

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2002- 147

FINAL DECISION

██████████ Chair:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on July 26, 2002, upon receipt of the applicant's complete application for correction of his military record.

This final decision, dated April 30, 2003, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to correct his record by increasing the permanent disability rating he received from the Coast Guard from 20% to 30% or higher. A 30% disability rating will entitle the applicant to retirement by reason of physical disability.

The applicant enlisted in the Coast Guard on March 16, 198x. He was discharged from the Coast Guard on November 7, 199x with a 20% disability rating due to bilateral knee degenerative arthritis, for which he received severance pay. At the time of his discharge he had 12 years, 7 months, and 22 days of active duty.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant alleged that he should have been discharged with a disability rating of 30% or higher. He asserted that his request for a higher disability rating is supported by his Coast Guard medical records and by the 60% disability rating awarded to him by the Department of Veterans Affairs [DVA] within one year of his discharge from the Coast Guard.

Background

A Medical Board Report (MBR) dated January 11, 198x, indicates that the applicant suffered an injury to his left knee in 1982, prior to entering the service. The MBR also states that the applicant re-injured the knee in August 198x after joining the Coast Guard, for which he underwent surgery in October 198x. On October 4, 198x, a Disposition Medical Board determined that the applicant was fit for continued duty in

the Coast Guard based on a September 198x medical evaluation that found the applicant's left knee absent of any "effusion, crepitus, or laity, with excellent range of motion (ROM)." On January 26, 198x, the Central Physical Evaluation Board (CPEB) agreed with the Medical Board (MB) and found the applicant fit for duty.

The medical record indicates that on January 19, 1994, the applicant reported to a Coast Guard clinic complaining about knee pain with limited ROM, after injuring his left knee playing basketball. He was treated with Naprosyn and placed in a limited duty status, with no prolonged standing or walking for one week.

On August 12, 199x, the applicant was evaluated for left knee pain by a hospital service technician. On December 6, 199x, he reported to the clinic again complaining of knee pain. He stated that he injured his knee while playing football. A doctor evaluated the applicant and found that the applicant's left knee was inflamed due to a trauma, but it tested negative for the Lachman's¹ and McMurray's² tests. The applicant was treated with Naprosyn and a knee support and he was placed sick in quarters 4 days. He was referred to a rheumatologist for evaluation.

On December 6, 199x, the applicant was seen by a rheumatologist who stated that x-rays revealed no evidence of rheumatoid arthritis but some narrowing of the left lateral joint space. The rheumatologist stated that there was "no evidence of synovitis, palmar erythema, or nodules." On December 11, 1996 the applicant was examined and found fit for duty.

On January 10, 199x, the applicant had a follow-up clinical visit and complained of left knee pain. The doctor noted that the applicant had experienced minimal relief of pain with Naprosyn. Additional tests were ordered to rule out Lupus and the applicant was placed on 30 days light duty.

A medical report dated February 7, 199x, indicates that the rheumatologist treated the applicant again on January 30, 199x. At this visit, fluid was removed from the applicant's left knee and it was injected with Depo-medrol. The rheumatologist recommended that the applicant be evaluated by an orthopedist.

On February 2, 199x, the applicant was referred to an orthopedist for an evaluation and he was continued on light duty. The orthopedic evaluation is not in the record. However, the record indicates that the applicant underwent arthroscopic surgery of the left knee on April 23, 1997. His preoperative diagnosis was "ACL

¹ Lachman's is an "anterior drawer test for cases of severe knee injury, performed at 20 degrees of flexion." Doland's Illustrated Medical Dictionary, 29th edition, p. 1807

² McMurray's test is used to determine if the knee has a torn medial meniscus. "The examiner rotates the . . . foot fully outward and the knee is slowly extended; a painful "click" indicates a tear of the medial meniscus of the knee joint." Doland's at p. 1808

[anterior cruciate ligament] insufficiency left knee," "early osteoarthritis left knee," and to "rule-out meniscal tear of the left knee." The operative diagnosis for the applicant's left knee was "ACL insufficiency left knee," "Grade I and II chondromalacia patella³," "Osteoarthritis of tibial femoral joint lateral compartment," "Grade II chondromalacia medial femoral condyle." On June 10, 199x, the applicant's orthopedist recommended the applicant's return to full duty.

The applicant returned to the clinic several times over the next approximately 18 months for physical therapy and with complaints of knee pain. On January 28, 199x, the applicant had x-rays taken of both knees. The radiologic report revealed that the applicant's left knee had degenerative changes with joint space narrowing. It further stated that the right knee appeared normal. A March 18, 199x MRI of the right knee revealed no evidence of a ligament or meniscal tear.

On April 6, 199x, the applicant was the subject of a limited duty medical board. The limited duty medical board report stated that the applicant suffered with bilateral knee pain for several years and that x-rays showed moderated degenerative joint disease of the left knee and mild degenerative joint disease of the right knee. He was placed on limited duty for 8 months with no shipboard duty, no running or deep knee bending, no lifting more than 10 pounds, and minimal ladder climbing.

