

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-068

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on January 31, 2012, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 27, 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

The applicant asked the Board to correct his record by raising his disability rating from 20% to 40%. The applicant stated that while on active duty he was processed for a medical separation under the Coast Guard's Physical Disability Evaluation System (PDES) following thoracolumbar spinal fusion surgery, but the Formal Physical Evaluation Board (FPEB) erroneously and unjustly found him to be only 20% disabled. Therefore, he was discharged with severance pay on October 15, 2010, instead of being retired with disability retired pay as he would have been if the FPEB had correctly evaluated his disability.

The applicant alleged that the FPEB arrived at its erroneously low rating because when measuring his forward flexion, his Coast Guard doctor allowed him to bend forward from the hip, and so his hip flexion was included in the measurement of his forward flexion, which the FPEB relied on in finding that the forward flexion of his spine warranted only a 20% rating. However, when his hip flexion is excluded from the measurement, the forward flexion of his thoracolumbar spine is only 15% and clearly meets the criteria for a 40% rating. The applicant alleged that the rules for measuring range of motion under the Veterans' Affairs Schedule for Rating Disabilities (VASRD), which the Coast Guard must follow, do not include hip flexion in the measurement of forward flexion of the thoracolumbar spine.

The applicant stated that when he was examined by a physician for the Department of Veterans' Affairs (DVA) after his discharge, the doctor properly measured only the forward flexion of his thoracolumbar spine and so evaluated his disability properly at 40%. The applicant

argued that if the Coast Guard measures range of motion differently than the DVA, then it is not in compliance with the National Defense Authorization Act (NDAA) of 2008,¹ which requires the Armed Forces to comply with all applicable existing guidelines under the VASRD. The applicant also noted that the Army and Navy also exclude hip flexion when assessing range of motion in the thoracolumbar spine and so having a different standard would unjustly place Coast Guard veterans at a disadvantage in comparison to the veterans of other military services.

Therefore, the applicant argued, the Board should find that the Coast Guard “erred as a matter of law in adopting a standard different from that imposed by the governing regulation,” correct his forward flexion measurement to 15%, raise his disability rating to 40%, and either permanently retire him or place him on the temporary disabled retired list (TDRL). The applicant supported his allegations by submitting copies of records related to PDES processing, the most relevant of which are included in the chronological summary of the record below.

SUMMARY OF THE RECORD

The applicant enlisted on [REDACTED] rating), and served on continuous active duty until he was discharged in accordance with an FPEB’s recommendation on October 15, 2010. The FPEB’s report, dated July 7, 2009, recommended that the applicant be separated with severance pay and a 20% disability rating under VASRD code 5241 for “spinal fusion; forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees.” The FPEB’s amplifying statement included the following paragraphs:

3) The Board considered the documentary evidence provided by [a physical therapist], dated 2 July 2009, concerning the evaluatee’s thoracolumbar spine range of motion. [The physical therapist] provided a total range of motion of 35 degrees forward flexion, yet indicated that DeLuca complaint measurements, “don’t give a true picture of lumbar ROM due to their allowance of hip motion to be included in the measurement.” Consequently, [the physical therapist’s] interpretation yielded an assessment of 10 degrees forward flexion from the non-fused portion of his spine, leaving 25 degrees coming from his hip joints. Regardless of [his] interpretation, current law requires the use of DeLuca measurements which permit flexion of hip joints in conjunction with thoracolumbar spine to obtain full forward range of motion, therefore, the appropriate measurement for forward flexion is 35 degrees. (see enclosure for current VASRD Medical Evaluation Board (MEB) guidance, photo forward flexion).

. . .

5) The disability for Spinal Fusion (VASRD code 5241): forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees is 20%.

¹ The NDAA of 2008, as codified at 10 U.S.C. § 1216a, states the following in pertinent part:

In making a determination of disability of a member of the armed forces, the Secretary concerned shall utilize the schedule for rating disabilities in use by the Department of Veterans Affairs, including any applicable interpretation of the schedule by the United States Court of Appeals for Veterans Claims; and may not deviate from the schedule or any such interpretation of the schedule. When retiring or separating a member of the armed forces for reason of physical disability, the Secretary concerned shall take into account all medical conditions, whether individually or collectively, that render the member unfit to perform the duties of the member’s office, grade, rank, or rating, to determine the member’s disability rating.

