DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-138

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 case after receiving the completed application, including the applicant's military and medical records, on May 16, 2014[1] and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, date February 6, 2015, 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, a retired [redacted] was processed under the Coast Guard's Physical Disability Evaluation System (PDES) and medically retired from the Coast Guard on August 8, 2007, with a combined disability rating of 50%.[2] The applicant alleged through counsel that she received her combined disability rating from the Department of Veterans Affairs (DVA) on September 11, 2008. The DVA rating was a combined 90%.[3] She asked the Board to correct her Coast Guard record to show that she was retired with a combined disability rating of 80%.

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[1] The applicant's petition was received on January 14, 2011.

[2] 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, 30% or higher under the VASRD at the time of retirement. Chapter 2.A.40. of the Physical Disability Evaluation System (PDES) Manual defines "physical disability" as "[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty. The term 'physical disability' includes mental disease, but not such inherent defects as behavior disorders, personality disorders, and primary mental deficiency."

[3] This rating was later increased to 100% after the applicant submitted a second compensation claim to the DVA on September 17, 2008. Individual unemployability was also granted by the DVA at this time.

The application was received by the Board on January 14, 2011. The applicant alleged that the application was timely filed. In support of this claim, the applicant stated that "[s]ince the DVA ratings provide[d] the new evidence of an injustice that forms the crux of our position, Counsel would contend that the three-year limitations period began upon the receipt of these findings dated 11 Sep 08." The applicant also went into detail describing the allegedly erroneous rating of her disabilities:

Disability Rating Associated with Psychiatric Impairment

First, the applicant addressed her degree of psychiatric impairment. The Coast Guard rated the applicant 30% for VASRD code 9400: Generalized Anxiety Disorder. The applicant argued for a rating of 50% under VASRD code 9434: Major Depressive Disorder. The applicant based this contention on the consistency in her psychiatric evaluations.

The applicant alleged that her Global Assessment of Functioning (GAF) score "had remained essentially unchanged" from an October 4, 2006 assessment through her DVA assessment post-discharge. The October 4, 2006 assessment rated the applicant with a GAF score of 41-50.[4] Her next psychiatric assessment was just before the FPEB and she was scored at 45, which is the score that the FPEB used in its determinations. The DVA gave the applicant a score of 48 on January 16, 2008.

The applicant alleged that these assessments and the consistency in their results merit a rating of 50% under VASRD code 9434.[5] The applicant argued that "[t]here was no evidence proffered by the FPEB to refute these assessments and the panel's conclusions rested solely upon their subjective observations of the Petitioner during the hearing."

The applicant asked the BCMR to adhere to the "benefit of the doubt" doctrine to support her contention that her psychiatric disability should be scored at 50%.[6] This is a Title 38 DVA principle that essentially states that if a reasonable doubt has arisen regarding the assembled data in its entirety, this doubt should be resolved in favor of the claimant.[7]

Disability Rating Associated with Spinal Injury

The next disability rating that the applicant contested was the degree of spinal impairment associated with her intervertebral disc syndrome. The applicant relied on the results of a February 22, 2007 surgery performed after the FPEB but before the Physical Review Council (PRC).

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[4] GAF Score 41-50 corresponds to "Serious Symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR any serious impairment in social, occupational, or school functioning (e.g. no friends, unable to keep a job)." Diagnostics and Statistical Manual of Mental Disorders, AMERICAN PSYCHIATRIC ASSOCIATION, 4th Ed. (2000).

[5] 38 C.F.R. § 4.130 (1996).

[6] 38 U.S.C. § 5107(b) (2000).

[7] *Id.*

The applicant stated that the surgery revealed evidence of a severe left L3/L4 paracentral disc herniation, postlaminectomy syndrome, and an incidental left dural tear at L4. The applicant emphasized the discovery of evidence of severe epidural fibrosis despite no signs of the previously reported L3/L4 laminectomy. [redacted]d a probe behind the L3 pedicle and a bayonet-shaped needle at the L2/L3 level in intraoperative X-rays from July 14, 2005.

The applicant went on to assert that the above findings, which occurred after the FPEB, explained the applicant's continued pain. She also alleged her range of motion before the surgery did not exceed 10 degrees from neutral in forward flexion or other planes of motion. This was reported to be worse than her previous physical therapy assessments which recorded a 15 degree range of motion in forward flexion.

