

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-112



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on March 9, 2017,¹ and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 12, 2018, 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 was medically discharged from the Coast Guard on October 8, 2002, asked the Board to correct his record by changing the disability rating he received upon discharge from 10% to 30%.² He explained that at the time he was discharged, he was diagnosed with both Major Depressive Disorder and an Anxiety Disorder. The applicant claimed that the Coast Guard “prejudicially picked just one disorder” in order to give him only a 10% disability and avoid providing him with a “full retirement.” He argued that had the Coast Guard “been earnest in their evaluation they would have at least rated [him] on the primary disorder,” Major Depressive Disorder, which would have led to a 30% disability rating (thereby qualifying him for a medical retirement). He stated that he should have been rated on both disorders, though, and not just one, as “they were connected to each other at the time and would surely have rated 30%.” The applicant stated that he was unjustly denied a full military retirement because of the Coast Guard’s prejudicial selection of one disability.

In regards to the delay of his application, the applicant stated that he had received a decision from the Physical Disability Board of Review (PDBR) in 2010, and had that board been “earnest

¹ The application was received on June 25, 2015, but it was not docketed until the Chair received a copy of the applicant’s military and medical records.

² The applicant waived his right of review under 10 U.S.C. § 1552 for the conditions on which he had received a final decision from the Physical Disability Board of Review under 10 U.S.C. § 1554a.

in their evaluation,” it would not have taken him “this long” to apply to this Board. He added that each time he tries to address this issue, it brings him a great deal of stress. In support of his application, he provided several documents, which are described below in the Summary of the Record.

PHYSICAL DISABILITY BOARD OF REVIEW

The application for the PDBR, DD Form 294,³ states the following in bold font in block 10: “I have read the attached instruction for this item and understand that by requesting this review I give up my right under 10 U.S.C. 1552 to petition my Service’s Board for Correction of Military/Naval Records to review and correct the rating for the medical condition(s) which made me unfit.”⁴ Below the instructions is a comparison chart between the BCMR/BCNR and the PDBR. The instructions portion of the form states the following regarding block 10:

By requesting a PDBR review, you are giving up your right under 10 U.S.C. 1552 to petition your Service’s Board for Correction of Military/Naval Records to subsequently review the rating for the medical condition(s) which rendered you unfit. The decision of the Secretary on this issue will be final. You may still ask your Service Board for Correction of Military/Naval Records (BCMR/BCNR) to consider other issues including those related to your disability separation.

The PDBR for the applicant convened on March 3, 2010. The cover letter states that the decision was made in accordance with 10 U.S.C. § 1554a and Department of Defense Instruction (DODI) 6040.44. The applicant had applied to the PDBR claiming that the Coast Guard had chosen one of his conditions over the other in order to give him a 10% disability rating as opposed to a 30% rating. His claim states the following:

I underwent (3) medical boards over a (3) year period for a multitude of ailments. The stress eventually led to me developing mental disorders. The third medical board started after spending a short stay in the hospital where I was eventually diagnosed with Major Depressive Disorder and Anxiety Disorder, Not Otherwise Specified. My psychiatrist...lists both of these as Axis I. The Coast Guard chose only one of these in order to qualify me for the least amount of disability. By choosing the Anxiety Disorder they were able to use the verbiage from the VASRD⁵ 9440 that puts me in the 10% range. Clearly if you look at the verbiage for 30% of the same paragraph you’ll see that it is more fitting since it mentions both the depressed mood and the anxiety. Additionally, the cause of these two disorders, as diagnosed by my psychiatrist, was the stress I endured dealing with the other ailments he lists as Axis III and IV, and the associated medical boards. At the very least I should have been found unfit for both Axis I disorders at an amount of 30% but, it is no stretch to say that the other medical conditions created those medical disorders and should be included as well.

The PDBR decision summarized the applicant’s applicable medical history, including a hospitalization and subsequent diagnosis of depression and anxiety. The decision noted that two previous Medical Boards had found the applicant fit for full duty, but both were convened before the hospitalization. The PDBR ultimately found, by a vote of two to one, that the applicant was properly rated at 10%, while one member found that the applicant should have been rated at 30%

³ The applicant’s DD 294 is not before the Board.

⁴ 10 U.S.C. § 1554a(c)(4) (requiring the PDBR to inform an applicant in writing that after applying to the PDBR, the applicant “may not seek relief from the Board for Correction of Military Records operated by the Secretary concerned.”).

⁵ Veterans Affairs Schedule for Rating Disabilities, 38 C.F.R. chap. 1, pt. 4.