On April 29, 199x, a rheumatologist evaluated the applicant and reported the following:

[The applicant] has long-standing musculoskeletal complaints, especially in his knees, dating back to sports injuries over ten years ago. He had had two arthroscopic surgeries in his left knee. There is internal mechanical damage and evolving arthritis. He now presents with more generalized aches and pains including symptoms in his wrist, feet and low back. I have had a chance to go over him in detail. He does not have psoriasis, joint swelling, or any other associated symptom.

Physical examination is remarkable for degenerative findings, as noted before, involving his knees. There is also evidence of degenerative arthritis in his mid foot regions, right greater than left. Back examination is normal. There is no synovitis⁴ or any sign on physical examination of any inflammatory form of arthritis.

³ Chondromalacia patella is defined by "pain and crepitus over the anterior aspect of the knee, particularly in flexion, with softening of the cartilage on the articular surface of the patella." Doland's at p. 344.

⁴ Synovitis is inflammation of a membrane that is painful, particularly on motion, and is characterized by a fluctuating swelling due to effusion within a synovial sac. Doland's at p. 1773.

His diagnosis is degenerative and post-traumatic knee disease, degenerative arthritis in several other joints, and nonspecific, largely musculotendinous low back pain. Some of his other pains are out of proportion to objective physical findings, for example in the wrists and hands.

. . . There is no clinical evidence of any surgical problem in his back or in any other joint. There is no evidence of rheumatoid arthritis.

On May 6, 199x, a medical board met and diagnosed that the applicant as suffering from bilateral knee degenerative arthritis, which rendered the applicant unfit for continued duty in the Coast Guard. The Medical Board referred the applicant's case to the Central Physical Disability Evaluation Board (CPEB) for final adjudication, with the following evaluation of the applicant's condition:

Physical examination is within normal limits except as noted below. The patient walks with a slightly antalgic gait, favoring the left side. His knees have full range of motion bilaterally. He has no significant joint line tenderness. He has negative lachman on both knees bilaterally. He has anterior drawers of 6 millimeters with good endpoints and symmetric on both knees bilaterally. He had no quadriceps atrophy. He is stable to varus and valgus stress. He has negative pivot shift test. Distal neurovascular intact.

* * *

X-ray examination shows that he has moderate degenerative arthritis of the left knee especially of the medial compartment and the patellar femoral compartment. He has slightly less evidence of degenerative arthritis of his right knee mainly in the medial joint space.

An MRI scan of his right knee showed that he had no evidence of an anterior cruciate ligament tear or meniscal tears.

On June 15, 199x, the applicant's commanding officer (CO) agreed that the applicant was not fit for full duty. He stated that he did not believe that the applicant would be capable of completing his duties which included: supervision and management of the ship's dining facility as food services officer, training of junior cooks, standing duty as inport officer of the deck or responding to shipboard emergencies. The CO further stated that the applicant would not be able to climb ladders, access restricted spaces, or stand for extended periods of time, which are a necessary to sea duty.

On July 19, 199x, the CPEB found that the applicant was unfit for continued active duty and recommended that the Commandant discharge him with separation

pay. The CPEB determined that the applicant was 20% disabled due to "Arthritis Degenerative: with x-ray evidence of involvement of 2 major joints, both knees" (code 5003 on the Veterans Affairs Schedule for Rating Disabilities (VARSD)).⁵

On September 7, 199x, after consultation with a lawyer, the applicant accepted the findings of the CPEB and waived his right to a formal hearing before the Physical Disability Evaluation Board. On September 16, 1999, the Commandant approved the findings and recommendation of the CPEB and directed the applicant's separation with severance pay. The applicant was separated on November 7, 1999.

DEPARTMENT OF VETERANS AFFAIRS (DVA)

The applicant received a combined 60% disability rating from the DVA. The applicant submitted documents showing that the DVA has granted him a 10% disability rating for each of the following: right knee degenerative arthritis, left knee degenerative arthritis (VASRD code 5300), right knee degenerative arthritis with instability, left knee degenerative arthritis with instability (VASRD code 5257), right wrist tendonitis, and chronic lumbar strain. The DVA examined the applicant's knees on July 19, 2000 and offered the following evaluation:

It . . . was indicated that [the applicant] was wearing a left knee brace. [The applicant] stated that he injured his left knee playing football in 1997, and had arthroscopic surgery and he had a second arthroscopic surgery on his left knee at an [Air Force base] . . . [A]s far as [the applicant's] knees are concerned, the right knee revealed no swelling or deformity. Range of motion showed flexion to 115 degrees and extension zero degrees. There was very slight or mild medial instability of the right knee. The left knee showed no swelling or deformity, but there was moderate medial instability of the left knee. Flexion of the left knee was 112 degrees and extension zero degrees. The examiner diagnosed degenerative arthritis of both knees.

