BASIS FOR RELIEF:

2. The applicant alleges that he was erroneously assigned a 20 % disability rating by the Coast Guard, as evidenced by the award of a 90% disability rating by the Department of Veteran's Affairs (VA) subsequent to his separation. The Applicant alleges that the evidence in his military record available to the Central Physical Evaluation Board (CPEB) that reviewed his case supports the VA's 90% rating.

MATTERS OF RECORD:

1. The application is timely.
2. May 7, 199x: Applicant enlisted in the U.S. Coast Guard.
3. Commandant Instruction M1850.2(series), Physical Disability Evaluation System (PDES) sets forth policy and procedures for evaluating and processing members with physical disabilities. This manual states that the PDES shall use the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) to assign codes and percentage of disability for an evaluatee found unfit for duty.
4. 38 CFR (VASRD), part 4.71a (5295). This section of the VASRD provides the general rating formula used by the Coast Guard PDES to determine fitness for duty disability percentages for lumbosacral strain.
5. 38 CFR (VASRD), part 4.123 and 4.124a (8520/8620). This section of the VASRD provides the general rating formula used by the Coast Guard PDES to determine fitness for duty disability percentages for incomplete paralysis of the sciatic nerve. It is noted that the maximum rating allowed for incomplete paralysis of the sciatic nerve is 40%.
6. March 2, 199x. Applicant underwent surgery to remove a large heel spur.
7. May, 199x. The Applicant injured his back while lifting a floor buffer at his unit.
8. March 26, 199x. Applicant underwent surgery at National Naval Medical Center, Bethesda, Maryland. A L4 decompressive laminectomy, bilateral L4-5 facetectomy and L4-L5 fusion was performed without complications. Prior to this surgery, the

Applicant's medical record indicates that he was evaluated and treated numerous times for his worsening back pain between June 199x and February 199x.

9. June 11, 199x. NAVMED 6100, Medical Board Report with accompanying narrative. An Initial Medical Board convened by [REDACTED] May 14, 199x diagnosed Applicant with (1) Weak and painful low back, L4 and Bilateral L4-5 fusion, (2) Residual right heel pains following surgical removal of heel spur and (3) rectal A/V malformation – stable. The Applicant's prognosis to return to a fit for full duty status was characterized as poor. The IMB recommended referral of case to the CPEB. The applicant acknowledged the findings on May 24, 199x without rebuttal.
10. June 22, 199x. CO, [REDACTED] ltr 1850. The Applicant's command endorsed and forwarded the IMB report to CPGC-adm-1 (CPEB), concurring with the IMB's recommendation. The letter states that the Applicant was successfully performing the limited duties assigned to him and was maintaining an outstanding attitude.
11. July 6, 199x, Standard Form 88, Report of Medical Examination. The Applicant received a full physical examination in conjunction with the convening of a Disposition Medical Board (DMB), recording his history of surgery and subsequent medical condition.
12. July 29, 199x. CGPC-adm-1 ltr 1850, Disposition Medical Board on SN Xxxx X. Xxxxx. The CPEB advised the Applicant's command that based on the IMB report, a final and fair finding/recommendation based on the available information could not be made by them. The CPEB directed the Applicant's command to convene a disposition medical board in accordance with the PDES manual. This letter appears to be a written follow-up to a verbal communication between the CPEB and the command to convene a DMB.
13. September 30, 199x. NAVMED 6100, Disposition Medical Board Report with accompanying narrative. A Disposition Medical Board convened by [REDACTED] [REDACTED] September, 199x diagnosed Applicant with (1) Chronic Pain syndrome-post laminectomy S/P L4-5 fusion (2) Residual right heel pains following surgical removal of heel spur, (3) rectal A/V malformation – stable and (4) Adjustment disorder with disturbance of mood and conduct. The Applicant's prognosis to return to a fit for full duty status was again characterized as poor. The narrative contains a summary of the additional evaluations conducted by several doctors in conjunction with the DMB. The narrative also noted the Applicant's increasing anxiety concerning his medical condition and the board process. The DMB recommended referral of case to the CPEB. The applicant acknowledged the findings on September 28, 199x without rebuttal (This date is incongruous with the date of the board, September 30, 199x.) We note that per chapter 5 of the Coast Guard Medical Manual, adjustment disorders may be grounds for administrative separation but are not considered a physical disability.
14. September 30, 199x. CO, [REDACTED] ltr 1850. The Applicant's command

endorsed and forwarded the DMB report to CGPC-adm-1 (CPEB), concurring with the DMB's recommendations. The letter states that the Applicant continues to perform his limited duties and maintains a positive outlook, and the command did not observe any unwarranted indications of unusual anxiety or depression.

