DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-133

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FINAL DECISION

[redacted]

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 August 25, 2003, upon the BCMR's receipt of the applicant's military and medical records.

This final decision, dated November 17, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant asked the Board to correct his military record to show that he was medically retired from the Coast Guard, instead of being discharged with severance pay due to a 10% disability rating for hepatitis C virus (HCV).

APPLICANT'S ALLEGATIONS

The applicant alleged that he was unjustly removed from the temporary disability retired list (TDRL) and discharged with severance pay when he should have been medically retired from the Coast Guard. He alleged while on the TDRL, Coast Guard doctors told him that he was cured and would never need treatment again. Therefore, he accepted the finding of the Central Physical Evaluation Board (CPEB) that he was only 10% disabled. However, he is again disabled by HCV and undergoing treatment.

The applicant alleged that he injured his back on two occasions while on active duty. Once in 1995, while working on a helicopter, he fell 14 feet onto a concrete floor and was out of work for two months but returned to active duty with the help of physi-

cal therapy. However, shortly after returning to active duty, an aircraft he was in crashed and he incurred severe neck and back injuries, which again required two months of rehabilitation before he regained his flight status. He alleged that he was not given an MRI following either of these incidents.

The applicant stated that during an annual flight physical examination in 1997, he was diagnosed with HCV of genotype 4-A, which is a Caribbean strand. He stated that he probably incurred the disease in 1991 or 1992, when he was involved with Operation Haitian Interdiction Gitmo, Cuba, and encountered thousands of migrants during interdictions and evacuations of overfilled boats. A liver biopsy revealed bridging fibrosis and the beginning states of cirrhosis. He was treated with Interferon. The treatment caused him to lose 30 pounds, turned his hair gray, and gave him migraine headaches. The applicant stated that during this period, he began to have severe neck and back pain and was referred for an MRI, which revealed multiple injuries to his neck.

Because of the side effects of the Interferon, an Air Force doctor put him on an experimental drug called Rebetron (ribavirin), but the side effects increased. His skin toughened up like leather, and the injections became very painful. However, after they discontinued the medication, his blood "levels began to rise again." In addition, the medication left him with a thyroid disorder, no energy, and headaches.

The applicant alleged that, thereafter, he returned to active duty for about a month although his condition had rendered him unable to fly. He was placed on the TDRL with a 30% disability rating for HCV and a 0% rating for his neck injury, even though he wanted to stay on active duty. Within two months of his temporary retirement, the DVA found him to be 40% disabled. He alleged that when the CPEB separated him with only severance pay, he was told that it was his only option and that he would have to get his disability payments from the DVA. The applicant alleged that he again began combination therapy for his HCV in July 2002.

In support of his allegations, the applicant submitted a copy of a DVA medical record dated August 13, 2002, which shows that his active medical problems are HCV and a related mood disorder and adjustment reaction caused by his medical condition. The report indicates that he was 30% disabled by service-connected "residuals of hepatitis" and 10% disabled by a service-connected "spinal disc condition," for a combined rating of 40%. The report also indicates that since his discharge, he has been treated for both neck and back pain and HCV.

The applicant also submitted a copy of a letter from his wife, who stated that because of the applicant's condition, he lost his career in Coast Guard aviation and is now unable to get health insurance. She also alleged that the applicant was told that, if he did not accept the severance pay from the CPEB, he would get nothing at all from

the Coast Guard. She stated that because of his treatment for HCV, he has not been able to work in two years. A letter from the applicant's mother contains similar information.

The applicant also submitted a copy of a letter from M.H., who stated that he himself has been rated as 100% disabled by the Department of Veterans' Affairs because of his HCV.

SUMMARY OF THE APPLICANT'S MEDICAL AND MILITARY RECORDS

On August 29, 1989, the applicant enlisted in the Coast Guard. He became an xxxxxxxxxxxxxxxxx.

