

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-126

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 upon receipt of the applicant's completed application on March 11, 2010, and the Chair subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 30, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by increasing his disability rating from 30% to 100%. The applicant retired from the Coast Guard on April 30, 2007, by reason of physical disability due to general anxiety disorder.

ALLEGATIONS

The applicant alleged that the 30% disability rating is unjust. He stated that he intended to appeal the 30% rating assigned to him by the Informal Physical Evaluation Board (IPEB) ¹ until his physical evaluation board (PEB) attorney advised him that he could possibly receive less than 30% by going before the Formal Physical Evaluation Board (FPEB). He stated that with the attorney's failure to return his phone calls and with the date approaching for the FPEB hearing, "I capitulated to the 30% and regretfully agreed to medically retire." He stated that it appeared to him that his attorney was overwhelmed with her case load and was not able to review his file for weeks and that her advice that he should accept the 30% rating "was a low key perceived threat to forego the FPEB or face the possibility of a further loss of benefit."

¹ An IPEB is a standing administrative board that evaluates medical evaluation board reports. Chapter 2.A.25. of the PDES Manual.

The applicant stated that he sustained a head injury when he was hit with a 20-pound sledge hammer on March 13, 2001, that shattered several bones in his face and his teeth. He underwent surgery and after recovery he completed officer candidate school (OCS) and continued with his duty assignments. He stated that he did not receive any medical follow-up for the facial injuries. The applicant stated that several years after the head injury, he underwent surgery to remove a tumor from his esophagus, which he attributed to the stress and side-effects of the facial injury. After recovering from this surgery, he reported to a new duty station, where a corpsman noted that the applicant should have had follow-up treatment for the head injury. The applicant stated that by this time he was having critical memory retention problems and difficulty multi-tasking. He stated that he underwent a battery of tests, including neurological, psychological, sleep disorder, hearing, dental, and sinusitis testing. He stated that he was found to be non-deployable and was offered the opportunity to retire with a 30% disability rating, which he accepted, but now believes to be unjust because the injury terminated his career. The applicant concluded his statement with the following:

If it would be possible for you to intervene and recommend a disability of 100% at least I would have a financial chance to start a new career and support my family with other educational benefits and can still become a contributing member of the community. I will certainly be trying for civil service position and a higher compensation rating would help financial support for me and my family.

BACKGROUND

On March 13, [REDACTED] the applicant was hit in the head [REDACTED] that required some reconstructive surgery to his face.

On April 21, [REDACTED] the applicant was referred to a psychiatrist for evaluation and treatment because he was experiencing flashbacks associated with the injury.

On April 26, [REDACTED], the applicant was referred for a sleep evaluation because of insomnia. The examiner stated that he believed the applicant had an anxiety disorder "variant of PTSD" that caused the insomnia. A further sleep study was ruled out because an earlier one did not reveal the applicant had significant sleep disordered breathing. The applicant was treated with Zoloft and Lunesta.

On May 13, [REDACTED] the applicant was evaluated by a psychiatrist. His chief complaints at that time were increased anxiety, low energy, and poor concentration. On mental examination, the applicant was alert, oriented, fairly well groomed, cooperative, euthymic, and anxious. He exhibited good eye contact, normal speech, and good judgment. The psychiatrist stated that his impressions were that the applicant suffered from general anxiety disorder, history of head injury, and mental and social stress. The psychiatrist took the applicant off of Zoloft and started him on Cymbalta.

On October 4, [REDACTED] the applicant underwent a fitness for duty evaluation because of the various medications that he had taken or was taking. The medical report stated that the applicant complained that he [REDACTED] while enlisted. I was hit in the face,

had a lot of facial trauma and afterwards: I couldn't fall asleep; I have trouble with concentration and now I have problems with motivation." The physician reported that on mental examination, the applicant had no evidence of delusions or ideas of references and that his thought processes were logical and goal-directed. The physician noted no evidence of looseness of association, flight of ideas, paranoia or grandiosity. The physician further stated:

Cognitively, the [applicant] was alert and oriented x 5. His ability to recall recent and remote information was judged to be grossly intact. The [applicant] functioned as an excellent historian, giving biographical and medical information, which was corroborated by the patient's medical record which was available for the examiner to review. Medical records from Dr. [FF²] were, however, not available for the examiner to review.