The applicant stated that the above evidence that came to light after the FPEB "would militate in favor of finding that the Petitioner's lumbar spine injuries should be rated at 40%..." pursuant to VASRD code 5243. She argued that this higher rating is warranted for three reasons: First, the FPEB did not consider the new evidence discovered in the February 22, 2007 surgery that was subsequently advanced in the applicant's rebuttal to the FPEB findings; the PRC did not consider the new evidence in the final agency action; the DVA physician found that the applicant suffered from impairment consistent with a 40% disability rating on January 14, 2008.

Disability Rating Associated with Neurogenic Bladder

The final disability rating directly addressed by the applicant in her allegations was her degree of impairment due to neurogenic bladder. The applicant alleged that after the February 22, 2007 surgery (post-FPEB surgery), "she suffered from increased genitourinary symptoms secondary to a neurogenic bladder that had previously been rated at 0% by the Informal Panel ("IPEB") since it was controlled by medication."

The applicant cited the later DVA examinations that concluded she "suffered from urinary leakage with a voiding frequency of three to four times per night." Based on the DVA findings, the applicant argued that she should be assigned a disability rating of 20% pursuant to VASRD code 5243-7517 because her bladder issue is "intertwined" with her spinal issues.

The applicant concluded by stating her total combined disability rating, as calculated in light of the above views of the evidence, should increase from 50% to 80% disabling.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 17, 1974, for a four-year term. She extended her enlistment in 1978 for one year and again in 1979 for nine months. On March 14, 1980, she was granted an honorable discharge (E-6). She immediately entered the Coast Guard Reserves for a three-year term. In March of 1983, she extended her reserve enlistment for another eight years. She was called up to active duty in 1990 and again in 1993.

In April of 1993, the applicant underwent an L5-S1 discectomy on her lower back. She returned to work within five weeks and described the surgery as successful.

On June 1, 1996, the applicant was [redacted] In 2001, she was again called up to active duty in the wake of 9/11.

Sometime in 2003, the applicant developed back pain which she sought care for. On September 29, 2004, she took sick leave because she reportedly could not walk or get out of bed. She was seen by a medical officer the next day. She began indefinite sick leave on October 28, 2004, because of an inability to perform her duties due to chronic back pain.

Over the course of the next few years, the applicant underwent a myriad of physical and mental evaluations in connection with her chronic back pain. An MRI on November 4, 2004, revealed she had a left L3-4 disc extrusion and evidence of lumbar degenerative disc disease. She had surgery on July 14, 2005.

The applicant reported moderate success in the initial six weeks after her surgery. However, her condition rapidly deteriorated and she reported worse pain than before surgery in her follow up appointments. On November 8, 2005, she began a physical therapy regimen. Over the next year, she realized very little positive change from the physical therapy.

On February 20, 2006, the applicant was examined by a psychologist for the onset of depression and anxiety. The psychologist diagnosed the applicant with mood disorder secondary to chronic lumbar pain radiating into left leg. She was also diagnosed with adjustment disorder with depression and anxiety as well as dysthymia. The psychologist assigned the applicant a GAF score of 48.

In March of 2006, the applicant began consultations with a surgeon who performed an L3-4 nerve block. No improvement was realized according to the applicant. On May 3, 2006, the applicant underwent a urinalysis due to partial incontinence since her July 14, 2005 surgery. The urologist reported "mild instability on filling without incontinence; Difficulty initiating void with long delay and weak hesitant stream without significant rise in detrusor pressure."

On May 31, 2006, the applicant's command convened a Medical Evaluation Board (MEB). The MEB concluded after reviewing medical submissions from multiple physical evaluations that the applicant was afflicted with the following: lumbar intervertebral disc herniation L3-4 hemilaminotomy, L5-S1 hemilaminotomy, diabetes mellitus type II, hyperlipidemia, hypertension, neurogenic bladder, bilateral hearing loss, dysthymia, and adjustment disorder with depression and anxiety features. The MEB went on to state that the applicant was unable to perform the full duties of her rate due to her pain and recuperation for over one year. The MEB "strongly recommend[ed]" that the applicant be medically retired.