(this member did not provide a written dissent). The board stated that the applicant was capable of performing his duties while he was not at sea, and so he suffered from a “transient occupational impairment that interfered with duty performance while at sea but had no difficulties when not at sea and did not require any medications.” The PDRB stated that impairments such as this that merely decreases work efficiency “during periods of significant stress warrant a 10% rating.” The PDRB declined to change the condition for which the applicant was rated from “Anxiety Disorder with Major Depressive Disorder” or the 10% disability rating. The PDRB also noted that because the applicant had not raised his other diagnoses that had been rated by the Department of Veterans’ Affairs (VA), including left elbow tendonitis, cervical spine degenerative joint disease, and a lower back condition, he was able to apply to the BCMR regarding these diagnoses to have the additional conditions added as unfitting.

SUMMARY OF THE APPLICANT’S MILITARY AND MEDICAL RECORDS

The applicant enlisted in the Coast Guard on January 11, 1990, after five years in the Navy.

The applicant was seen by a doctor on December 21, 2000, who noted that the applicant had recently had a Medical Board, which found that he was fit for full duty. A copy of the board’s findings are not available in the applicant’s medical record.

On December 17, 2001, a Medical Board found that the applicant was fit for full duty. The findings state “it is not apparent that any disability exists.” The board considered the applicant’s claims of obstructive sleep apnea, recurrent urticarial/angioedema, and symptomatic premature ventricular contractions. None of his symptoms were found to interfere with satisfactory performance of duty; nor were any disabling in nature.

The Psychiatric Department at the applicant’s command prepared a Summary of Psychiatric Evaluation dated May 14, 2002. The psychiatrist reported that the applicant was not fit for sea duty due to “a combination of moderately severe psychiatric disorders,” which were “directly caused by the [applicant’s] apprehension over being forced...to go to sea despite evident concerns” from his doctors regarding his angioedema and urticarial conditions. The author, a Navy doctor, noted that the applicant had begun to feel depressed and hopeless with crying episodes and poor concentration. The doctor noted that while a previous Medical Board had found the applicant fit for full duty, the applicant had experienced “a gradually worsening of general anxiety and tension,” which rendered him not fit for sea duty. The applicant was specifically diagnosed with the following:

Axis I: (1) Major Depressive Disorder, Single Episode, moderately severe, #296.22, Did not exist prior to enlistment (DNEPTS); (2) Anxiety disorder not otherwise specified, moderately severe, #300.00 DNEPTS.

Axis II: No personality Disorder, #V71.09.

Axis III: Obstructive Sleep Apnea; Recurrent Idiopathic Urticaria/Angioedema; Hypertension; Palpitations.

Axis IV: Chronic medical illness which arouses fear in patient; worries by patient of increased risk of mortality from illness; conflict with senior USCG medical-administrative personnel.

Axis V: Current GAF 55

Following this assessment, the applicant was processed under the Coast Guard's Physical Disability Evaluation System. On July 22, 2002, the Physical Disability Evaluation Board (PEB) issued a report, "Findings and Recommended Disposition," which stated that the applicant suffered from "anxiety disorder: occupational impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress." This condition was incurred while the applicant was on active duty, was not the result of intentional misconduct, and was assigned a 10% disability rating. The PEB recommended that the applicant be separated with severance pay. After consulting counsel, the applicant signed these findings on August 16, 2002. He accepted the PEB's findings and recommended disposition and waived his right to a formal hearing before a Formal Physical Evaluation Board.

The applicant was honorably discharged on October 8, 2002. He had accumulated a total of 17 years, 8 months, and 28 days of military service. The narrative reason for his separation is "disability, severance pay."

Following his discharge, the applicant applied to the Department of Veterans Affairs (VA) for benefits and was rated as follows:

| | |
|--------------------------------|-----|
| Sleep Apnea Syndromes | 50% |
| Arthritis, Degenerative | 10% |
| Urticaria | 10% |
| Limited Flexion of Forearm | 10% |
| Hypertensive Vascular Disease | 10% |
| Ventricular Arrhythmias | 0% |
| Major Depressive Disorder | 0% |
| Lumbosacral or Cervical Strain | 0% |
| Combined: | 70% |

With the applicant's medical record, the Board also received his records from after his discharge. In particular, the applicant provided pages from his medical record from 2015 to 2017, which note that the applicant had suffered from depression and an anxiety disorder, although neither condition appeared to cause him problems following his discharge.