On December 6, 1994, the applicant reported to a clinic complaining of back pain. He reported that he had fallen backward off a helicopter check stand onto concrete. He was prescribed Motrin and placed on sick leave. X-rays did not reveal any abnormalities. On January 25, 1995, shortly after his return to active duty, he reinjured his back during a "hard landing" of an aircraft. He was prescribed Naprosyn and referred to physical therapy.

On October 2, 1995, the applicant sought treatment for back pain. He stated that he had suffered a "number of short bouts of pain" since his fall the previous year. He was referred for physical therapy.

On April 28, 1998, the applicant underwent a liver biopsy, which revealed "features of chronic active hepatitis with patchy portal chronic inflammation and mild focal piecemeal necrosis. Spotty parenchymal necrosis is seen as well. The liver tissue shows focally increased periportal fibrosis with few portal areas showing definitive bridging." The applicant's diagnosis was "chronic active hepatitis, mild activity, with occasional bridging fibrosis."[1] The applicant was prescribed a course of Interferon treatment.

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[1] "Chronic active hepatitis" can be mild, moderate, or severe, but it is "recognized to be a progressive disorder that can lead to cirrhosis, liver failure, and death." Braunwald, E., *et al*., eds., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 15th ed. (McGraw-Hill, 2001), p. 1744. "Classification of chronic hepatitis is based upon (1) its *cause*, (2) its histologic activity, or *grade*, and (3) its degree of progression, or *stage*. Thus, neither clinical features alone nor hisologic features—requiring liver biopsy—alone are sufficient to characterize and distinguish among the several categories of chronic hepatitis." *Id.* at 1742. The cause of the applicant's hepatitis is apparently the C virus. "[T]he majority (almost 60%) of patients [with chronic HCV] remain asymptomatic and well compensated, with no clinical sequelae of chronic liver disease. Overall then, chronic hepatitis C tends to be very slowly and insidiously progressive, if at all, in the vast majority of patients, while in approximately a quarter of cases, chronic hepatitis C will progress eventually to end-stage cirrhosis." *Id.* at 1747.

"Grade, a histologic assessment of necroinflammatory activity, is based upon examination of the liver biopsy. An assessment of important histologic features includes the degree of *periportal necrosis* and … so-called *piecemeal necrosis* or *interface hepatitis*); the degree of confluent necrosis that links or forms bridges between vascular structures … referred to as *bridging necrosis*; the degree of hepatocyte degeneration and focal necrosis within the lobule; and the degree of *portal inflammation*. … [The] most popular [of scoring systems] is the numerical histologic activity index [with a maximum score of 22]. Based on the presence and degree of these features of histologic activity, chronic hepatitis can be graded as mild, moderate, or severe." *Id.* at 1743.

"The stage of chronic hepatitis, which reflects the level of progression of the disease, is based on the degree of fibrosis. … Staging is based on the degree of fibrosis as follows: 0 = no fibrosis; 1 = mild fibrosis; 2 = moderate fibrosis; 3 = severe fibrosis, including bridging fibrosis; 4 = cirrhosis." *Id.*

"Perhaps the best prognostic indicator in chronic hepatitis C is liver histology. Patients with mild necrosis and inflammation as well as those with limited fibrosis have an excellent prognosis and limited

On September 10, 1998, a doctor reported that the applicant had been advised to stop Interferon. The doctor reported that the applicant was a "non-responder" to Interferon because there had been no virologic response after approximately 15 weeks of treatment. The doctor noted that the applicant would therefore begin "combination" therapy. He also noted that the applicant had lost 27 pounds as a side effect of the Interferon and that he should begin taking Zoloft because of depressive symptoms.

On September 23, 1998, a gastroenterologist reported that the applicant had had a "partial response to Interferon monotherapy." He stated that since the applicant was "only 28 years old and he already has bridging fibrosis on liver biopsy, I think that we need to be as aggressive as possible in eradicating viremia in his case. Clearly, the addition of ribavirin may be necessary in order to achieve a higher percentage of response. In patients who have previously not responded to Interferon, combination therapy achieves a sustained viral eradication in 15% of patients receiving the combination for six months." The gastroenterologist stated that "[a]fter three months of combination therapy, hepatitis C virus RNA test should be done. If this is negative, he should continue on combination therapy to complete a total of one year." He noted that he had discussed the side effects of the therapy with the applicant.