Views of the Coast Guard

The Coast Guard recommended that the applicant's request for relief be denied for lack of proof of error or injustice. The Chief Counsel argued that the applicant has failed to show by a preponderance of the evidence that the Coast Guard committed an error or injustice by rating his disability at 20%. He stated that absent strong evidence to the contrary, it is presumed that Coast Guard officials carried out their duties lawfully,

⁵ The Coast Guard uses the VASRD to make percentage determinations. According to 38 CFR § 4.1., "This rating schedule is primarily a guide in the evaluation of disability resulting from all types of disease and injuries encountered as a result of or incident to military service."

correctly, and in good faith. Arens v. United States, 969 F. 2d 1034, 1037 (D.C. Cir. 1990).

The Chief Counsel stated that the findings of the DVA regarding the applicant's alleged disabilities have no bearing or legal effect on the Coast Guard's medical findings. In this regard, the Chief Counsel stated that the DVA, taking the whole person into consideration, determines to what extent a veteran's civilian earning capacity has been reduced as a result of physical disabilities and provides compensation. In contrast, the Coast Guard determines if a member is unfit to perform his military duties and then rates to what extent the medical condition prevents the member from performing his duties. He further stated as follows:

The procedures and presumptions applicable to the DVA evaluation process are fundamentally different from, and more favorable to the veteran than, those applied under the PDES (Coast Guard's Physical Disability Evaluation System). The DVA is also not limited to the time of Applicant's retirement from the Service. 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 60% disabled isn't binding on the Coast Guard nor indicative of differing or conflicting opinions between Coast Guard and DVA medical officials.

Last, the chief counsel stated that the applicant was afforded all of his due process rights with respect to the processing of his case through the physical disability evaluation system.

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

On December 2, 2002, a copy of the Coast Guard views was mailed to the applicant with an invitation for him to submit a response. He did not submit a response.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.
2. The applicant requested an oral hearing. The Chair, under section 52.31 of title 33, Code of Federal Regulations, recommended disposition on the merits without a hearing. The Board concurred in that recommendation.
3. The applicant has submitted insufficient evidence to show that the Coast Guard committed an error or injustice when it determined that he was 20% disabled

due to degenerative arthritis in both knees. Nor has he shown that he should have received a higher disability rating from the Coast Guard.

4. The applicant did not alleged a specific error or injustice with respect to the CPEB findings or the physical disability evaluation process in his case other than to note the difference between the CPEB's 20% disability rating and the DVA's 60% disability rating. The Board has consistently held that a higher disability rating from the DVA does not alone establish that the Coast Guard committed an error or injustice by assigning a lower disability rating. The Court of Federal Claims has stated "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The Veterans Administration determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. [Citation omitted.] The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. [Citation omitted.] Accordingly, Veterans Administration ratings are not determinative of issues involved in military disability retirement cases." Lord v. United States, 2 Cl. Ct. 749, 754 (1983).

5. Moreover, while the Coast Guard uses the Veterans Affairs Schedule for Rating Disabilities (VASRD), 38 CFR, part 4, the Coast Guard has not adopted all of the DVA's policies with respect to rating disabilities. The Coast Guard's policies on how to rate disabilities are in Chapter 9 of COMDTINST M1850.2C (Physical Disability and Evaluation Manual). Thus, while the DVA rated the applicant's bilateral degenerative arthritis and knee instability separately, the Coast Guard rated them as one disability. Coast Guard regulation states, "when a rating is assigned under a limitation of motion diagnostic code (5200 series), it will not be combined with a rating under diagnostic code 5003 for other joint involvement on the basis of x-ray findings." Regardless of the DVA's examination of the applicant approximately eight months after his discharge on July 19, xxxx, the Medical Board report of May 10, 199x stated that the applicant had full range of motion in both knees and the CPEB made the disability determination based on x-ray evidence. Accordingly, it was appropriate for the Coast Guard to rate the applicant for only degenerative arthritis.

6. In addition, the DVA's higher disability rating included other disabilities that were not considered by the CPEB in its fitness for duty determination, even though medical entries indicate the applicant has complained about his wrist and back while on active duty. The applicant presented no evidence, however, that the right wrist tendonitis or the lumbar strain contributed to his unfitness for continued duty at the time of his discharge from the Coast Guard. According to Chapter 2.C.3.(3) of the COMDTINST M1850.2C, the CPEB will rate only those disabilities that make a member unfit for military service or contribute to his or her inability to perform military duty.

7. More importantly than the above, the Board finds that the applicant, after consultation with a lawyer assigned to counsel him on whether to accept or reject the CPEB's recommendation, signed a statement accepting the CPEB's finding that he was

unfit for continued active duty and should be discharged with severance pay due to physical disability rated at 20% disabling for bilateral degenerative arthritis as evidenced by x-rays. The applicant also waived his right to a formal hearing before the FPEB, where his objection to the CPEB findings could have been addressed prior to his discharge. Absent clear evidence of error or injustice, the Board will not disturb findings rendered by the Coast Guard.

8. The applicant received all due process to which he was entitled under the Physical Disability Evaluation System. Accordingly, the applicant's request for relief should be denied

ORDER

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

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