

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-057

**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 Chair docketed the application upon receipt of the applicant's completed application on January 11, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated September 7, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

On February 19, 2002, the applicant was discharged by reason of physical disability due to "extensive degenerative arthritis, right knee [and] mild to moderate arthritis, left knee," with a combined 10% disability rating. He asked the Board to correct his record to show that the following conditions also caused or contributed to his unfitness to perform the duties of his rate and or grade at the time of his separation: sleep apnea, minor degenerative changes of the lumbar spine with narrowing of the L4-5 disk space, carpal tunnel syndrome of the right hand, and carpal syndrome of the left hand.¹ He was discharged because of his bilateral knee disability with separation pay.

On April 9, 2002, the applicant filed a claim with the Department of Veterans' Affairs (DVA). On April 23, 2003, the DVA granted him a combined 70% disability rating for bilateral degenerative arthritis of the knee, sleep apnea, degenerative changes of the lumbar spine, and bilateral carpal tunnel syndrome. On August 28, 2003, the applicant filed a DVA claim for an increased disability rating. On June 10, 2004, the DVA granted the applicant a 100% disability rating because the applicant was unable to secure or to follow "a substantially gainful occupation" as a result of his service-connected disabilities. The applicant alleged that his DVA

¹ The Physical Disability Evaluation System found and rated the applicant's bilateral knee condition as being unfitting for continued service.

diagnosed disabling conditions were present at the time of his discharge from the Coast Guard and they affected his ability to do his job as an electrician's mate.

Prior to filing an application with the BCMR, the applicant filed an application with the Physical Disability Board of Review (PDBR) under 10 U.S.C. 1554(a) and Department of Defense Instruction 6040.44 (2009)² seeking an increase in the Coast Guard's combined 10% disability rating based upon the DVA's disability rating determinations.

On March 19, 2010, the PDBR increased the applicant's disability rating for his bilateral knee arthritis to 20%. However, the PDBR did not have jurisdiction with regard to the applicant's other alleged disabilities because none were mentioned in the Physical Disability Evaluation System (PDES) processing prior to his discharge.³ The PDBR told the applicant that he retained the right to file an application with the Coast Guard BCMR asking to correct his record to show that he was unfit to perform the duties of his rate due to the other disabilities that were diagnosed by the DVA.

BACKGROUND

Coast Guard Physical Disability Evaluation System (PDES) Processing

On October 12, 2001, a Medical Board⁴ was convened to evaluate the applicant's bilateral knee condition. The Medical Board Narrative Summary stated that the applicant suffered from "bilateral knee pain secondary to advanced degenerative arthritis, left knee, [and] mild degenerative arthritis, right knee." The report offered the following final diagnosis and recommendations:

[The applicant] has rather extensive degenerative arthritis involving the right knee and the beginnings of some mild to moderate arthritis involving the left knee. With the patient's relatively young age, there are not any good surgical options to offer him at this point with regards to the right knee. With regards to the left knee, it is possible that he could go under arthroscopy with assessment of both meniscal and chondral surfaces and possibly improve his symptomatology. Unfortunately, his right knee is going to continue to be quite limiting for him, and he needs to be placed on permanent restrictions due to the severity of his arthritis.

² According to DoD Instruction 6040.44, the purpose of the PDBR is to reassess the accuracy and fairness of the combined disability ratings assigned to service members who were discharged as unfit for continued military service by the military departments with a combined disability rating of 20 percent or less and were not found to be eligible for retirement.

³ The PDES is a Coast Guard structure composed of administrative boards and reviewing and approving authorities whose common purpose is evaluating members for their physical ability to continue the required performance of their duties and the equitable application of the laws relating to separation or retirement of members because of physical disability. Article 2-A-39 of the PDES Manual (1996)

⁴ A medical board is a clinical body comprised of 2 or more medical officers who evaluate an individual's condition in light of the requirements of military duty and provide a written professional opinion concerning the evaluatee's physical and mental qualifications in relation to military service and makes certain recommendations regarding the evaluatee. The first such report in each evaluatee's case is an IMB (initial medical board) and all subsequent reports are DMBs (disposition medical boards). Article 2-A-29 of the PDES Manual.

These restrictions include no running, no jumping, no crawling, no kneeling, no climbing, no repetitive lifting greater than 30 lbs.

The Medical Board referred the applicant's case to the Central Physical Evaluation Board (CPEB)⁵ for adjudication with his commanding officer's (CO's) endorsement to the Medical Board. The CO recommended that the applicant be separated from the Coast Guard by reason of physical disability. The CO wrote that the applicant was limited in the performance of the normal duties of his grade/rate due to extensive degenerative arthritis of the right knee and mild to moderate arthritis in the left knee. The CO noted his poor prognosis and that he would be permanently restricted in his jumping, crawling, kneeling, and climbing and in lifting of no greater than 30 pounds. He concurred with the Medical Board that the applicant could not perform the duties normally assigned to his grade and rate.