The applicant filed two addenda to her MEB package, seeking amendment of their conclusions. In her first addendum on June 23, 2006, the applicant reported to the MEB the results of an MRI performed June 19, 2006. She reported the results as being consistent with a mucous retention cyst causing migraine headaches. She stated another MRI would be performed

on June 28, 2006 to further develop the diagnosis. The results of this MRI were consistent with an incidental pineal cyst.

The applicant's second addendum [redacted]t 1, 2006. The addendum reported the results of an oral surgery conducted June 29, 2006. The surgery revealed lesions in the mouth likely caused by dry mouth from her pain medications. Biopsies of the lesions were sent to a lab and determined to be benign.

On October 4, 2006, the applicant underwent a psychiatric evaluation by a Navy psychiatrist. The exam was performed in preparation for her upcoming Informal Physical Evaluation Board (IPEB). The applicant was diagnosed with depressive disorder not otherwise specified, anxiety disorder not otherwise specified, and a GAF score of 41-50.

On November 2, 2006, the IPEB convened to review the applicant's case. The IPEB found by a preponderance of the evidence that the applicant was unfit for duty by reason of physical disability. The unfitting conditions cited were generalized anxiety disorder (30%), intervertebral disc syndrome (20%), left leg radicular pain rated analogous to sciatic nerve (10%), and injury of the bladder (0%). She was assigned a combined disability rating of 50%. The applicant rejected these findings and demanded a hearing before a Formal Physical Evaluation Board (FPEB).

At a psychological consultation January 26, 2007, the applicant first reported having suicidal thoughts attributable to pain. She reported three suicidal occasions and twice initiating attempts. She told the psychologist she felt "hopeless about the future" and that she was in "agony." The applicant stated that Effexor was effective in treating the suicidal thoughts. She was given a GAF score of 45.

On January 30, 2007, the FPEB convened to address the applicant's case after the IPEB findings. The applicant was represented by counsel during the hearing. The FPEB addressed new evidence proffered by the applicant in the form of the psychologist's evaluation as well as a physical therapist's report. The FPEB independently concurred with the overall findings of the IPEB, rating the applicant for general anxiety disorder (30%), intervertebral disc syndrome (20%), and left leg radicular pain rated analogous to sciatic nerve (10%). Once again, she was assigned a combined disability rating of 50% and recommended for permanent retirement.

On March 18, 2007, the applicant, through counsel, submitted a rebuttal of the FPEB findings. The rebuttal primarily consisted of findings from a surgery performed February 22, 2007 (after the FPEB was held). The surgery was to correct an L3-4 disc herniation. The applicant referred to the post-surgery report to emphasize the following findings:

- The surgery revealed "evidence of a severe left L3/L4 paracentral disc herniation, postlaminectomy syndrome and an incidental left dural tear at L4."
- "[T]he surgeon found evidence of severe epidural fibrosis despite no signs of the previously reported L3/L4 laminectomy."
- The "surgeon noted that intraoperative X-rays dtd 14 Jul 05 revealed a probe behind the L3 pedicle and a bayonet-shaped needle at the L2/L3 level."

- Before the surgery, the applicant "had no range of motion in forward flexion or other planes of motion beyond 10 degrees from neutral." (The applicant used this finding in her allegations to show consistency; she compared the post-surgery report to the range of motion assessments provided to the [redacted]ich show the applicant's range of motion in forward flexion at 15 degrees).
- The surgeon diagnosed the applicant with chronic pain disorder, meaning surgery would not completely alleviate the pain.

In her rebuttal, the applicant cited the above findings to argue that her ratings should be raised. Specifically, she argued that her lumbar spine injuries amount to a disability rating of 40% instead of the 20% rating given by the Coast Guard. The applicant further argued that her psychiatric disorders should be rated at 50% based on her chronic pain syndrome as well as previous psychiatric and psychological examinations. She alleged that her medical records have consistently supported the higher ratings. These two requested ratings amount to a combined 70% disability rating.

The applicant also included a contingency finding in her rebuttal of the FPEB's findings. She argued that even if the psychiatric rating were maintained at 30%, there would still be "a strong argument" for increasing the combined disability rating to 60%, assuming the back injuries received her proposed increased rating. The applicant reported in her rebuttal that "she would be prepared to accept" a combined rating of 60% based on this alternate calculation.