VIEWS OF THE COAST GUARD

On September 6, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. The JAG argued that the applicant should be barred from the BCMR process because he already received a final decision from the PDBR. According to DODI 6040.44, an applicant seeking relief under the PDBR may not then seek relief from the BCMR. Here, the applicant received a final decision from the PDBR on March 3, 2010. The PDBR application contains a clause which states that an applicant waives his right to seek BCMR relief. In addition, the final decision "alludes to this" by pointing out that the applicant did not raise other diagnoses in his application the PDBR and was therefore entitled to petition the BCMR with respect to those conditions. With his recommendation, the JAG also adopted the findings and analysis provided in a memorandum by the Personnel Service Center (PSC).

PSC stated that the application was not timely, as the applicant was discharged on October 8, 2002. As to the merits, PSC argued that the evidence presented to both the PEB and to the PDBR sufficiently supported the diagnosis of Anxiety Disorder with a 10% disability rating. PSC argued that the decision was based on medical documentation which showed a history of anxiety caused by the applicant's apprehension of sea duty. PSC also noted that the applicant's Coast Guard medical and personnel records are afforded the presumption of regularity. PSC argued that the applicant did not show that an error or injustice exists in his record. Both the PEB and the PDBR thoroughly reviewed the applicant's medical history and determined that a 10% disability rating was warranted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 21, 2017, the applicant responded to the views of the Coast Guard and disagreed. He reiterated his argument that the Coast Guard chose just one of his two Axis I conditions, "the lowest one," and discharged him instead of medically retiring him. He also argued that the PDBR erred in using an outdated version of DODI 6040.44. He stated that prior to June 2, 2009, Enclosure 3, Section 5.e.(2) stated, "Only the medical condition(s) determined to be specifically unfitting for continued military service, as previously determined by the Military Department PEB, will be subject to review by the PDBR." Change 1 was put into effect on June 2, 2009. The applicant noted that the quoted language was removed, and in its place is the following:

The following will be subject to review by the PDBR:

- (a) Medical conditions determined to be specifically unfitting for continued military service, as previously determined by the Military Department PEB.
- (b) Those instances when the covered individual requests the PDBR to review conditions identified but not determined to be unfitting by the PEB of the Military Department concerned.

The applicant argued that the PDBR used the outdated instruction in considering his application because it only considered "the single medical condition assigned" by the PEB. He claimed that this fact is proven by the PDBR's decision wherein "they continue to only address a single Major Axis I (Anxiety Disorder) but in their final 'Board Findings' conveniently lump the second Major Axis I with the first by calling it 'Anxiety Disorder with Major Depressive Disorder' as if they were one in the same." He noted that his Psychiatric Evaluation, PEB findings, and the VSARD do not "lump these two separate conditions together." The lowest rating for Major Depressive Disorder under the VASRD was 20% at the time of the applicant's discharge, and the lowest rate for Unspecified Anxiety Disorder was 10%. He argued that these together constitute a minimum of a 30% disability rating. The applicant argued that the PDBR attempted to create an aggregate rating by assigning one "generic VASRD category" when Major Depressive Disorder is a category of its own. He stated that this "attempted slight of hand by the PDBR is a severe injustice and does not represent a valid and forthright finding by an objective board." He urged that this alone is an injustice that creates grounds for the BCMR to review his application and "negates any rights [he] may have waived."

Regarding the timeliness of his application, the applicant acknowledged that his application was not made within three years but asked that the Board consider the application in the interest of justice.

APPLICABLE LAW & POLICY

Title 10 U.S.C. § 1554a is titled “Review of separation with disability rating of 20 percent disabled or less.” Section 1554a(c)(4) states the following:

With respect to any review by the Physical Disability Board of Review of the findings and decisions of the Physical Evaluation Board with respect to a covered individual, whether initiated at the request of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual or initiated by the Physical Disability Board of Review, the Physical Disability Board of Review shall notify the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual that, as a result of the request or consent, the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual may not seek relief from the Board for Correction of Military Records operated by the Secretary concerned.

Department of Defense Instruction 6040.44 as applicable during the applicant’s PDBR stated the following:

The following will be subject to review by the PDBR:

- (c) Medical conditions determined to be specifically unfitting for continued military service, as previously determined by the Military Department PEB.
- (d) Those instances when the covered individual requests the PDBR to review conditions identified but not determined to be unfitting by the PEB of the Military Department concerned.

In addition, the Instruction states that the Secretary of the military departments must obtain written acknowledgement from applicants that “as a result of the request for review by the PDBR, the covered individual...may not seek relief from the Board for Correction of Military Records (BCMR)” and notes that a decision by the PDBR is final.

Chapter 2.C.3.a.(3)(a) of the Physical Disability Evaluation System (PDES) manual in effect in 2002 states that in determining a member’s disability rating, a PEB—

shall not rate an impairment that does not contribute to the condition of unfitness or cause the evaluatee to be unfit for duty 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. In making this professional judgment, board members will only rate those disabilities which make an evaluatee unfit for military service or which contribute to his or her inability to perform military duty.