On December 12, 2001, the Central Physical Evaluation Board (CPEB) diagnosed the applicant as suffering from bilateral degenerative arthritis with a combined 11% disability rating rounded down to 10%. The CPEB recommended the applicant's separation from the Coast Guard with severance pay.

On January 7, 2002, the applicant accepted the tentative CPEB findings and recommendations and waived his right to a formal hearing. On January 26, 2002, the Chief Counsel of the Coast Guard found the CPEB proceeding to be in acceptable form and supported by substantial evidence of record.

On January 30, 2002, the Chief of the Administrative Division, Coast Guard Personnel Command approved the CPEB's findings and recommendations and directed that the applicant be separated from the Coast Guard with severance pay.

Department of Veterans' Affairs (DVA) Rating Decisions

The applicant submitted a copy of the DVA rating decision of April 21, 2003, granting him disability ratings retroactive to February 19, 2002. In addition to the 10% disability rating for degenerative joint disease in each knee, the DVA determined that the applicant suffered from service-connected sleep apnea, degenerative changes of the lumbar spine, and carpal tunnel syndrome in both hands.⁶

The DVA gave the applicant a 50% disability rating for sleep apnea because he was prescribed a nasal continuous positive airway pressure (CPAP) machine. The DVA determined that the applicant was diagnosed with sleep apnea by polysomnogram on October 28, 2001.

The DVA assigned the applicant a 10% disability rating for minor degenerative changes to the lumbar spine with some narrowing of the L4-5 disk space based on their July 15, 2002

⁵ The CPEB is a permanently established administrative body convened to evaluate the physical fitness of active duty and reserve members to perform their assigned duties based upon the record.

⁶ The DVA stated that the applicant's Coast Guard medical record shows that he received treatment for sleep apnea and pain in his finger while on active duty. The medical record the Board received from the DVA does not contain entries from the applicant's Coast Guard medical record.

examination. The DVA examination showed the applicant's range of motion limited to 70 degrees flexion (normal flexion is 95 degrees), 20 degrees extension (normal extension is 35 degrees), 30 degrees lateral flexion bilaterally (normal lateral flexion is 40 degrees), and 20 degrees rotation bilaterally (normal rotation is 35 degrees). The DVA stated the applicant experienced pain on all ranges of motion.

The DVA assigned the applicant a 10% disability rating for carpal tunnel syndrome of the right hand with moderate degenerative changes. The DVA rating decision stated that the applicant's Coast Guard medical record showed that he was treated in March and April 1995 for injuries to the fourth finger of his right hand. The rating decision stated that the DVA examination revealed no muscle atrophy and that the hand had full muscle strength. It also noted that there was no swelling and that range of motion was intact. The DVA rating decision also stated the following:

You had positive Tinel's and Phalen's test. You had decreased sensation to pinprick in the right 4th and 5th fingers. An electromyograph performed in connection with your VA examination showed that there was evidence of mild carpal tunnel syndrome involving only the motor branch of the right and left medial nerve. X-rays in July 2002 showed moderate degenerative changes of the right 4th and 5th distal interphalangeal joints.

The DVA assigned the applicant a 10% disability rating for carpal tunnel syndrome of the left hand for similar findings as those of the right hand discussed above. The applicant's combined disability rating from the DVA was 70%.

On June 10, 2004, the DVA increased the applicant ratings for degenerative changes to the lumbar spine to 40%, degenerative joint disease of the left knee to 20% and degenerative changes to the right knee to 20%, for a combined disability rating of 90%. The DVA rating decision also stated that the applicant was entitled to individual unemployability as of February 20, 2002 because the applicant was unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. The rating decision noted that the applicant had not been employed since he left the service, that he had been on Percocet for low back pain, and he had requested a walker because he was falling frequently due to his bilateral knee condition. The applicant's wife indicated to the DVA that the applicant was taking morphine and Percocet and could not obtain full or part time employment due to the adverse side effects of the medication.

VIEWS OF THE COAST GUARD

On May 3, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC). In recommending denial of the applicant's application, PSC reached the following conclusions:

The applicant received a full and fair hearing in accordance with law and COMDTINST M1850.2 (series) [PDES Manual]. The applicant reviewed the diagnoses referred by the Medical Board to the [CPEB] and chose not to write a

letter of exception. In addition, when given the opportunity to reject the CPEB's findings, he chose to accept the finding that he was only 10% disabled. The recommendations of the CPEB received legal review and were approved by the Final Approval Authority.