[The applicant's] ability to attend and concentrate throughout the interview was judged to be grossly intact. His current level of functioning has been stabilized on his present medication regime. A specific inquiry into the signs and symptoms of depression, anxiety and PTSD were positive for such symptoms as flashbacks, nightmares, hyperarousal and dissociative symptoms.

The applicant's fitness for duty examination resulted in the following diagnoses: "Depressive disorder secondary to traumatic brain injury, anxiety disorder secondary to traumatic brain injury, rule/out PTSD, sleep disorder secondary to traumatic brain injury, and rule/out cognitive disorder, not otherwise specified secondary to traumatic brain injury." The examiner found the conditions minimally impacted the applicant's fitness for military service and that they had a mild impact on his civilian social, industrial adaptability. Among other recommendations, the examiner stated that there "are no contraindications to deployment of this Coast Guard personnel at this time. He has been stable on his present medication regimen for four months."

On January 11, 2007, the applicant was evaluated by an initial medical board (IMB) because he was diagnosed with cognitive deficit not otherwise specified (NOS) and history of closed head injury as of March 2001. The medical board reported the following in pertinent part:

[The applicant] states that since the time of his head injury, he has experienced difficulty with multitasking, short term memory, concentration, sleep initiation and bilateral tinnitus. Due to these symptoms, member has undergone several evaluations and treatments. On [REDACTED] [the applicant] underwent sleep study . . . which resulted in a diagnosis of obstructive sleep apnea (OSA). However, trial of CPAP was never accomplished. Additionally, member received psychiatric evaluation by Dr. [F] and diagnosed with generalized anxiety disorder. He was tried on numerous medications to include Lexapro, Zoloft, Cymbalta, Lunesta, Trazodone, Atarax, and Restoril without success. Seroquel ultimately did assist with sleep initiation and has been continued to this day. Finally, psychiatric fitness for duty evaluation was performed on [REDACTED] AFB . . . Recommendations at that time included completion of OSA evaluation,

² Dr. FF is a psychiatrist who had treated the applicant earlier.

behavioral health therapy, and neuropsychological testing. Unfortunately, these suggestions were not acted upon and member PCS'd [transferred on permanent change of station orders], reporting for duty as operations officer aboard ██████████ in ██████████

Once on board ██████████, [the applicant] experienced difficulty learning his new job and confided in his XO that he was having problems with short term memory, multitasking, and concentration. Furthermore, ██████████'s corpsman discovered the aforementioned medical issues on chart review. [The applicant] was therefore placed on shore duty pending further evaluation.

Beginning on ██████████ member began neuropsychological evaluation . . . which resulted in several significant findings. First, the presence of anxiety with mild depressive symptoms . . . was confirmed. Secondly, member was noted to demonstrate low to borderline function in multiple areas involving short term memory. Dr. [F] also opined that these memory findings were not consistent with the head trauma experienced in ██████████. However, the neuropsychologist felt that the disparity between verbal and performance IQ scores might be indicative of a lowered function. Of note, concentration and ability to multitask appeared intact. Finally, although PTSD has been considered on several occasions, diagnosis was not confirmed by neuropsychologist or by any other recent mental health consultant.

Neurology consultation was obtained 11 Jan 2007 with CDR [A] at ██████████ Naval Health Clinic . . . Dr. [A] concurs with findings and disposition that member is not fit for sea duty. However, he disagrees with neuropsychologist's opinion regarding correlation of head injury to [the applicant's] cognitive defect since these problems "temporarily" related to the time of the accident.

