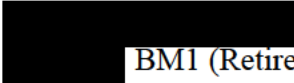


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-076

 BMI (Retired)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on February 27, 2019, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 20, 2020, 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 received a regular military retirement on January 31, 2010, asked the Board to reconsider his requests in BCMR Docket No. 2017-141. He asked the Board to correct his record by placing him on the Temporary Disability Retired List (TDRL) for the first five years following his retirement, changing his career retirement for completing more than 20 years of service to a medical retirement with a post-traumatic stress disorder (PTSD) rating of at least 50%, and updating his DD-214 accordingly.

The applicant argued that the Informal Physical Disability Evaluation Board (IPEB) erred in failing to apply the Veteran Affairs Schedule for Rating Disabilities (VASRD) in assessing his disability rating. He argued that according to VASRD § 4.129¹, a diagnosis of PTSD required a disability rating of not less than 50% and required that the applicant be placed on the TDRL and re-evaluated within six months. Instead, he alleged, the IPEB erroneously offered him only a 30%

¹ The VASRD is codified in 38 C.F.R. §§ 4.1 through 4.150. The pertinent section, § 4.129, addresses the disability rating for mental disorders due to traumatic stress as follows:

When a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted.

disability rating. The applicant argued that had the IPEB not erred in failing to apply the VASRD, he would have chosen a medical retirement rather than a career retirement.

The applicant argued that the IPEB was required to apply VASRD § 4.129 to his disability rating for PTSD because the following criteria were met: 1) the mental disorder developed while in the service; 2) the mental disorder was the result of a highly stressful event; and 3) the mental disorder was severe enough to bring about separation from active military service. The applicant argued that the IPEB's justification for not applying VASRD was that his initial exposure to highly stressful events occurred while he was serving in the U.S. Army and that this was only exacerbated during his service in the Coast Guard. He argued that the initial exposure to highly stressful events is irrelevant since his PTSD was not diagnosed until 2008, when he was in the Coast Guard. The applicant argued that the Coast Guard had no choice but to assign him at least a 50% disability rating.

In addition to receiving at least a 50% disability rating, the applicant argued that VASRD § 4.129 required that he be placed on the TDRL. He argued that not placing him on the TDRL violated federal administrative law. The applicant argued that had the IPEB applied VASRD § 4.129 and placed him on the TDRL, his subsequent Department of Veterans Affairs (VA) rating decisions would have qualified him for permanent retirement with at least a 50% disability rating.

The applicant concluded by stating that the law requires the Coast Guard to properly retire service members so that they receive the most favorable retirement. According to the applicant, his retired pay would be higher if he had elected medical retirement:

Career Redux retirees only receive 40% of their base pay. Military disability retirement at 50% of base pay is clearly 10% higher than 40% REDUX retirement, which would not apply if medically retired. In addition to receiving 10% more of base pay, military disability retirement pay (combat-related) is not considered taxable income. The 10% increase in pay plus the tax exemption is an obvious benefit to a qualifying member.

SUMMARY OF THE RECORD

The official records were summarized in the decision in BCMR Docket No. 2017-141, but the following records are particularly pertinent to the request for reconsideration.

On July 14, 2009, the applicant received the Coast Guard's Informal Physical Disability Evaluation Board's (IPEB) findings and recommendations. The IPEB determined that the applicant was unfit for continued duty due to recurrent post-traumatic stress disorder (PTSD). The IPEB described the applicant's disability as follows:

Post-traumatic stress disorder; 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, chronic sleep impairment.

The IPEB further indicated that the applicant's disability was not the result of willful neglect, intentional misconduct, or unauthorized absence by the applicant; was incurred while the applicant was entitled to basic pay; and was the proximate result of performance of active duty or

inactive duty training or incurred in the line of duty during war or national emergency. It assigned the applicant a 30% disability rating for his PTSD. The IPEB recommended permanent disability retirement.

In the amplifying statement of the IPEB, the IPEB president stated that it did not utilize VASRD § 4.129:

As the condition is one of long standing due to combat exposure while serving in the U.S. Army in Panama and Desert Storm; the condition [was] exacerbated on active duty in the Coast Guard while responding to Hurricane Katrina. Member's symptoms originated in the late 1980's early 1990's.

On September 22, 2009, the applicant's attorney, Commander W, submitted a Reconsideration Request asking the IPEB to increase the applicant's disability percentage for PTSD at least to 50% based on 10 U.S.C. § 1216a and 38 C.F.R. § 4.129 and to 70% based on his symptoms.