Following this rebuttal, the FPEB issued another report stating that its findings remained unchanged. The FPEB stated that a higher (than 20%) rating for intervertebral disc syndrome was not warranted and noted their personal observations of the applicant's abilities during the January 30, 2007, hearing. They reported that the applicant was "able to bend at the waist to stand, walk without a cane, and stand and sit for longer periods of time than her physical therapist indicated was possible in his statement." Further, the FPEB reportedly "found other inconsistencies in the limits of her disability between the statements from her various doctors and therapists."

The FPEB stated that a higher (than 30%) rating for general anxiety disorder was not warranted based on the applicant's testimony at the hearing. According to the FPEB, the applicant "demonstrated her ability to carry on a detailed conversation on incidents past and present, leading the Board to believe her short and long term memory [was] fine." Further, "[s]he indicated that she had not suffered from frequent panic attacks, and was able to effectively maintain her daily routine, although not as easily as she had before the medical issues began. She also described her relationships with friends and neighbors."

On May 7, 2007, the Physical Review Counsel (PRC) concurred with the findings of the FPEB, concluding that there were no errors or omissions in the record and policy and regulation was consistently applied. The PRC made no alterations to the FPEB combined disability rating of 50%.

On August 8, 2007, the applicant was medically retired from the Coast Guard with a 50% disability rating and retired pay.

On January 22, 2008, the applicant was evaluated by the Department of Veterans Affairs (DVA). On September 11, 2008, the applicant was assigned a disability rating of 90% by the DVA. The rating was subsequently increase[redacted]

The applicant's petition to this Board was received on January 14, 2011, but completed by receipt of military and medical records on May 16, 2014.

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 schedule shall be discharged with severance pay.

Benefit of the Doubt Statute and Regulation

The applicant cited 38 U.S.C. § 5107(b) (2000), which states the following:

> (b) Benefit of the doubt.-- The Secretary [of Veterans Affairs] shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

The applicant also cited 38 C.F.R. § 4.3 (2009), which states the following:

> When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.

Physical Disability Evaluation System (PDES Man 1850.2D)

Chapter 2.C.1.b concerns PDES guidelines and states that "[a]lthough these laws shall be administered in a manner which protects the government from assuming unwarranted responsibility for payment of disability and retirement benefits, reasonable doubt as to the entitlement of an evaluee shall be resolved in the evaluee's favor."

Chapter 2.C.2.a. of the PDES Manual provides that the "sole standard" that a PEB 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.i. states that the "exis[redacted]able under the standard schedule for rating disabilities in use by the [DVA] does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. … Such a member should apply to the [DVA] for disability compensation after release from active duty."

Chapter 5.C.1.a. states, "The board shall consider documentary evidence transmitted to it by proper authority, and such other evidence as may be adduced at the hearing. The board may also require and examine such records as may be in Coast Guard files that relate to the issues before the board."

Chapter 5.C.1.d. states, "When the testimony presented at the hearing reveals that the evaluee claims to have impairments not disclosed by the medical records or presents credible evidence in conflict with the medical records and the issue thus drawn is not one that can be readily resolved by the observation of the board, the case should be continued and further developed by additional physical examination, special studies, or investigation by appropriate agencies. The FPEB has authority to order a disposition medical board or addenda to satisfy this requirement."

Chapter 9.A.2 of the PDES Manual states the following:

a. The VASRD is used in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage ratings represent, as far as can practicably be determined, the average impairment in earning capacity resulting from such diseases and injuries, and their residual conditions in civilian occupations.

b. Conditions which do not render the member unfit for continued service will not be considered for determining the compensable disability rating unless they contribute to the finding of unfitness.

Chapter 9.A.3 states the following:

a. It is not expected that every case will show the exact symptomatology specified in the VASRD, especially with the more fully described grades. Findings that are sufficiently characteristic of the symptoms described in the VASRD and the rating with impairment of function are required in all instances. There is no rigid requirement for the presence of all enumerated manifestations of a given disability. Those manifestations which are sufficiently and significantly representative of the entity and the severity of limitations imposed on the member are the only requirements.

b. Where there is a reasonable doubt as to which of two percentage evaluations should be applied, the higher evaluation will be criteria for that rating. Otherwise, the lower rating will be assigned. [redacted] reasonably procurable and assembled data, there remains a reasonable doubt as to which rating should be applied, such doubt shall be resolved in favor of the member and the higher rating assigned.