15. October 28, 199x. CGHQ form 4808, Findings of the CPEB. The CPEB found the Applicant unfit to perform the duties of his rate, diagnosing him with Chronic Pain syndrome, status post L4-5 fusion, rated as intervertebral disk syndrome: moderate, recurring attacks, VASRD codes 5299 and 5293 at 20% disability rating. The CPEB recommended separation with severance pay. Board members were [REDACTED]
[REDACTED]
16. November 1, 199x. CGPC-adm-1 letter 1850. Applicant's command was formally notified of the CPEB's findings. The Applicant was advised that he would have 15 working days to accept or reject the CPEB's findings and request a Formal Physical Evaluation Board (FPEB). The command was also advised that any questions concerning the board process should be directed to CGPC-adm-1.
17. November 12, 199x. Applicant acknowledged receipt of the findings of the CPEB.
18. November 15, 199x. CG-4809. After counseling provided by his CG counsel, the Applicant stated he rejected the CPEB's findings and recommended disposition and demanded a hearing before a FPEB.
19. November 22, 199x. CGPC-adm-1 letter 1850. The Applicant was informed that his FPEB would be conducted on November 30, 199x. The Applicant was advised that he could obtain civilian legal representation at his own expense. He was also advised that lack of preparation on his or his counsel's part would not cause the board to be delayed.
20. November 22, 199x. CGPC-epm message to [REDACTED]. Follow-up message to CGPC-adm-1 letter 1850 of November 22, advising member to report on November 29, for this hearing in Washington, DC.
21. November 26, 199x. CG-3513, Statement of Rights of Evaluatee. The Applicant indicated he wished to appear in person before the FPEB, that CG counsel be appointed for him, and that he would be presenting evidence of his condition at the hearing. He also stated he would require the 3 day delay for the presentation of his case.
22. November 29, 199x. COMDT(G-LMJ) ltr 1850. [REDACTED] USCG was appointed as the Applicant's counsel.
23. November 29, 199. LCDR [REDACTED] ltr 1580 to CGPC-adm-1, with consult evaluation. Applicant's counsel submitted documents for consideration by the FPEB concerning his diagnosed adjustment disorder.

24. November 30, 199x. LCDR [REDACTED] ltr 1580 to CGPC-adm-1, with statements. Applicant's counsel submitted statements from his spouse and commanding officer concerning his medical condition for consideration by the FPEB.
25. November 30, 199x. CG-3511A, Proceeding and recommended findings of the CG Physical Evaluation Board. The FPEB found the Applicant unfit to perform the duties of his rate due to intervertebral disc syndrome: moderate; recurring attacks, VASRD code 5293 with a 20% disability rating. The FPEB recommended that the Applicant be separated with severance pay. The FPEB members were [REDACTED]
[REDACTED]
26. November 30, 199x. The Applicant acknowledged receipt of the recommended findings of the FPEB and indicated he intended to submit a rebuttal and that he did not waive the 15 day waiting period.
27. December 14, 199x. Applicant letter 6150 to CDR [REDACTED], FPEB via CO, [REDACTED]. Applicant submitted a formal intent to file a rebuttal to his FPEB and requested a 60 day extension to submit further documentation for consideration by the Physical Review Council (PRC). The Applicant requested the additional time to obtain additional information about his medical conditions, including "second opinions."
28. December 15, 199x. CO, [REDACTED] endorsement. The Applicant's command favorably endorsed his request for an extension to submit a rebuttal. His command again stated is positive outlook and high level of performance.
29. February 10, 200x. Applicant letter 6150. Applicant submitted his rebuttal to the FPEB. The Applicant requests to be rated at 40% disabled and retired "...for one reason, to obtain a medical retirement from the US Coast Guard which would enable me to move on with my life and to try to adjust with my disability has made on my life." The Applicant bases his rebuttal on several grounds, including that the FPEB's finding that his condition was "moderate" and not "severe." The Applicant complains that he was not given enough time to prepare for the original FPEB and wasn't aware until it was too late that he could obtain second opinions concerning his conditions. The applicant submitted several documents with this letter:
S]
- Narrative report dated January 5, 200x from Dr. [Z], [REDACTED] Medical Center. Dr. [Z]'s characterizes Applicants back condition as "severe," but that his severe pain was essentially resolved. Dr. [REDACTED] stated he expected the Applicant's current pain level to improve, but never disappear entirely.
- Narrative report dated December 23, 199x from Dr. [Y], [REDACTED]
[REDACTED] Dr. [Y] found the Applicant to be suffering from severe limited range of motion of his back due to pain, intermittent radicular symptoms which may or may not be related to his lumbar fusion, and persistent right leg pain.