On July 19, 2009, the applicant submitted a rebuttal to the FPEB's report. The applicant stated that the FPEB's amplifying statement "made it clear that the members believe it is appropriate to include hip flexion when assessing the range of motion in the thoracolumbar spine" but that this position is contrary to that taken by the DVA and by Senior Medical Advisors to the Army Physical Disability Agency and the Navy Council of Review Boards. The applicant argued that there is no evidence that the physician who measured his forward flexion for the Coast Guard followed these guidelines but that a Tricare physician measured his ROM properly. Therefore, the applicant concluded, the FPEB had made "a mistake of law in that it expressly stated that it is permissible to include hip flexion when assessing the range of motion of the thoracolumbar spine." The applicant argued that because his forward flexion, when properly measured, was 15 degrees, the FPEB should assign him a 40% disability rating under the VASRD.² The applicant attached to his rebuttal the following documents:

- An email from an Army doctor dated July 17, 2009, advises the applicant's counsel that since October 14, 2008, Army examiners had been specifically instructed to use the DVA worksheets; that the DVA worksheet provided that hip flexion should not be included in the measurement of forward flexion of the thoracolumbar spine; and that she would ask for Army guidance dated June 12, 2008, that does not mention exclusion of the hip flexion measurement to be removed from the Army Physical Disability Agency's website.
- Army guidance dated June 12, 2008, which states that the NDAA of 2008 provides that the Army "will use the Veterans Affairs Schedule for Rating Disabilities (VASRD) any applicable interpretation of the VASRD by the U.S. Court of Appeals for Veterans Claims." The guidance states that ROM of the thoracolumbar spine should be measured "from L5 to T1 as a unit by asking the Soldier to forward bend naturally as if to touch the floor. Follow the range of motion, keeping the goniometer arm along the mid-axillary line. The goniometer base is to be kept in line with the femur. Record the angle that subtends the arc of motion." The guidance also states that the DVA's worksheets for measuring ROM "may be useful" and refers practitioners to the Guidance for Use of Goniometer to measure spine ROM on the Army's website.³
- An email from a Senior Medical Advisor to the Navy Council of Review Boards, dated July 17, 2009, advises that "especially where needed (e.g. for rating purposes in re unfitting conditions), we insist that the MTFs [medical treatment facilities] isolate ROM of the thoracolumbar spine from that attributable to hip action."

On February 17, 2010, the president of the FPEB advised the applicant that his rebuttal had been reviewed but did not support a change to the board's findings and recommendation. He stated that the FPEB "is not bound by the U.S. Army Physical Disability Agency representative's

² The Board notes that the applicant also argued that the FPEB should have found two other medical conditions—plantar fasciitis and bilateral shoulder impingement—to be unfitting. The Board has omitted the evidence and arguments about these two conditions from this summary because the applicant limited his application to challenging the FPEB's rating of his back condition.

³ The Board notes that the guidance for using a goniometer to measure ROM in the thoracolumbar spine currently on the Army's website states that the evaluatee should bend forward at the waist to touch the toes and includes the drawing from Plate V of the VASRD.

interpretation of Range of Motion (ROM) measurements, and it is wholly appropriate to include hip flexion when computing ROM. Consequently, member's ROM measurement and recommended level of disability remain unchanged."

On March 1, 2010, the applicant responded to the president of the FPEB by stating that the FPEB's position "is directly contradictory to the guidance provided to VA examiners when assessing range of motion under the very regulation adopted by the Coast Guard." He noted that Senior Medical Advisors to both the Army and Navy had acknowledged that "hip flexion is to be excluded from the calculation of range of motion in the thoracolumbar spine" and that the DVA required its physicians to exclude hip flexion when calculating ROM of the thoracolumbar spine. The applicant argued that the FPEB's decision to deviate from the DVA's rating criteria would be a violation of the NDAA of 2008. The applicant included with his response a DVA Disability Examination Worksheet for "Spine Examination" downloaded on March 1, 2010,⁴ which states—"Provide forward flexion of the thoracolumbar spine as a unit. Do not include hip flexion." The DVA worksheet directs the practitioner to measure ROM in the thoracolumbar spine with a goniometer while the evaluatee is standing but provides no further description of the evaluatee's motion or the measurement to be taken.