In October 1998, the applicant began combination therapy with Interferon and Rebetron (ribavirin).

On October 20, 1998, an Initial Medical Board (IMB) reported that the applicant was not fit for duty due to chronic active hepatitis C with bridging fibrosis, which did not exist prior to his enlistment. The IMB report indicates that the applicant was well until March 1998, when liver function tests revealed the HCV. Treatment with injections of Interferon began on April 22, 1998, and he "experienced debilitating side effects (headache, myalgia, and marked decrease in appetite) coupled with absolute neutropenia from the Interferon which limited his ability to work." The IMB report indicates that despite the treatment, "his viral load had not decreased appreciably." Therefore, on October 13, 1998, ribavirin was added to the Interferon injections. Zoloft and Relafen were also prescribed for the applicant's side effects. The IMB reported that the applicant was thus far tolerating the combination of medications and that his "white and red counts have stabilized and the liver function studies remain in the normal range save for a slightly elevated SGOT. … His liver is not enlarged or contracted and is nontender to palpation." The IMB stated that the applicant should continue the combination treatment for six months to see if his viral load would decrease. The IMB stated that the applicant's prognosis is "guarded" and referred him to the CPEB. On Novem-

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progression to cirrhosis. In contrast, among patients with moderate to severe necroinflammatory activity or fibrosis, including septal or bridging fibrosis, progression to cirrhosis is highly likely over the course of 10 to 20 years." *Id.* at 1747.

ber 16, 1998, the applicant indicated that he did not desire to rebut the IMB's findings and recommendation.

On November 5, 1998, a doctor noted that the applicant was suffering "numerous side effects" from the therapy, including arthralgias, myalgias, headaches, and sleep disturbance.

On November 6, 1998, the applicant's commanding officer (CO) forwarded the IMB report to the Coast Guard Personnel Command (CGPC) with a cover letter noting that the applicant had been "sick in quarters" since March 26, 1998, was medically grounded, and was so sick that he could not be used "in any capacity."

On December 3, 1998, a doctor noted that the applicant was suffering "significant side effects," including headaches, myalgia, agitation, and electrical pain down the spine. The applicant was also diagnosed with "Rebetron/[Interferon] induced depression."

On December 10, 1998, an MRI of the applicant's cervical spine revealed "minimal spondylosis" at his C4-5, C5-6, and C6-7 discs that did not result in significant narrowing of the central canal or neural foraminal. In addition, a "left paracentral disc protrusion" was found at C7-T1 without any deformity of the spinal cord or cord signal alteration.

On December 22, 1998, the CPEB found that the applicant was 30% disabled by HCV and unfit to perform the duties of his grade. The CPEB recommended that he be placed on the TDRL.

On January 7, 1999, a doctor noted that the applicant had elected to stop combination treatment because of the side effects, including weight loss, myalgias, arthralgias, pleuritic cough, and fatigue. On January 15, 1999, a doctor noted that a hepatitis C virus RNA test revealed zero virus, which indicated that he was responding to the combination therapy.

On January 20, 1999, a Coast Guard attorney counseled the applicant about the results of the CPEB. The applicant rejected the CPEB's findings and recommendation and demanded a hearing before a Formal Physical Evaluation Board (FPEB).

On January 27, 1999, a doctor noted that the applicant had stopped combination therapy.

On January 28, 1999, a neurologist reported that the applicant had suffered intermittent neck pain, scapular pain, and "sensory symptoms" in his left arm since falling off a helicopter in 1995. The doctor noted that his nerve function was normal, but that

his range of motion was limited and that a cervical MRI showed "small left C6-T1 disc herniation not compressing spinal cord or spinal nerve root." He referred the applicant to a physiatrist and noted that surgery was not indicated.