MRI brain completed 03 Jan 2007 revealed incidental finding of a periventricular venous angioma but was otherwise normal.

It is the opinion of this examiner the diagnosis of

1. Cognitive Disorder NOS . . . is correct.
2. Post concussion syndrome with h/o left tripod fractures s/p ORIF is correct.
3. Anxiety disorder . . . with mild depressive symptoms is correct.
4. Obstructive sleep apnea is correct.

This case presents several challenges. First, neuropsychology and neurology opinions conflict on correlation of head injury to cognitive deficit. However, I tend to agree with ██████████ since these issues clearly surfaced by history following this head trauma and therefore have made the determination DNEPTE [did not exist prior to enlistment]. Additionally, member's anxiety disorder has negatively impacted scenario and has been recalcitrant to multiple medications. Finally treatment of OSA may provide some relief but overall impact will most

likely be minimal at best. Therefore, MEB is submitted without results of repeat sleep study with trial of CPAP. In the meantime, this member has clearly not been able to fulfill the requirements of his current billet and given evaluations prior to PCS, his fitness for duty has been in question for quite some time. Subsequently, I believe [the applicant's] prognosis for continued military service is poor.

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It is correct that member is not fit for full duty. His condition is not compatible with sea duty or worldwide qualification.

On January 24, 2007, the applicant's commanding officer (CO) stated that he concurred with the findings of the medical board. In this regard, he stated that the applicant's condition is a direct result of injuries incurred in the line of duty in 2001 and that the member's injuries created a medical situation that disqualifies the applicant for retention in the Coast Guard and he recommended that the member receive a 100% disability rating.

On January 26, 2007, the applicant signed a statement regarding the finding of the medical board where he acknowledged the diagnoses, the recommendation that he did not satisfy medical retention standards and referral to Commander, Personnel Command, and the recommendation for an indefinite period of limited duty with no sea duty. The applicant also acknowledged that the medical board's opinions and recommendations were not binding on the Coast Guard and that his case was subject to further review and final disposition by higher authority. He also indicated by his signature that he did not desire to submit a statement in rebuttal to the medical board.

On February 5, 2007, the Informal Physical Evaluation Board (IPEB) considered the applicant's case. The IPEB's diagnosis was "generalized anxiety disorder: occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily with routine behavior, self-care and conversational normal) due to such symptoms as: depressed mood, chronic sleep impairment, and mild memory loss (such as forgetting names, directions, recent events)." The IPEB rated the applicant's condition as 30% disabling and recommended that he be permanently retired from the Coast Guard. The IPEB provided an amplifying statement that read in part as follows:

By a preponderance of the evidence the [IPEB] finds as follows: a. [The applicant] is unfit for continued duty by reason of physical disability. b. The unfitting condition is Generalized Anxiety (Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)) diagnostic code: 9400) rated as 30%. [The applicant's] record supports the fact that his condition makes it impossible for him to complete the tasks normally assigned to a junior officer. He is therefore unfit for continued military service. Although there is some evidence that the condition is a result of the head injury that occurred in 2001, the preponderance of the evidence both from his medical record and work

record/history supports the fact that the two are not related. The [IPEB] recommends that he should be permanently retired at a disability rating of 30%.

On February 12, 2007, CGPC informed the applicant by letter of the IPEB's findings and advised him to consult legal counsel before deciding whether to accept or reject the findings of the IPEB. The applicant was advised that he could elect Coast Guard counsel at no cost to him or he could elect civilian counsel of his choice at his own expense. On the same date, the applicant elected to consult with and be represented by assigned counsel at no cost to him.

On March 22, 2007, the applicant by his signature accepted the IPEB findings and recommended disposition and waived his right to a formal hearing.

On April 30, 2007, the applicant was honorably retired from the Coast Guard by reason of physical disability with a 30% disability rating.

VIEWS OF THE COAST GUARD

On June 18, 2010 the Board received an advisory opinion from the Judge Advocate General (JAG) of the Coast Guard. He adopted the facts and analysis provided by the Commander, Personnel Service Center (PSC), and recommended that the applicant's request for relief be denied.