The FPEB's report was reviewed and approved, and the applicant was discharged on October 15, 2010, with a 20% disability rating and severance pay.

VIEWS OF THE COAST GUARD

On June 26, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC stated that the applicant has misinterpreted the FPEB's amplifying statement to mean that the FPEB

f. ... combined hip flexion and thoracolumbar flexion to achieve the 35 degrees of thoracolumbar flexion. However, this was not the case. Rather, the FPEB remained resolute to follow the guidance in the VASRD. Moreover, the FPEB declined to accept the assertion of [the civilian physical therapist] that flexion of the thoracolumbar spine should not include movement of the hips. It was [the physical therapist] who was deviating from the VASRD in his attempt to divide out and exclude any movement of the hips. In essence, in order to measure forward flexion of the thoracolumbar spine, [the physical therapist] would have a patient bend forward without pivoting at the waist. This is not the movement contemplated by the VA in Plate V. ...

g. The VA's only guidance on how to measure the forward flexion of the thoracolumbar spine is [Plate V and the DVA Disability Examination Worksheet].

h. [The DVA Disability Examination Worksheet] states that the examiner is not to include hip flexion when measuring thoracolumbar flexion. However, when viewed in light of the drawing in Plate V ..., it is clear that it was intended that the patient's forward flexion would naturally involve the movement of the hip flexors. What was to be excluded, as stated in the guidance of

⁴ See "Spine Examination," available at <http://www.vba.va.gov/bln/21/benefits/exams/disexm53a.pdf>.

[the DVA Disability Examination Worksheet] is that separate measurement of the hip flexion is not to be taken and combined with the thoracolumbar flexion.

PSC stated that the emails from the Army and Navy doctors “do not state what [the applicant’s] counsel asserts they say” and their opinions “are neither instructive nor controlling” because the Armed Forces must follow the VASRD. PSC further pointed out that the ROM “for thoracolumbar spine is 0 – 90 degrees. In order to achieve the maximum of 90 degrees flexion, a person must pivot at the hips. Plate V shows a demonstration of how the thoracolumbar measurement is to be taken. The diagram shows the patient pivoting at the hips, not above them.”

The JAG also noted that the applicant’s medical records show that his military doctor found him to have excellent ROM and his physical therapist found him to have normal ROM until the last measurement on June 4, 2009, when he apparently measured the applicant’s ROM without allowing him to bend at the waist and so measured it at only 10 degrees. The JAG noted that the military doctor also stated that he had observed the applicant sitting normally and getting in and out of a car normally, which motions would be very difficult for someone with only 10 degrees of flexion. The doctor’s measurements showed that on May 22, 2008, the applicant’s ROM was 70 degrees and that after months of physical therapy, his ROM was 105 degrees in February 2009, but the applicant apparently stopped doing the exercises.

The JAG stated that in relying on the physical therapist’s 35-degree ROM measurement taken on July 2, 2009, the FPEB “gave [the applicant] the benefit of the doubt in concluding that his back was impaired at a 20% disability level,” although the FPEB could have used any of the earlier measurements, which would have justified a lower percentage rating.

The JAG concluded that the applicant’s disability was “thoroughly and properly evaluated and adjudicated. The determinations were logical, legal, and correct. The FPEB’s findings were supported by law and consistent with the guidance of the VASRD.” Therefore, he argued, the applicant has failed to prove by a preponderance of the evidence that his disability rating is erroneous or unjust.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 3, 2012, the applicant responded to the views of the Coast Guard. He stated that his application “stands upon its own merits and is ready for decision. The applicant further alleged that since the maximum ROM for the thoracolumbar spine is 90 degrees, the military doctor’s 105-degree measurement is physically impossible. He again argued that “the plain language of the regulation makes it clear that hip flexion in any form is not to be included when assessing range of motion on forward flexion of the thoracolumbar spine.” Therefore, he said, the Board should grant relief.