On November 4, 2009, the applicant signed and acknowledged the IPEB's report showing a 30% disability rating. He also initialed it next to an option indicating that he accepted the proposed findings of the IPEB and the recommended disposition. A handwritten note states that he would remain on active duty until reaching 20 years of service on November 19, 2009.

On November 24, 2009, the applicant signed and had notarized a document entitled, "Certificate of Full and Fair hearing." That document stated the following:

I hereby certify it has been fully explained to me that a medical board has found I am suffering from a physical disability, namely PTSD and this disability was incurred while I was entitled to basic pay from the United States Coast Guard. My diagnosis was the proximate result of performance of active duty.

I further certify it has been fully explained to me under 10 U.S.C. 1214 and the regulations in Chapter 17, Personnel manual, COMDTINST M1000.6 (series), I am entitled, as a matter of right, to a full, fair hearing before a physical evaluation board before my separation from the United States Coast Guard if I demand such hearing.

I further certify it has been fully explained to me that if I sign this statement, I may be separated from the United States Coast Guard in the near future without further hearing and without any disability compensation whatsoever.

With full knowledge of the findings of the medical board convened in my case and of my rights in this matter, I hereby certify I do not demand a hearing before a physical evaluation board and request I be retired on the first day of February 2010 from the United States Coast Guard IAW my submitted and command approved request for retirement.

The applicant requested and was retired for sufficient years of service on January 31, 2010, instead of being medically retired.

On March 11, 2010, the applicant received a decision from the VA assigning him an overall combined disability rating of 80% as of February 1, 2010. He was assigned 50% for PTSD, 50% for sleep apnea, and 20% for right shoulder arthritis with cuff tear. The VA determined that a higher evaluation of 70% disabling for PTSD was not warranted. This evaluation was not considered permanent.

On January 25, 2012, the applicant received an updated decision from the VA assigning him an overall combined disability rating of 100% as of February 1, 2010, based on his diagnosis of PTSD with major depressive disorder. According to the VA, an evaluation of 100% is assigned whenever there is evidence of total occupational and social impairment. This evaluation was not considered permanent.

On October 4, 2018, the applicant received an updated decision from the VA assigning him an overall combined disability rating of 100% based on his diagnosis of PTSD with major depressive disorder. This evaluation was considered permanent.

VIEWS OF THE COAST GUARD

On September 18, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case.

The JAG stated that the sole issue before the Board is whether the IPEB erred in offering the applicant a 30% disability rating for PTSD in light of 10 U.S.C. § 1216a and 38 C.F.R. § 4.129.

The JAG alleged that the applicant waived his right to contest the assignment of his disability rating when he dismissed the IPEB process in November 2009 and instead chose a career retirement. The JAG alleged that the lack of a memorandum showing the IPEB's response to the applicant's Reconsideration Request shows that the IPEB did not have an opportunity to rule on it, and the Formal Physical Evaluation Board (FPEB) was not afforded an opportunity to hear the applicant's claims. The JAG alleged that the applicant's right to contest any error was foreclosed by the applicant's voluntary dismissal of his claims.

The JAG stated that the IPEB's ruling was a non-binding recommendation. To support this statement, the JAG noted five instances in the IPEB's findings that make it clear that it was not the Coast Guard's final determination of the applicant's case. The JAG argued that the applicant could have accepted or rejected the findings. In fact, the applicant rejected the IPEB's finding and his counsel filed a Motion for Reconsideration. However, according to the JAG, the applicant dismissed his entire disability claim before the Motion for Reconsideration was decided and requested a regular retirement instead. The JAG argued that the applicant's dismissal of his disability claim precluded the Coast Guard from correcting the alleged error. The JAG argued that "to have the BCMR correct the error, if any, 10 years later would be unjust for the Coast Guard and Applicant unjustly enriched."

The JAG argued that the applicant's 30% disability rating was the result of a reasonable, though likely erroneous, interpretation of 38 C.F.R. § 4.129. The IPEB acknowledged that the applicant had PTSD as the result of combat stemming from an inherently stressful event. However, the IPEB determined that the applicant's PTSD did not develop during his service in the Coast Guard. The IPEB determined that the applicant's PTSD developed during his service in the Army and was only aggravated by his service in the Coast Guard. The JAG argued that because the applicant's PTSD did not "develop in service" with the Coast Guard, it was reasonable for the IPEB to be of the position that it was not required to apply the VASRD. The JAG reiterated that if

the IPEB erred in its interpretation of the statute, the applicant is estopped from pursuing relief because the applicant dismissed the disability evaluation process.