- Results of MRI performed by the [REDACTED], [REDACTED]. The impression from this MRI indicated presence of considerable post-surgical epidural fibrosis encircling the L5 nerve roots, posterior disc bulge at the L5-S1 level without deformation of the S1 nerve roots, and degenerative changes involving the L4-5 and L5-S1 intervertebral discs.
- Standard Form 502, Narrative Summary, IMB Addendum dated January 30, 200x. This is a narrative prepared by LTJG [X], Physician's Assistant, [REDACTED] Clinic. LTJG [X] summarizes the reports of Drs. [Y and Z] and the MRI report. He concludes that "Dr. [Z] feels that SN Xxxxx [Applicant] has a much more significant condition than previously assigned."
- A study from "[REDACTED]." examining the link between post-operative scarring or fibrosis and recurrent radicular pain.

30. February 11, 200x. CO, [REDACTED] letter 6150. Applicant's command forwarded his rebuttal package to the president of the FPEB. The CO notes Applicant's continued high level of performance of his limited duties and that he remains "remarkably positive."
31. CGHQ-9959, Action of the PRC, COMDT(G-LGL) and the Commandant. On March 3, 200x the PRC concurred with the findings of the FPEB. On March 10, 200x COMDT(G-LGL) certified that the proceedings of the FPEB were technically correct. On March 13, 200x Commander, CGPC, for the Commandant, Approved the findings and recommendations of the FPEB.
32. March 17, 200x. CGPC-epm-1 message to [REDACTED] CPGC notified Applicant that Commander, CGPC approved the findings and recommendations of his FPEB on March 13, 200x and that he was to be discharged no later than April 14, 200x for physical disability, with severance pay.
33. March 23, 200x. CGPC-epm-1 message to [REDACTED] In response to a message from [REDACTED] of March 17, 200x (not included in record), Applicant was advised that his letter of rebuttal of February 10, 200x, with enclosures was considered by the FPEB on March 9, 200x and that his rebuttal did not support a change to their recommendations. However, Applicant was also advised that the Physical Review Council would reconsider his case and make another final decision by April 3, 200x. The Applicant was further advised that the previous findings and recommendations made in his case met the definition of the findings they are allowed to make in determining that he was unfit for continued duty.
34. March 30, 200x. Applicant letter 1040. Applicant requested that his April 14, 200x discharge be delayed and he be retained on active duty until "I have received a fair and full hearing which clearly addresses all of the disability codes that render me unfit for military service."
35. March 30, 200x. CO, [REDACTED] endorsement to Applicant's letter.

Applicant's command favorably endorsed his request to be retained, noting that he could fill communications center watchstanding duties while awaiting a decision.

36. March 31, 200x. Applicant letter 6150. Applicant submitted further documentation for consideration by the PRC and an extensive rebuttal to the FPEB. In summary, The Applicant felt he had not obtained a full and fair hearing in the PDES process because:

- The FPEB did not completely evaluate his disabilities. He asserts that he has at least seven separate disabilities that render him unfit for military service.
- The FPEB assigned the incorrect percentage of disability for the VASRD code they used and disregarded the diagnoses of the medical personnel who evaluated him.
- That the Applicant was represented poorly by CG assigned counsel, who he alleges advised him not to submit certain documents, specifically related to fibrosis/scarring on his vertebrae.
- Applicant asserts that any further consideration and decision on his case should be made by entirely new board members to ensure fairness.

The Applicant also claimed to be submitting new evidence of disabilities that the FPEB did not have when considering his rebuttal.

37. CO, [REDACTED] letter (undated) endorsing Applicant letter of March 31, 200x. Applicant's command forwarded Applicants letter, recommending that his medical condition be reevaluated for possible assignment of additional VASRD codes, and a different PRC review his case.

38. April 4, 200x. COMDT (G-LGL) memo to CDR [REDACTED], Physical Review Council. Comments and opinion concerning Applicant's appeal and rebuttal of March 31, 200x, advising the PRC concerning the Applicant's complaint about his assigned council and the VASRD codes used in his case.