Chapter 9.A.4.a. of the PDES manual prohibits “pyramiding” of disability ratings (assigning more than one disability rating) for diagnoses that affect the same body area or system as follows:

Pyramiding is the term used to describe the application of more than one VASRD rating to any area or system of the body when the total functional impairment of that area or system is more appropriately reflected under a single diagnostic code. Pyramiding is not permitted as it results in overrating the disability.

The VASRD, at 33 C.F.R. § 4.14, states the following regarding the avoidance of pyramiding: “The evaluation of the same disability under various diagnoses is to be avoided.” Under the VASRD, major depressive disorder and anxiety disorders are mental disorders that are rated under the General Rating Formula for Mental Disorders pursuant to §§ 4.125 *et seq.*

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 generally has jurisdiction concerning veterans' requests to upgrade Coast Guard disability ratings following discharge pursuant to 10 U.S.C. § 1552. But in challenging his disability rating for his mental health conditions through the PDBR pursuant to 10 U.S.C. § 1554a, the applicant knowingly waived his right to have the BCMR review his disability ratings for his mental health conditions. This waiver is shown on the PDBR application form and is required by Congress in 10 U.S.C. § 1554a(c)(4). Therefore, by statute, the BCMR lacks the authority and jurisdiction to review the applicant's claims with respect to his mental health conditions because they were reviewed by the PDBR.⁶ As the PDBR noted in its decision, though, the applicant did not waive his right to have the BCMR consider whether he should have received disability ratings for medical conditions not considered by the PDBR. Therefore, the BCMR has jurisdiction with respect to conditions that were diagnosed while the applicant was on active duty but were not considered by the PDBR.

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.⁷ The applicant signed and accepted the PEB's findings and was discharged in 2002. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2002, and his application is untimely.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁸ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"⁹ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."¹⁰

5. Regarding the delay of his application, the applicant asked the Board to find it in the interest of justice and consider his case on the merits. The applicant also stated that had the PDRB been more "earnest" in their final decision, it would not have taken him so long to apply to the BCMR. The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

⁶ See *Lawrence v. Office of Personnel Management*, 108 M.S.P.R. 325, ¶ 6, *aff'd*, 318 Fed. Appx. 895 (Fed. Cir. 2008) (finding that an uncoerced waiver of appeal rights divests the Merit Systems Protection Board of jurisdiction over the claim).

⁷ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁸ 10 U.S.C. § 1552(b).

⁹ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

¹⁰ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

6. The Board's cursory review of the merits of this case indicates that the applicant's claim cannot prevail. While on active duty, he was diagnosed at different times with left elbow tendonitis, cervical spine degenerative joint disease, a lower back condition, obstructive sleep apnea, recurrent urticarial/angioedema, and symptomatic premature ventricular contractions, but he was medically discharged because anxiety prevented him from going to sea. Three Coast Guard Medical Boards, convened in 2000, 2001, and 2002, reviewed the applicant's medical conditions and fitness for duty but did not find him unfit for duty because of these conditions. Active duty members often continue serving with various medical diagnoses and impairments, and only those that contribute to a member's unfitness for continued military service are rated by the PEB.¹¹ The PEB did not find these conditions to be unfitting and assigned a rating only for the applicant's mental health condition.¹² And the applicant, after consulting legal counsel, accepted the PEB's findings and did not demand a hearing before a Formal Physical Evaluation Board. The decisions of the Medical Boards and PEB are presumptively correct,¹³ and the applicant did not submit evidence that overcomes the presumption of regularity accorded the findings of the Medical Boards and the PEB. Instead, he alleged that he should have received at least a 30% disability rating based on diagnoses of Major Depressive Disorder and Anxiety Disorder. But as stated in finding 1, above, the BCMR lacks the authority to review his disability rating for his mental health. Based on the record before it, the Board finds that the applicant's claims cannot prevail on the merits.

7. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ See Physical Disability Evaluation System Manual Articles 2.C.3.a.(3)(a) (stating that the PEB will not rate impairments that do not contribute to a member's unfitness for duty); 2.C.2.a. ("The sole standard 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."); and 2.C.2 f. (listing certain circumstances, including a member's inability to perform all duties in every geographic location, that do not by themselves support a finding that a medical condition renders a member unfit for military service).

¹² With respect to the single disability rating covering both of the applicant's psychiatric diagnoses, the Board notes that "pyramiding"—assigning more than one disability rating to one part or system of the body—is prohibited under the VASRD and Chapter 9.A.4.a. of the PDES manual.

¹³ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

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

January 12, 2018