On February 4, 1999, a doctor wrote the following in the applicant's record: "Hep C—? remission."

On February 5, 1999, the applicant's CO sent CGPC an addendum to the IMB. The CO noted that the applicant was still unable to work. The addendum states that the applicant was treated for three and one-half months with a combination of Rebetron and Interferon but elected to discontinue the therapy due to insomnia, agitation, depression, arthraligias, and myalgias. The addendum also stated that in November 1989, the applicant was evaluated for pain that "radiated from the lower cervical spine into his left medial scapula and down the radial surface of his brachium to the level of the elbow." Examination showed "persistent torticollis (chin pointed to the right)," and a "[c]ervical spine plain film revealed a mild retrolistheses at C6-7 that corrected with extension. The x-ray report cited the torticollis and degenerative changes" at C6-7, and a "cervical MRI demonstrated the small paracentral disc herniation at the C7-T1 level." The addendum noted that a neurosurgeon had recommended a non-surgical approach to treatment and referred the applicant to a physiatrist.

On February 18, 1999, a doctor noted that the applicant's side effects had subsided but that tests indicated that his LFTs had risen since he stopped combination therapy. The doctor stated that the applicant was a "Rebetron non-responder" either because the medication had failed or because the applicant had not taken the full treatment course.

On March 10, 1999, a doctor noted that the applicant would not begin combination therapy again and that there was no other option of therapy to offer him.

On March 16, 1999, the IMB submitted another addendum. It states that on January 28, 1999, a neurosurgeon diagnosed the applicant with "C7-T1 disc herniation not compressing the spinal cord or spinal nerve root" and recommended physical therapy. The addendum also noted that at the applicant's gastroenterologist had determined that the applicant was not responding to the combination Interferon/Rebetron treatment and agreed that it should be discontinued.

On March 31, 1999, the CPEB amended its report to include a finding that the applicant was 0% (zero) disabled by "cervical strain analogous to lumbosacral strain," as well as 30% disabled by HCV. On April 6, 1999, the applicant was counseled on the amended report by a Coast Guard attorney, accepted the findings and conclusions, and waived his right to an FPEB. The report was reviewed by the Chief Counsel on April 15, 1999, and approved on April 21, 1999.

On June 6, 1999, the applicant was temporarily retired on the TDRL after having completed nine years, nine months, and seven days on active duty.

On December 14, 2000, the applicant underwent a periodic (18-month) physical examination to determine whether he should be continued on the TDRL, returned to active duty, or separated. The doctor's report states that the applicant had declined pegylated (PEG) Interferon therapy due to his past experiences with both Interferon and combined treatment. The doctor wrote that the applicant "feels well [but is] complaining of mild neck and lower back pain. The patient has currently started a new business approximately four months ago at an automotive shop … . The patient's appetite is currently okay. He denies any nausea, vomiting, diarrhea or weight loss, and he has had no edema. The patient self discontinued his Levothyroxine approximately two weeks ago as he stated that it made him feel a little more tired than normal. The patient is currently without any other complaints at this time." The doctor noted that the applicant had "chronic hepatitis-C with a histologic response to combination therapy, but the patient is unable to tolerate therapy long term due to side effects" and that he and another doctor had recommended a full year of treatment with pegylated Interferon and Rebetron. However, the applicant "is not agreeable to any therapy because of the severe side effects previously experienced. No other therapy is available for [him] at this time and consideration needs to be given by him to tackle this disease now before the setting of cirrhosis may set in [sic]." The doctor also noted that the applicant had mild hypothyroidism, which "may require long term use of Levothyroxine." The doctor stated that the applicant should "follow-up in January 2001 to discuss treatment again" and should have another liver biopsy within the following six months. There is no evidence in the record of another liver biopsy.

On January 17, 2001, the CPEB found the applicant to be just 10% disabled by "hepatitis infectious: demonstrable liver damage" and recommended that he be separated with severance pay.