PSC stated that the Coast Guard rated the applicant appropriately based on the law at the time of his PDES evaluation. PSC discussed the Veterans Administration Schedule for Rating Disabilities (VASRD) code 8045 (brain disease due to trauma) rather than discussing the IPEB's finding of unfitness due to generalized anxiety disorder. PSC also noted that the applicant, with the advice of assigned counsel, accepted the findings and recommendation of the IPEB and waived his right to a formal hearing before the Formal Physical Evaluation Board (FPEB).

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On June 22, 2007, the Board sent the applicant a copy of the views of the Coast Guard, but it was returned to the Board marked "wrong address." The staff sought and found a new address for the applicant and re-sent the advisory opinion to him on September 24, 2010. The Board did not receive a reply from the applicant to the advisory opinion.

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.”

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. Although a medical board diagnosed the applicant with several conditions, the IPEB found only generalized anxiety disorder to be unfitting for retention. Under Chapter 2.C.3.a.(3)(a) of the PDES Manual, a physical evaluation board rates only “those disabilities which make an evaluatee unfit for military service or which contributes to his or her inability to perform military duty.” The applicant did not argue in his application that the other conditions listed by the medical board were unfitting for service and therefore, they are not addressed in the findings and conclusion of this decision.

3. The applicant requested a correction of his record to show that he was retired due to physical disability with a 100% disability rating instead of the 30% rating he actually received. However, the applicant has submitted insufficient evidence to prove that the Coast Guard committed an error by retiring him with a 30% disability rating for generalized anxiety disorder instead of a 100% rating.

4. Article 9.B.2. of the Physical Disability Evaluation System (PDES) Manual instructs participants in the PDES to use great care in selecting a member's VASRD code number and in its citation on the rating sheet. There is nothing in the record that indicates such care was not exercised by the IPEB. Under code 9400 of the VASRD, indicators for a 30% rating are described as follows.

Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self care, and conversation normal), due to such symptoms as depressed mood, anxiety, suspiciousness, panic attacks (weekly or less), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

The majority, if not all, of the applicant's medical evaluation reports noted that the applicant experienced chronic sleep problems and short-term memory and concentration problems. These symptoms fit the description for a 30% disability rating under the VASRD code 9400.

5. For a 50% rating for generalized anxiety disorder, an evaluatee's symptoms must meet the following description:

Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short and long-term memory (e.g. retention of only highly learned material, forgetting to complete tasks); impaired judgment, impaired abstract thinking, disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.

There is nothing in any of the applicant's medical reports that supports finding that the applicant's symptoms matched those for a 50% rating. His symptoms were insomnia, inability to concentrate, short term memory problems, and lack of motivation. Therefore, the applicant has failed to prove that the Coast Guard committed an error by rating his disability as 30% disabling.

6. Chapter 2.C.2.a. of the PDES Manual provides that the "sole standard" to be used 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." It further provides that 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. While the applicant's CO recommended a 100% disability rating, he failed to explain the applicant's duties and how his disability impacted his ability to perform those duties. The purpose of the IPEB is to determine whether a disability is unfitting for continued service and, if so, how much that disability interferes with a member's ability to perform the duties of his grade or office. The applicant did not offer an argument in this regard.

7. Just as importantly, the Board finds that the applicant, after consultation with his Coast Guard assigned counsel accepted the IPEB's findings and waived his right to an FPEB hearing where he could have challenged the 30% disability rating. The applicant has submitted no evidence, except for his own allegation, that he was not accurately counseled by his lawyer.

8. The applicant received all due process to which he was entitled under the Physical Disability Evaluation System and has failed to prove that the Coast Guard committed an error or injustice in his case.

9. Accordingly, the applicant's request for relief should be denied.

ORDER

The application of XXXXXXXXXXXX, USCG (Ret.), for correction of his military record is denied.