Veterans Affairs Schedule for Rating Disabilities (VASRD)- 38 C.F.R. Part 4

VASRD code 9400: General Anxiety Disorder; VASRD code 9434: Major Depressive Disorder (both disorders are scored the using same rating criteria; 38 C.F.R. § 4.130):

> 50%: 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.
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> 30%: 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 often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

VASRD code 5243: Intervertebral Disc Syndrome: General Rating Formula for Diseases and Injuries of the Spine (38 C.F.R. § 4.71a):

> With or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease:
>
> 40%: Unfavorable ankylosis of the entire cervical spine; or, forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine
>
> 20%: Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, forward flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, the combined range of motion of the cervical spine not greater than 170 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis

> Note (1): Evaluate any associated objective neurologic abnormalities, including, but not limited to, bowel or bladder impairment, separately, under an appropriate diagnostic code.

Under VASRD code 5243/8599/8720, radicular leg pain is rated by analogy to sciatic nerve pain (38 C.F.R. § 4.124a). Neuralgia associated with this pain is rated at 10%. Under COMDTINST 1850.2D, 9.A.7., "Analogous Ratings," ratings associated with afflictions that are closely related are rated by analogy. The designated VASRD code is derived from a combination of the codes of the associated afflictions. The last two digits "99" indicate an unlisted condition.

Under VASRD code 5243-7517: Neurogenic Bladder (38 C.F.R. § 4.115b), a combination of conditions related to "5243: Intervertebral Disc Syndrome" and "7517: Bladder, injury of: Rate as Urinary Frequency" can be scored together by analogy. The applicant asserted this condition should be rated at 20% based on incapacitating episodes:

> 20%: Daytime voiding interval between one and two hours, or; awakening to void three to four times per night.

VIEWS OF THE COAST GUARD

On November 6, 2014, the Judge Advocate General (JAG) submitted an advisory opinion wherein he recommended that the Board deny relief in this case.

In recommending denial, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). PSC stated the applicant's argument relied on the difference between the Coast Guard's disability rating and the disability rating assigned by the DVA. PSC also stated that the application was timely.

PSC relied on the presumption of regularity accorded the FPEB decision.[8] PSC emphasized that the member has the burden of proving by a preponderance of the evidence that an error or injustice occurred. PSC stated that Physical Evaluation Boards are the expert administrative bodies charged by law with administering disability ratings.

PSC stated that the FPEB findings in this case were clearly articulated in their Amplifying Statement and that on the date of the hearing, the FPEB board members personally observed the applicant "bend at the waist to stand, walk without a cane, and stand and sit for longer periods of time than her physical therapist indicated was possible in his statement." PSC further cited the FPEB's description of their in-person interaction with the applicant as evidence of regularity in the Coast Guard's administration of their own policies.

PSC concluded by stating that the applicant received the benefit of the doubt from the FPEB in the assignment of her disability rating, that there was no basis to overturn the ratings

[8] 33 C.F.R. § 52.24(b) (2003); *see Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

based on the FPEB's proper evaluation, and that the applicant failed to prove by a preponderance of the evidence that her rating was incorrect or that an injustice had occurred. PSC stated that the Coast Guard's determinations pursuant to her PDES processing were logical, legal, and correct. [redacted]

The JAG, in concurrence with PSC, emphasized that the DVA rating "is not itself medical evidence, and therefore may not be considered in reaching the Coast Guard's disability rating." The JAG further stated that the examinations conducted by the DVA were after the applicant's discharge from the Coast Guard and therefore, those "examinations could not be considered in evaluating the applicant's condition while on active duty."

The JAG did however take issue with the FPEB's methods. The JAG cited COMDTINST M1850.2D, Chapter 5.C.1.d, which states the following:

> When the testimony presented at the hearing reveals that the evaluee claims to have impairments not disclosed by the medical records or presents credible evidence in conflict with the medical records and the issue thus drawn is not one that can be readily resolved by the observation of the board, the case should be continued and further developed by additional physical examination, special studies, or investigation by appropriate agencies. The FPEB has authority to order a disposition medical board or addenda to satisfy this requirement.