On January 31, 2001, a gastroenterologist noted that he had seen the applicant, who had a "history of hepatitis-C virus with Stage III disease by liver biopsy status post treatment with Interferon monotherapy for five months and combination therapy for six months." He noted that the genotype of the HCV was aggressive and that the applicant, though then asymptomatic, had a "low viral load" and was "mildly hypothyroid," which was "likely secondary to his Interferon therapy." The doctor prescribed medication for the applicant's hypothyroidism and noted that he should begin treatment with pegylated Interferon. He stated that the applicant had previously refused to try the pegylated Interferon because it was experimental but had now agreed to try it because the Food and Drug Administration had recently approved it.

On February 9, 2001, a Coast Guard attorney counseled the applicant about the CPEB's report. The applicant signed a form to accept the CPEB's findings and recommended disposition and to waive his right to a hearing before a Formal Physical Evaluation Board (FPEB).

On February 22, 2001, the Chief Counsel found that the CPEB's report was technically correct and supported by the evidence of record. On February 23, 2001, the CPEB's recommendation was approved, and on March 5, 2001, the applicant was removed from the TDRL and honorably discharged with severance pay.

In February 2002, the applicant again sought treatment for HCV. The doctor noted that he had previously been offered treatment but refused it "because of his work situation." In July 2002, the applicant began combination therapy again. He was also prescribed Wellbutrin and Clonazepam for depression.

Notations in the applicant's DVA record indicate that on August 13, 2002, he had a combined disability rating of 40%, including a 30% rating for "residuals of hepatitis" and a 10% rating for his "spinal disc condition."

On October 24, 2002, a doctor noted that the applicant "has genotype 4 hepatitis C with a high viral load, which is a difficult to treat hepatitis with a 40 to 50% chance to respond to a year of combination treatment. He is on a waiting list for pegylated Interferon and in the mean time he has been receiving Regular Interferon three times a week plus Ribavirin daily. His viral load 12 weeks into therapy was still high, making his chances to respond to treatment poor. He has significant side effects from the treatment consisting of fevers, nausea, vomiting, weight loss, muscle aches, transient leucopenia and depression. … He has a firm resolution to complete therapy on the hope for a sustained response even if his chances are limited, as he is young and has a family." The doctor noted that because the applicant's viral load was still high, his "chances" would be low even with pegylated Interferon.

On October 31, 2002, the applicant began taking pegylated Interferon. On January 10, 2003, a doctor noted that the applicant's viral load was still high after 30 weeks of combination therapy and 11 weeks of pegylated therapy. The doctor noted that the applicant wanted to continue treatment even though the chance of success was only "1-2%." In February 2003, the applicant "was discontinued from his treatment" because he was not responding to the therapy. In April 2003, the applicant reported that the side effects of the drugs had diminished and that he was "doing much better."

Notations in the applicant's DVA record indicate that by February 4, 2004, the applicant's DVA combined disability rating had increased to 70%, including a 60% rating for "residuals of hepatitis" and a 20% rating for his "spinal disc condition."

VIEWS OF THE COAST GUARD

On December 30, 2003, the Judge Advocate General (TJAG) of the Coast Guard recommended that the Board deny the applicant the requested relief.

TJAG alleged that in 2001 the applicant "was afforded full due process rights and, with full advice of counsel, agreed with the Coast Guard's rating of his disability." Citing *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), TJAG argued that the fact that the DVA assigned the applicant a 40% combined rating "is not determinative of the same issues involved in military disability cases" because "[t]he DVA determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries," whereas the "Armed Forces … 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." TJAG further argued the following:

> 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 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 finding that the Applicant was 40% disabled is not relevant to the Coast guard's finding that [he] was only 10% disabled at the time of his separation from the Coast Guard. The sole standard for a physical disability determination in the Coast Guard is unfitness to perform duty.

