

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2016-178**



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**FINAL DECISION**

This is a proceeding 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 after receiving the applicant's completed application on July 28, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 12, 2017, 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, who applied to the Board shortly before he was medically retired from the Coast Guard, asked the Board to correct his record by adding hearing loss to the disqualifying conditions for which he was being medically separated. The applicant stated that after his medical board occurred, he learned that he had "moderate/severe noise-induced hearing loss that requires the use of hearing aids."

In support of this request, the applicant submitted a report of a hearing test, dated July 26, 2016, which shows "moderately severe" hearing loss at the 4,000 Hertz frequency. The doctor checked a box stating that "[p]atient would benefit from hearing aids and hearing aids are recommended" and wrote by hand beside this entry, "(As per Pt [patient] interest)."

**VIEWS OF THE COAST GUARD**

On January 23, 2017, the Judge Advocate General submitted an advisory opinion in which he recommended that the Board deny relief in this case based on the findings, analysis, and recommendation provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that pursuant to 10 U.S.C. § 1216a, the Coast Guard must use the Veterans Affairs Schedule for Rating Disabilities (VASRD) when assigning disability ratings to unfitting

conditions, but when retiring or discharging a member because of disabilities, the Coast Guard “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.” PSC further noted that pursuant to Article 2.C.2.i. of the Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, “the existence of a physical defect or condition that is ratable under [the VASRD] 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.”

PSC further noted that pursuant to Article 3.F.1. of the PDES Manual, in assessing a member’s fitness for duty, a Medical Evaluation Board (MEB) conducts many tests, including an audiogram, and notes all impairments. If the member is considered unfit for duty, the MEB report is forwarded to an Informal Physical Evaluation Board (IPEB) for assessment of the member’s impairments and assignment of disability ratings, if any. The IPEB issues a report showing which impairments are considered unfitting for military service and assigning disabilities ratings. Pursuant to Article 4.A.13.c. of the PDES Manual, the member is counseled by an attorney about the IPEB’s findings and recommendation and has the options of accepting them, accepting them conditionally upon approval of a retention request, rejecting them and demanding a hearing before a Formal Physical Evaluation Board (FPEB), requesting reconsideration, or waiving disability processing altogether to request administrative separation or retirement.

PSC stated that during his PDES processing, the IPEB rated the applicant for bipolar disorder only and found him to be 30% disabled by the condition pursuant to VASRD code 9432. The IPEB recommended that he be permanently retired with a 30% disability rating. In response, the applicant requested reconsideration and asked that his rating for bipolar disorder be increased from 30% to 50%, but the IPEB denied this request because there was no evidence that the applicant’s condition had deteriorated. On June 7, 2016, the applicant accepted the IPEB’s findings and recommendation for permanent retirement with a 30% disability rating and waived his right to a formal hearing before the FPEB.

PSC stated that on July 25, 2016, the applicant requested and underwent another audiogram, and the doctor recommended that he use hearing aids. On August 4, 2016, PSC issued separation orders, which were approved with an effective retirement date of November 7, 2016.

PSC recommended that the Board deny the applicant’s request. PSC stated that the applicant received all due process under the PDES in the determination of his disability rating. PSC stated that the MEB had tested the applicant’s hearing and did not find it to be an unfitting condition. PSC stated that the applicant had the opportunity to review the results and to present new evidence to the IPEB when he requested reconsideration but did not do so. PSC noted that as a veteran, the applicant may undergo evaluation by the VA and request benefits if his hearing affects his civilian employment. In support of this recommendation, PSC submitted records showing the following:

- The IPEB's report, dated May 5, 2016, shows that the applicant was recommended for permanent retirement based on a finding that he was 30% disabled by bipolar disorder, which he had incurred while on active duty.
- On May 12, 2016, after the applicant had authorized his attorney to review his records, the attorney counseled the applicant about the results of the IPEB and his options.
- On May 23, 2016, the applicant's attorney submitted a request for reconsideration to the IPEB on behalf of the applicant. The attorney argued that the applicant's rating for bipolar disorder should be increased to 50%.
- On June 6, 2016, the IPEB responded to the applicant's request for reconsideration and for an increase to 50%. The IPEB denied it because the applicant had submitted no evidence that his condition had deteriorated.
- On June 7, 2016, the applicant accepted the IPEB's findings and waived his right to an FPEB. The Final Reviewing Authority approved the IPEB's findings and recommendation on July 29, 2016.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On January 30, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing within thirty days. No response was received.

### **SUMMARY OF APPLICABLE REGULATIONS**

Chapter 3.F.6.b. of the Medical Manual, COMDTINST M6000.1F, provides that the retention of a member with hearing loss on active duty is "determined on the basis of ability to perform duties of grade or rating."

Chapter 2.C.2.a. of the PDES Manual (COMDTINST M1850.2D) 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 "existence of a physical defect or condition that is ratable 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 9.A.1.c.(1) states that "[t]here is no legal requirement, in making disability retirement determinations, to rate a physical condition, not in itself considered to be disqualifying for military service, along with another condition that is determined to be disqualifying, in arriving at the rated degree of incapacity incident to retirement from military service for disability.

Except as discussed in (2) below [concerning post-operative residuals], in making this professional judgment board members will not rate those disabilities neither unfitting for military service nor contributing to the inability to perform military duty.”

Chapter 9.A.2. 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.

### 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.
2. The applicant alleged that the IPEB's failure to provide a disability rating for his hearing loss constitutes an error and injustice in his record. When considering errors and injustice, the Board begins each case presuming that the applicant's military records are correct and that Coast Guard officials, including his doctors and medical boards, have acted correctly and in good faith in assigning his disability rating.<sup>1</sup> The applicant bears the burden of proving, by a preponderance of the evidence, that the outcome of his PDES processing was erroneous or unjust.<sup>2</sup>
3. The applicant has not proven by a preponderance of the evidence that the outcome of his PDES processing and retirement with a 30% disability rating for bipolar disorder—and with no disability rating for hearing loss—is erroneous or unjust. The record shows that the applicant received all due process under the PDES system and accepted the recommendation of the IPEB after receiving reconsideration. There is no evidence that the applicant complained of hearing loss interfering with his performance of duty or that there was a sudden deterioration of his hearing. The fact that his hearing at 4,000 Hertz was found to be moderately severe shortly before his retirement for bipolar disorder does not prove that his hearing loss interfered with his performance of duty. Not every impairment is unfitting. Pursuant to Chapter 3.F.6.b. of the Medical Manual and Chapters 2.C.2.a., 2.C.2.i., 9.A.1.c.(1), and 9.A.2.b. of the PDES Manual, only hearing impairments that cause or contribute to a member's unfitness to perform his duties require PDES processing and assignment of a disability rating by the IPEB. The preponderance

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<sup>1</sup> See *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that “absent strong evidence to the contrary,” government officials are presumed to have acted “lawfully, correctly, and in good faith”).

<sup>2</sup> 33 C.F.R. § 52.24(b).

of the evidence shows that the applicant was found unfit for duty only because of his bipolar disorder, and the record contains no evidence showing that the applicant's hearing loss interfered with his performance of duty or caused or contributed to his unfitness for duty.

4. Accordingly, the applicant's request should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

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

May 12, 2017