39. May 1, 200x. CO, [REDACTED] letter 6150. Applicant's command submitted documentation as an addendum to the Disposition Medical Board completed September 30, 199x (Matter of Record #14). Enclosure (1) of this letter summarizes the Applicant's current medical conditions:

1. Chronic Pain Syndrome/Intervertebral Disc Syndrome, S/P L4-L5 Fusion/Laminectomy
2. Hypertension with Left Ventricular Hypertrophy
3. Major Depressive Disorder (The psychiatric evaluation provided as an enclosure diagnosed the Applicant with on Axis I: Major Depressive Disorder, Single Episode, Moderate, DNEPTE, #296.22). Per Chapter 5 of the Medical Manual, this condition should be evaluated as disqualifying under the PDES process.
4. Recurrent Headaches
5. Bi-Lateral Heel Pain secondary to heel spurs-Recurrent
6. Plantar Fascitis - Recurrent
7. Rectal A/V Malformation - Stable

8. Lumbar Degenerative Disease at L4-S1, posterior disc bulge at L5-S1, Lumbar Spondylosis
9. Lateral Femoral Cutaneous Nerve Neuropathy
40. May 31, 200x. CGHQ form 9959, Revised action of the Commandant on the findings and recommendations of the Applicant's FPEB held November 30, 199x. Commander, CGPC, for the Commandant rescinded his approval of the FPEB's findings and recommendations and ordered them to reconsider the Applicant's case. Commander, CGPC, had doubts concerning the FPEB's decision to rate the Applicant under a single VASRD code (5293), instead of following published DOD guidelines (DOD Instruction 1332.39), which suggest that in post-operative circumstances it might be more appropriate to rate the evaluatee under both code 5295 and the appropriate 8500 series code or codes, probably including, but not necessarily limited to code 8520. The case was returned to the FPEB for reconsideration with specific direction to follow the DoD's guidelines, and rate the evaluatee under the "split" codes.
41. July 31, 200x. President, FPEB letter 1850. The President of the FPEB (CDR [REDACTED]) advised Commander, CGPC that per his order of May 31, 200x, the Applicant's case had been reconsidered, the their findings and recommendations changes as follows:
 - VASRD Code 5295, rated at 10%, with demonstrable pain on spinal motion associated with positive radiographic findings.
 - VASRD Code 8520, rated at 10%, sciatic nerve paralysis of; incomplete; mild.

These new ratings replaced the original VASRD code 5293 and were not in addition to that original rating. No additional ratings, findings or ratings were made concerning Applicant's other conditions.

This information is also documented on an undated CG-3511A that references this letter.
42. August 4, 200x. Endorsement to FPEB letter 1850 of July 31, 200x. CGPC-adm-1 forwarded a copy of the FPEB's letter to the Applicant.
43. August 30, 200x. Applicant letter to CGPC. Applicant acknowledged receipt of decision of the FPEB and submitted an appeal, requesting the rating under VASRD 5295 be increased to 20% and he be rated up to 10% under VASRD code 5310, Plantar fascitis for right foot.
44. August 31, 200x. CPGC-adm-1 letter 1850. CPGC-adm-1 acknowledged receipt of Applicant's appeal of the FPEB's decision and advised him it would be forwarded to the PRC for review.
45. September 26, 200x. PRC letter 1850 to Commander, CGPC. After a review of the entire case package, including materials submitted by the Applicant for consideration, the PRC ([REDACTED]) concurred the findings and

recommendations of the FPEB as set forth in their letter of July 31, 200x.

46. CGHQ-9959, Action of the PRC, COMDT(G-LGL) and the Commandant. On September 26, 200x the PRC (CAPT [REDACTED]) concurred with the findings of the FPEB (See matter of record 46). On September 27, 200x COMDT(G-LGL) certified that the proceedings of the FPEB were technically correct. On October 2, 200x Commander, CGPC (CAPT [REDACTED]), for the Commandant, approved the revised findings and recommendations of the FPEB, and directed that Applicant be separated for physical disability with severance pay.
47. October 4, 200x. CGPC-epm-1 message to [REDACTED]. Command and Applicant were notified via message of Commander, CGPC approval of the FPEB revised findings and recommendations and directed Applicant to be discharged no later than October 18, 200x.
48. October 18, 200x. Applicant was separated for physical disability, with severance pay.
49. October 10, 200x. The U.S. Department of Veteran's Affairs (VA) awarded the Applicant an overall combined disability rating of 90% , effective October 19, 200x, as follows:
 1. Laminectomy and Fusion with Radiculopathy, L4-5 - 60%
 2. Major Depressive Disorder – 30%
 3. Bilateral Heel Spurs with Plantar Fasciitis – 30%
 4. Hypertension – 10%
 5. Gastro-Esophageal Reflux Disease – 10%
 6. Arterial Venal Malformation of the Rectum with Chronic Bleeding and Diarrhea – 10%

The Applicant was denied 100% disability because it was not shown that he is unable to work as a result of his service-connected disabilities.