TJAG attached to his advisory opinion and adopted a memorandum on the case prepared by CGPC. CGPC alleged that the applicant "was afforded his full due process rights" and that "not substantive administrative errors were made" in processing him under the PDES. CGPC also alleged that "the medical findings and recommendations of each of the Applicant's CPEBs were based on an appropriate evaluation of his medical condition and fitness for continued active duty." CGPC pointed out that the applicant accepted the findings and recommendation of the final CPEB after receiving "qualified legal advice." CGPC alleged that "[c]ontrary to the Applicant's allegation, at no time was he ever counseled that his condition was 'cured.' In fact, during the Applicant's periodic examination on the TDRL … , it was [his] own characterization that he was doing well. At the same time he was strongly advised that his failure to resume long-term treatment could worsen his condition, but he nevertheless indicated his refusal to do so. Regrettably, since his removal from the TDRL, the Applicant's reluctance to accept available treatment has probably contributed to the worsening of his condition."

CGPC stated that it appears from a letter that the applicant wrote to his congressman on August 6, 2002, that the DVA has assigned him a 40% disability rating. CGPC argued that the DVA's 40% rating reflects the DVA's evaluation of the appli-

cant's current employability, whereas the Coast Guard's 10% rating reflects his fitness for duty at the time of his periodic examination on the TDRL.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 20, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The applicant was granted a 180-day extension and responded on August 6, 2004. The applicant stated that his current DVA disability rating is not 40% but 80%. He stated that at the time of the CPEB, he was very sick with severe side effects and that otherwise he would not have accepted the findings. The applicant stated that he did not respond to Interferon/Rebetron therapy and that the side effects of the medications, from which he continued to suffer, had ruined his life.

In support of his allegations, the applicant submitted copies of the DVA medical records dated February 4, 2004. They indicate that the applicant suffers from a spinal disc condition with neck pain (rated at 20% disabling), "acute or unspecified hepatitis C" (rated at 60% disabling), and both mood and adjustment disorders due to his medical condition. They also indicate that he was then being treated with pegylated Interferon and ribavirin and was suffering the side effects of fatigue, weight loss, headaches, diarrhea, and occasional nausea and vomiting.

APPLICABLE LAW

Under the Department of Veterans' Affairs Schedule for Rating Disabilities (VASRD), infectious hepatitis (code 7345) merits a

- 100% disability rating when the veteran has "marked liver damage manifest by liver function test and marked gastrointestinal symptoms, or with episodes of several weeks duration aggregating three or more a year and accompanied by disabling symptoms requiring rest therapy";
- 60% rating when the veteran has "moderate liver damage and disabling recurrent episodes of gastrointestinal disturbance, fatigue, and mental depression";
- 30% rating when there is "minimal liver damage with associated fatigue, anxiety, and gastrointestinal disturbance of lesser degree and frequency but necessitating dietary restriction or other therapeutic measures";
- 10% rating if there is "demonstrable liver damage with mild gastrointestinal disturbance"; and a
- 0% rating if the member is "healed [and] nonsymptomatic."

Article 3.F. of the Medical Manual (COMDTINST M6000.1B) 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 that "[m]embers 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."

The PDES Manual (COMDTINST M1850.2C) 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. of the PDES Manual 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 duties of his grade or rating.

Chapter 4 of the PDES Manual 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 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.2.a.(1) provides that before recommending that a member be separated or retired, the CPEB must find that the disability "is of a permanent nature and stable." 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 evaluee can be compensated while on the TDRL." 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 evaluee to be unfit for continued duty."

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. If a member waives his right to an FPEB, the CPEB's recommended findings are forwarded to the Chief Counsel's office for a legal review and then to CGPC for final action.