The JAG disputed that the applicant's level of disability could "be readily resolved by the observation of the board." The JAG alleged that the FPEB substituted their own observations for the applicant's previous psychiatric evaluations. However, he stated that "no different outcome would be guaranteed, so it is not apparent that the board's actions prejudiced the member." The JAG further stated that the applicant had not submitted any evidence that could overcome the presumption of regularity in the Coast Guard's actions.

The JAG concluded that he would not be opposed if the BCMR were to find error in the FPEB actions in not ordering further medical evaluations based on their in-person observations "as directed by COMDTINST M1850.2D." However, he finally recommended that the BCMR deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 14, 2014, the Chair sent a copy of the views of the Coast Guard to the applicant's counsel and invited him to respond within thirty days. The Board received no response.

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.

2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in her record. The applicant alleged that her application was timely filed because she received her initial DVA rating decision, which persuaded her that her Coast Guard disability rating was erroneous, in September 2008. However, the record shows that the applicant was well aware of her medical conditions, had received multiple medical opinions, timely challenged the IPEB's and FPEB's decisions, and was represented by counsel before the FPEB. Moreover, the DVA decision does not show that the Coast Guard misdiagnosed or otherwise failed to reveal the applicant's medical conditions to her even though the Coast Guard evaluated some of her medical conditions under different codes and at lower ratings and did not consider her bladder condition to be unfitting.[9] Therefore, the Board finds that a preponderance of the evidence indicates the applicant's date of discovery of the alleged error and injustice in her military record was August 8, 2007.[10] Her application was not timely filed.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. To determine whether the interest of justice supports a waiver of the statute of limitations, the Board should "analyze both [a] the reasons for the delay and [b] the potential merits of the claim based on a cursory review."[11] The applicant's argument is for a limitations period beginning on September 11, 2008, which is the date the DVA issued its ratings. The applicant did not explain her delay but described the DVA ratings as forming "the crux of our position." The fact that the applicant received the DVA decision in 2008, however, does not explain or justify her delay in applying to this Board. In order to meet the timeliness requirement of 10 U.S.C. § 1552(b), the applicant should have applied to this Board within three years of her discharge on August 8, 2007.

4. A cursory review of the merits in this case indicates that the applicant received all due process under the Coast Guard's PDES. She was represented by counsel before the FPEB and in her rebuttal of the FPEB decision. The PRC nonetheless upheld the FPEB on May 7,

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[9] *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983); *see Kirwin v. United States*, 23 Cl. Ct. 497, 507 (1991) ("The VA rating [in 1986] is irrelevant to the question of plaintiff's fitness for duty at the time of his discharge in 1978. Indeed, the fact that the VA retroactively applied plaintiff's 100% temporary disability rating only to 1982, and not 1978, gives some indication that plaintiff was not suffering from PTSD at the time of his discharge."); *Dzialo v. United States*, 5 Cl. Ct. 554, 565 (1984) (holding that a VA disability rating "is in no way determinative on the issue of plaintiff's eligibility for disability retirement pay. A long line of decisions have so held in similar circumstances, because the ratings of the VA and armed forces are made for different purposes.").

[10] *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

[11] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

2007. The FPEB's determinations are presumptively correct,[12] and the record contains evidence supporting each determination:

a. *30% disabled for VASRD code 9400: General Anxiety Disorder*
This disability was rated pursuant to 38 C.F.R. § 4.130. The applicant was treated for anxiety and depression related to her back condition while on active duty and was assigned a GAF score of 45.[13] The FPEB relied on this evidence in its initial report. The FPEB noted the applicant was able to apply both long-term and short-term memory during the hearing and described it as "fine". They also cited the applicant's testimony where "[s]he indicated that she had not suffered from frequent panic attacks, and was able to effectively maintain her daily routine, although not as easily as she had before the medical issues began." The FPEB noted the applicant sustained social relationships with friends and neighbors. The evidence of record is not inconsistent with the VASRD standard for a 30% rating.

b. *20% disabled for VASRD code 5243: Intervertebral Disc Syndrome*
This disability was rated pursuant to 38 C.F.R. § 4.71a. The applicant's medical records show that she suffered from this condition. The FPEB explained why the higher, 40% rating was not warranted because she could "bend at the waist to stand, walk without a cane, and stand and sit for longer periods of time than her physical therapist indicated was possible in his statement." The evidence of record is not inconsistent with the VASRD standard for a 20% rating.

c. *10% disabled for VASRD code 5243/8599/8720: Left Leg Radicular Pain Rated Analogous to Sciatic Nerve*
The FPEB did not explain their specific reasoning behind this finding in their amplifying statement, but the applicant's medical records support a 10% rating according to the standards.