50. Section 2.C.3.a.(3)(a) of the PDES Manual, COMDTINST M1850.2(series) states:

2.C.a.(3) Unfit for Continued Duty by Reason of a Physical Disability. If the board finds the evaluatee unfit for continued duty by reason of physical disability, the board shall make the finding "Unfit for Continued Duty." The board shall then make the following findings:

(a) propose ratings for those disabilities which are themselves physically unfitting or which relate to or contribute to the condition(s) that cause the evaluatee to be unfit for continued duty. The board shall not rate an impairment that does not contribute to the condition of unfitness or cause the evaluatee to be unfit for duty along with another condition that is determined to be disqualifying in arriving at the rated degree of incapacity incident to retirement from military service for disability. In making this professional judgment, board members will only rate those disabilities

which make an evaluatee unfit for military service or which contribute to his or her inability to perform military duty. This policy applies to those evaluatees whose initial entry into the PDES occurs subsequent to 9 July 1987. In accordance with the current VASRD, the percentage of disability existing at the time of evaluation, the code number and diagnostic nomenclature for each disability, and the combined percentage of disability will be provided.

51. Section 2.C.2.a of the PDES Manual, COMDTINST M1850.2(series), states:

2.C.2 Fit For Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:

a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service.

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 reasonably be expected to perform in his or her office, grade, rank or rating.

CONCLUSIONS:

1. The Applicant asserts the Coast Guard failed to award the same disability rating that the VA awarded him after his separation. Some of the Applicant's conditions were degenerative in nature – it is not surprising that his condition may have worsened during the time he left the Coast Guard and applied to the VA for benefits, therefore the VA's findings and diagnosis do not necessarily conflict with the findings of the Coast Guard made at the time he was separated. The Coast Guard is not required to change its final disability rating for a member because a condition worsens after separation. In addition, the Military Services and the VA's disability evaluation system are different and serve different purposes. The military services first determine unfitness for duty and then rate only the extent that the unfitting medical condition or conditions prevent the member from performing their duties. Of note is that during the Applicant's board process, his command continued to note his ability to perform his limited duties in an outstanding manner and maintain a positive attitude. The VA ratings are based on an evaluation of the whole person, including the evaluation of the evaluatee's temporary employability status and earning capacity. Accordingly, VA ratings are not determinative of the issues involved in military disability rating determinations. The 90% awarded by the VA includes service-connected impairments that are clearly not part of the applicant's lumbar spine problems for which he was found unfit for continued military service. Without reaching to the aptness of any individual DVA rating, the following table shows the difference between the ratings awarded by the VA and the Coast Guard:

Medical description	VASRD Diagnostic Code & percent assigned by VBA	Found unfitting by Coast Guard PDES?	VASRD Diagnostic Code & percent assigned by USCG
Laminectomy and Fusion with Radiculopathy, L4-5	5293 @ 60%	Yes	5295 @ 10% 8520 @ 10% Combined = 19% Rounded = 20%
Major Depressive Disorder	9434 @ 30%	No	NA
Bilateral Heel Spurs with Plantar Fasciitis	5276 @ 30% (analogous rating)	Note: PDES 2.C.3.a(3)(a) (Not rated by the board because they were not found to be unfitting themselves or contributing to the conditions that caused the Applicant to be unfit for continued duty.)	NA
Hypertension with Left Ventricular Hypertrophy	7101 @ 10%		NA
Gastro-Esophageal Reflux Disease	7346 @ 10%		NA
Arterial Venal Malformation of the Rectum with Chronic Bleeding and Diarrhea	7332 @ 10% (analogous rating)		NA

2. Contrary to the Applicant's assertions that he was denied due process, adequate counsel and that he was denied the opportunity to present any evidence concerning his condition, the record extensively shows that the Applicant was provided his full rights to present his case, including rebuttal, within the PDES process. The record indicates that the findings and recommendations of the FPEB convened to reconsider the Applicant's case were based on a thorough examination and diagnosis of the Applicant's entire record and a reasonable, accurate interpretation of the VASRD.
3. The Applicant's allegations that the actions of the Coast Guard were unjust because the numerous individuals involved in the board process made prejudgments before reconsidering his case is without merit. He offers no evidence of when and how this occurred, but only implies that they were obviously prejudiced because they did not make the decision he sought. To the contrary, the record indicates that Coast Guard authorities went to great lengths to give the Applicant the benefit of the doubt in this matter.

RECOMMENDATION:

1. I recommend that no relief be granted.