Chapter 8 of the PDES Manual governs the disposition of members who have been temporarily retired on the TDRL. Chapter 8.A.6. provides that a member cannot stay on the TDRL, entitled to temporary disability retired pay, for more than five years. Chapter 8.C. states that members shall be periodically examined while on the TDRL to determine if their conditions have changed. The examining physician's report must be forwarded to the Coast Guard Personnel Command (CGPC) for consideration by the CPEB. Chapter 8.E. provides that after the member's final examination while on the TDRL, a CPEB will consider his case and make recommendations in accordance with Chapter 2.C.3.c. as to his fitness for duty and his degree of disability for each permanent ratable, service-incurred medical condition. Chapter 2.C.3.c. provides that when evaluating a member on the TDRL, the CPEB will continue the member on the TDRL if the member's condition has not stabilized. Otherwise, the procedures prescribed in Chapter 4 must be followed.

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 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The preponderance of the evidence indicates that the Coast Guard committed no errors with respect to the applicant's processing under the PDES. After being placed on the TDRL in June 1999 with a 30% disability rating, the applicant underwent a periodic physical examination approximately eighteen months later, in December 2000. According to the doctor who conducted the examination, the applicant reported that he felt well, complained only of "mild neck and lower back pain," and had recently started his own business. On January 17, 2001, a CPEB reviewed his case and the report of the physical examination and concluded that his condition was sufficiently stable to justify removal from the TDRL and that his permanent disability rating from the Coast Guard should be just 10 percent. On February 9, 2001, the applicant was counseled about the CPEB's findings and recommendation by a Coast Guard attorney and signed a form to accept them and waive his right to a hearing before an FPEB. The record

further indicates that the CPEB's findings and recommendation were reviewed and approved in accordance with regulation. Therefore, the Board concludes that the applicant received all due process provided under the provisions of the PDES Manual.

4. The applicant argued that his Coast Guard attorney erred on February 9, 2001, by advising him to accept the CPEB's findings and recommendation. However, he did not prove that his attorney advised him to accept the CPEB's findings and recommendation or, if the attorney in fact did so, that the advice was necessarily poor. Absent evidence to the contrary, the Board must presume that government officials, including the applicant's attorney, have acted "correctly, lawfully, and in good faith."[2] The applicant failed to support his allegation with a statement from the attorney about the content of his counsel.

5. The applicant alleged that he was misled into waiving his right to an FPEB because his doctors erroneously told him that he was cured and would not need any more treatment. However, except for one notation in the record dated February 4, 1999, in which a doctor suggested that the applicant's HCV might be in remission, the record indicates that the applicant's doctors consistently advised him of the prognosis for his condition and continued to refer him to new therapies that might help his condition. In fact, the doctor who examined the applicant in December 2000, prior to the final CPEB, noted that he had encouraged the applicant to try a new therapy but that the applicant was rejecting the advice. Therefore, the Board finds that the applicant's allegation that he only accepted the 10% disability rating and waived his right to an FPEB on February 9, 2001, because he had been misled by his doctors to believe that his condition was cured and that he would not need new treatment is not credible.

6. The applicant alleged that his initial 40% and current 70% combined disability ratings from the DVA prove that the 10% rating he received from the Coast Guard is erroneous. The fact that the DVA assigned the applicant a higher disability rating does not prove that the Coast Guard's rating was erroneous because the rating systems implemented by the DVA and the Armed Forces use different standards and serve different purposes. The DVA periodically evaluates veterans and increases or decreases their compensation to reflect the extent to which their civilian employment is currently diminished by a service-connected disability, whereas the Armed Forces assign members a permanent disability rating at the time of their separation to reflect the extent to which they are deemed permanently unfit for duty because of a disability incurred during their service.[3]

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[2] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b).

[3] *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983) (citing 38 U.S.C. § 355 (now 38 U.S.C. § 1155) for the purpose of the DVA's system and 10 U.S.C. § 1201 for the purpose of the Armed Forces' system). PDES Manual, Article. 2-C-2.(b); Medical Manual, Article 3.F.1.c.