APPLICABLE REGULATIONS

Under the VASRD, the following rating descriptions apply for disabilities of the thoracolumbar spine, including spinal fusion (code 5241):

Unfavorable ankylosis of the entire spine	100%
Unfavorable ankylosis of the entire thoracolumbar spine.....	50%
Forward flexion of the thoracolumbar spine 30 degrees or less; or favorable ankylosis of the entire thoracolumbar spine	40%
Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees	20%
Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees	10%

Note 2 to this table refers the reader to Plate V and states that “for VA compensation purposes ... [n]ormal forward flexion of the thoracolumbar spine is zero to 90 degrees ... The normal ranges of motion for each component of spinal motion provided in this note are the maximum that can be used for calculation of the combined range of motion.” Plate V includes a drawing showing how to measure flexion of the thoracolumbar spine. The drawing shows a man standing but bent over at the waist as if instructed to touch the floor. A vertical line parallel to the man’s legs is marked as zero degrees and a horizontal line from the man’s waist to his shoulders is marked 90 degrees.

The VASRD table of ratings and Plate V are reproduced in Enclosure (1) of the Coast Guard’s PDES Manual.

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 filed within three years of the applicant’s separation.
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.⁵
3. The applicant alleged that his discharge with a 20% disability rating is erroneous and unjust and that he should have been retired with a 40% rating because in assessing his percentage of disability, the Coast Guard improperly included his hip flexion in measuring the ROM in his thoracolumbar spine. The Board begins its analysis in every case by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ Absent evidence to the contrary, the Board presumes that

⁵ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁶ 33 C.F.R. § 52.24(b).

Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁷

4. The Board finds that the preponderance of the evidence shows that the FPEB properly followed both the VASRD and the Coast Guard’s identical regulations in Enclosure (1) of the PDES Manual in finding that the applicant was 20% disabled as a result of his spinal fusion. Plate V in both the VASRD and Enclosure (1) of the PDES Manual clearly shows that to measure thoracolumbar flexion, the evaluatee must stand and bend over at the waist, as if to touch the floor, and the goniometer measures the entire ROM—the angle—between a line parallel to the legs (approximately vertical) and a line extending from the waist to the shoulders. Although not controlling, the Army’s guidance dated June 12, 2008, likewise instructs the practitioner to have the member stand and bend forward “naturally as if to touch the floor. Follow the range of motion, keeping the goniometer arm along the mid-axillary line. The goniometer base is to be kept in line with the femur [leg]. Record the angle that subtends the arc of motion.” The position of the evaluatee and goniometer measurements described in these VASRD, Coast Guard, and Army regulations clearly result in some flexion of the hips being measured along with spinal flexion. Bending naturally at the waist to touch the floor—as a servicemember on active duty may need to do—normally includes motion of the hips and cannot be done at a 90-degree angle—the largest ROM mentioned in the VASRD’s rating scale—without motion of the hips. The emails submitted by the applicant are too brief to be persuasive or dispositive of how thoracolumbar ROM is to be measured under the VASRD and, as explained below, his reliance on the DVA worksheet is misplaced. The Board finds that the applicant has presented insufficient evidence to prove by a preponderance of the evidence that the Coast Guard failed to follow the VASRD in assessing the applicant’s thoracolumbar ROM and disability rating.

5. The applicant’s reliance on the DVA worksheet for “Spine Examination” is misplaced. The DVA worksheet explains how to document a spine examination but it does not describe either the motion to be made by the evaluatee or how the measurement is to be taken with the goniometer. The applicant has not proved that the wording of the worksheet contradicts, much less overrules, the procedure for measuring thoracolumbar ROM shown in Plate V of the VASRD. In light of the picture in Plate V, the worksheet’s instruction—“Provide forward flexion of the thoracolumbar spine as a unit. Do not include hip flexion.”—appears to the Board to mean only that when documenting a member’s spinal flexion, the doctor does not also include a measurement of hip flexion because hip flexion is documented separately in accordance with a different DVA worksheet, “Joints (Shoulder, Elbow, Wrist, Hip, Knee, and Ankle) Examination.”⁸

6. Accordingly, the Board finds that the applicant has not proved by a preponderance of the evidence that his discharge with severance pay and a 20% disability rating is erroneous or unjust. His request should be denied.

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ See “Spine Examination,” available at <http://www.vba.va.gov/bln/21/benefits/exams/disexm53a.pdf>; and “Joints (Shoulder, Elbow, Wrist, Hip, Knee, and Ankle) Examination,” available at <http://www.vba.va.gov/bln/21/benefits/exams/disexm34.pdf>.

ORDER

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