The applicant's conditions were thoroughly and properly evaluated and adjudicated. The determinations were logical, legal, and correct. Subsequent findings by the DVA do not invalidate the accuracy, validity, and legality of the CPEB's findings. The CPEB's findings were supported by law and consistent with the guidance of the VASRD (Veterans Administration Schedule for Rating Disabilities). Moreover, the Coast Guard rated the applicant's conditions based on a standard of fitness for continued military service. Whereas, the DVA's ratings were based on the impact his conditions have upon his quality of life.

The applicant has failed to prove by a preponderance of the evidence that his rating was incorrect or that an injustice has occurred. Failing to meet his burden, the Coast Guard's actions are deemed correct, unlawful, and done in good faith. Accordingly his petition should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 7, 2012, a copy of the Coast Guard's views was sent to the applicant for a response. The Board did not receive a response from the Applicant.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. Although the applicant was discharged in 2002, the application was timely because it was filed with the Board within three years of the March 19, 2010 PDBR decision.⁷

2. The disability rating with respect to the applicant's bilateral knee conditions has been adjudicated by the PDBR. The PDBR increased the applicant's Coast Guard's rating for his bilateral knee disability from 10% to 20%. According to DOD Instruction 6040.44, the finding and determination of the PDBR with regard to the applicant's knee condition are final and non-appealable. Therefore, the 20% disability rating assigned by the PDBR cannot be reconsidered by the Board.

3. The Board has jurisdiction to consider whether the Coast Guard committed an error or injustice by not deciding whether the applicant's sleep apnea, lumbar pain, and bilateral carpal

⁷ See *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994) (finding that an application to the Board is timely if filed within three years after the issuance of a final decision from the Discharge Review Board, which has a fifteen-year statute of limitations).

tunnel syndrome were unfitting for continued service during his PDES processing.⁸ The applicant argued that his medical board and CPEB should be reviewed for fairness, consistency, and accuracy. He argued that his 20% disability rating is inconsistent with the 100% disability rating granted to him by the DVA for various other conditions, including unemployability and is suspect. For the reasons discussed below, the Board disagrees with the applicant's argument.

4. Although the DVA granted the applicant disability ratings for certain other conditions that were not diagnosed by the Medical Board and CPEB, this Board has consistently held that a disability rating from the DVA for a condition not rated by the Coast Guard does not, in and of itself, establish that the Coast Guard committed an error or injustice by not rating any of the other conditions diagnosed and rated by the DVA. In Lord v. United States, 2 Cl. Ct. 749, 754 (1983), the Court of Federal Claims 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.]"

5. The Coast Guard Medical Board and CPEB found the applicant's bilateral knee condition to be unfitting for his continued service in the Coast Guard as an electrician's mate. There was no other diagnosis of an unfitting condition made by the medical board or CPEB. The applicant did not object to the medical board's finding by filing a rebuttal. Nor did he object to the CPEB. The applicant accepted the findings of the CPEB and waived his right to a formal hearing. In addition, the applicant's CO agreed with the Medical Board and noted only the applicant's knee condition as causing the applicant's inability to perform the duties of his rate and/or grade.

6. The DVA rating decisions do not discuss or evaluate to what extent the applicant's other conditions interfered with his ability to perform his duties as an electrician's mate or even whether the ratings officer considered the issue. Rather, the DVA rating decisions address whether the applicant's conditions were service-connected disabilities and the impact they have on his civilian earning capacity or his quality of life. A service-connected disability means that a condition was incurred or aggravated in the line duty while in the military. Chapter 2.A.47 of the PDES Manual (1996). A service-connected medical condition is not necessarily unfitting for military duty. Unfit for duty is "the status of a member who is physically or mentally unable to perform the duties of the office, grade, rank, or rating because of physical disability." Chapter 2.A.50 of the PDES Manual.

7. While the DVA rating decisions noted that the applicant was treated for sleep apnea with a CPAP in 2001, for an injury to his back in 1993, and for an injury to the fourth finger on

⁸ Section 5.e.(2) of Enclosure (3) to DODI 6040.44 states that the PDBR has authority to review "medical conditions determined to be specifically unfitting for continued military service, as previously determined by the Military Department PEB" and "[t]hose instances when the [member] requests the PDBR to review conditions identified but not determined to be unfitting by the PEB of the Military Department concerned."

his right hand in 1995, they do not discuss what, if any, impact the conditions had on the applicant's ability to perform his duties as an electrician's mate.

8. 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 member concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank, or rating. The applicant's bilateral knee condition was the only condition identified by the medical board, the CPEB, and the applicant's CO as causing the applicant to be unable to perform the duties as an electrician's mate, and the post-service DVA rating decisions are insufficient to prove otherwise.⁹

9. Accordingly, the applicant has failed to prove that the Coast Guard committed an error or injustice in his case. Accordingly, his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁹ The military record obtained from the Coast Guard and the medical record obtained from the DVA did not contain a complete copy of the applicant's Coast Guard medical record.

ORDER

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