7. The record indicates that the applicant's HCV is expected slowly to worsen and could result in cirrhosis and liver failure.[4] Under Chapter 2.C.3.c. of the PDES Manual, when evaluating a member on the TDRL, the CPEB is supposed to continue the member on the TDRL if the member's condition has not stabilized. The word "stabilized" is not defined in the manual. However, Chapter 2.C.10.a.(2) provides that the CPEB 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 evaluee can be compensated while on the TDRL." Therefore and in light of the slow progression of most HCV cases and the fact that the applicant was refusing medical treatment, the Board finds that the CPEB did not err in finding that he could be removed from the TDRL and that his condition had stabilized sufficiently for the purpose of assigning him a permanent disability rating.

8. The record also indicates that the CPEB assigned the applicant a 10% rating in 2000 after having placed him on the TDRL with a 30% rating in 1999. As there is no indication that the condition of the applicant's liver had actually improved and the condition of most HCV patients' livers worsens over time, this decrease in disability rating seems anomalous. However, members may not be placed on the TDRL with less than a 30% rating. If in 1999 the CPEB thought that the applicant should be placed on the TDRL because his condition might change significantly within five years, it could not assign him a lower rating than 30%. Therefore, that rating does not necessarily reflect the degree to which the CPEB deemed the applicant to be permanently disabled in 1999. Accordingly, the Board finds that the 30% temporary rating in 1999 does not prove that the 10% rating in 2001 was erroneous.

9. Although the applicant has not proved that the Coast Guard erred in processing his case under the PDES or in providing him legal or medical advice, the Board is also authorized to remedy injustices in military records and must consider whether his 10% disability rating and discharge with separation pay, in lieu of a medical retirement, "shocks the sense of justice."[5] The record indicates that the applicant has a form of HCV that has not sustained a response to any of the known treatments (Interferon, Interferon combined with Rebetron, and PEG) and that may progress slowly to cirrhosis of the liver and liver failure, which would require a transplant to prevent death. Therefore, the Board must consider whether—despite the applicant's voluntary acceptance of the 10% rating on February 9, 2001—his separation with severance pay on

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[4] Braunwald, E., *et al*., eds., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 15th ed. (McGraw-Hill, 2001), pp. 1744, 1747.

[5] *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (holding that "injustice" as used in 10 U.S.C. § 1552(a) is treatment by military authorities that shocks the sense of justice but is not technically illegal).

March 5, 2001, constitutes treatment by military authorities that shocks the sense of justice.

10. The record indicates that up until 1998, the applicant's HCV was asymptomatic and was only revealed by blood tests and liver biopsy. However, whenever he is in treatment, the side effects of the medicines render him quite ill. At the time of the CPEB in January 2001, the applicant had started a new business and was feeling well again (except for mild back aches) because he had not accepted treatment for his HCV in almost two years. His doctors were urging him to renew treatment, however, because his liver condition was believed to be deteriorating. The record also indicates that the Coast Guard did not conduct another liver biopsy to determine the exact progress of the applicant's disease prior to the CPEB's determination on January 17, 2001. The applicant knew all of this and yet still accepted the 10% disability rating offered by the CPEB. As a result, the applicant currently receives all of his disability payments from the DVA instead of receiving part of them from the Coast Guard and part from the DVA, as would be the case if he had been medically retired from the Coast Guard.

11. The two compensation schemes provided for by Congress under the DVA and the Armed Forces are not identical. (For example, compensation from the DVA is tax exempt.) For various reasons, some veterans prefer to receive compensation from one source over the other. Although the applicant did not contest the CPEB's findings and recommendation in February 2001, he apparently now believes that he would benefit if he were entitled to receive some of his disability compensation from the Coast Guard, instead of from the DVA. The circumstances of the applicant's status in January 2001, as described in finding 10 above, and the applicant's belief that he would be better off with a medical retirement from the Coast Guard do not persuade the Board that the Coast Guard committed an injustice in discharging him with a 10% disability rating and severance pay or that his receipt of disability benefits from the DVA rather than the Coast Guard constitutes a significant injustice in his record.

12. Accordingly, the applicant's request for correction should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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