5. The applicant argued that she should have received a 20% rating for neurogenic bladder (VASRD code 5243-7517) based upon how often she wakes to urinate at night. The FPEB did not rate the applicant for this disability presumably because it was not considered unfitting for military service.[14] The applicant has not proven by a preponderance of the evidence that this determination was incorrect.

6. The applicant alleged that her ratings should be raised pursuant to the benefit of the doubt doctrine. Under 38 U.S.C. § 5107(b), "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary [of Veterans Affairs] shall give the benefit of the doubt to the claimant." This doctrine

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[12] 33 C.F.R. § 52.24(b); *see also, Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d at 813, for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

[13] GAF Score 45corresponds to "Serious Symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR any serious impairment in social, occupational, or school functioning (e.g. no friends, unable to keep a job)." Diagnostics and Statistical Manual of Mental Disorders (2000).

[14] Physical Disability Evaluation System Manual 1850.2D, Chapter 9.A.2.b (2006).

applies to the DVA's determinations but does not govern the PDES. Chapter 2.C.1.b. of the PDES Manual states that "[a]lthough these laws shall be administered in a manner which protects the government from assuming unwarranted responsibility for payment of disability and retirement benefits, reasonable doubt as to the entitlement of an evaluee shall be resolved in the evaluee's favor." Under Chapter 5.C.1.d. of the manual, however, the FPEB may resolve conflicts in the medical records or other evidence based on their own observations. The record shows that the FPEB did so in this case, and the applicant has not proven by a preponderance of the evidence that it did so erroneously or unjustly.

7. The applicant alleged that the higher ratings she received from the DVA prove that the FPEB erred in assigning her ratings. Under 10 U.S.C. § 1201, a physical evaluation board (Coast Guard) assigns disability ratings according to the extent to which the member has been rendered permanently "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability." In contrast, under 38 C.F.R. § 4.1, the DVA considers the extent to which all of a veteran's "service-connected" disabilities currently render her unable to work in civilian life, whether or not these disabilities rendered the veteran unfit for duty at the time of separation. Therefore, DVA ratings are "not determinative of the same issues involved in military disability cases."[15] The fact that the DVA has currently assigned the applicant a combined disability rating higher than the Coast Guard's rating retroactive to the date of her discharge does not prove that the Coast Guard erred in assigning the applicant a 50% combined, permanent disability rating.

8. The JAG expressed doubt about whether the FPEB should have relied on its own observations of the applicant's disabilities at the hearing. However, Chapter 5.C.1.a. of the PDES Manual allows the FPEB to consider "such other evidence as may be adduced at the hearing," and Chapter 5.C.1.d. allows the FPEB to resolve conflicts in medical evidence based on their own observations if possible. The JAG's doubt does not persuade the Board that the FPEB erred in exercising this authority. In this regard, the Board notes that the FPEB stated in its amplifying statement that it considered *all* testimony brought before it by the evaluee, including the reports from her psychologist and physical therapist. Moreover, the FPEB's personal observations did not cause that board to lower her ratings from those recommended by the IPEB, which relied solely on the medical records.

9. The record shows that the applicant was represented by counsel and received due process during her PDES processing. She has not submitted evidence that overcomes the presumption of regularity accorded the FPEB's assessment of her permanent disabilities at the time of her discharge.[16] Accordingly, the Board will not excuse the application's untimeliness, or waive the statute of limitations. The applicant's request should be denied.

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[15] *Lord*, 2 Cl. Ct. at 754.

[16] *See* 33 C.F.R. § 52.24(b); *see also* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R.§ 52.24(b)).

ORDER

The application of [redacted] USCG (Retired), for correction of her military record is denied.

February 12, 2015

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