The JAG also argued that the applicant's claim is moot because a 100% VA disability rating entitles him to the maximum award under Concurrent Retirement and Disability Pay (CRDP).² In response to the applicant's allegation that he is entitled to "Military Disability Retirement Pay," the JAG argued that the applicant is already receiving tax-free payments from the VA in addition to his military retirement. According to the JAG, the applicant's career retirement and 100% disability rating from the VA already entitles him to receive the maximum amount under the law.³

The JAG alleged that the applicant was not forced to dismiss his disability claim and accept a career retirement. At the time that the applicant voluntarily dismissed his claim, the applicant's counsel had already submitted a Motion for Reconsideration. The JAG argued that the applicant could have proceeded with the Motion for Reconsideration and then could have subsequently requested an FPEB if he did not accept the outcome of the IPEB. The JAG alleged that there is no evidence that the Coast Guard is responsible for the applicant's voluntary dismissal of his claim and acceptance of the career retirement.

The JAG argued that the 100% disability rating given to the applicant by the Department of Veteran's Affairs (VA) is not binding on the Coast Guard. According to the JAG, the VA's evaluation process is fundamentally different from the process applied under the Coast Guard's Physical Disability Evaluation System (PDES). For instance, if a service-connected condition becomes disabling after discharge, the VA may award compensation on that basis. Under the Coast Guard's PDES, the sole standard for a physical disability determination is unfitness to perform duty.

The JAG concluded by stating that the BCMR is not a medical board and is not well positioned to assess the applicant's medical records. To support this argument, the JAG cited BCMR Final Decision 2003-092 that stated the following:

The Board has found that the Coast Guard's failure to evaluate the applicant's fibromyalgia and hypertension under the PDES constitutes error and injustice in his record. However, the BCMR is not a medical board and is not well positioned to assess whether the applicant's hypertension and fibromyalgia rendered him unfit for duty prior to his placement on the TDRL or, if so, to determine the degree to which he was disabled by either of these conditions.

The JAG conceded that there is medical evidence that the BCMR could review, however, it would be improper for the BCMR to make a finding for the applicant.

² 10 U.S.C. § 1414.

³ *Veterans Compensation Benefits Rate Tables*, VA.GOV, https://www.benefits.va.gov/compensation/resources_comp01.asp (last visited Mar. 4, 2020).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 24, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant contended several of the JAG's arguments.

The applicant argued that he did not waive his right to contest his disability rating. He alleged that his Motion for Reconsideration was in fact heard by the IPEB and subsequently denied. He stated that he learned that his Motion for Reconsideration had been denied during a telephone conversation with his attorney. He alleged that the Coast Guard does not have any documentation that his Motion for Reconsideration was pending when he accepted a career retirement.

The applicant acknowledged that he signed the "Certificate of Full and Fair Hearing". However, he alleged, he signed this document less than ten days after being released from the hospital where he was receiving treatment for a stress disorder. At the time, he thought it was his best option. The applicant acknowledged that he was not forced to accept a career retirement, but he maintained that his decision was based on poor advice from his attorney.

The applicant argued that the IPEB's disability rating was in fact a finding and not just a non-binding recommendation as suggested by the JAG. He argued that the only recommendation put forth by the IPEB was for the applicant to be given a permanent disability retirement.

The applicant argued that the IPEB's interpretation of VASRD § 4.129 was unreasonable. According to him, VASRD § 4.129 required the IPEB to assign the applicant a disability rating of at least 50%. The IPEB did not have discretion as to whether to apply the VASRD to his disability rating, even if the applicant's initial exposure to highly stressful events occurred while he was serving in the Army.

The applicant argued that contrary to the JAG's assertion, a medical retirement would offer him more benefits. He stated that the JAG's argument that he would be unjustly enriched if the Board corrected his record shows that a medical retirement and placement on the TDRL would increase his benefits. He maintained that the most favorable retirement is required by law and that because a medical retirement would increase his benefits, the Board should correct his record.

The applicant argued that the Board would not have to conduct an evaluation of his medical records to correct his record. He stated that the evaluations and ratings are clear in his record and that the Board would simply have to apply the VASRD to his disability rating.

The applicant acknowledged his role in this matter. However, he asked the Board to consider the erroneous advice he received from his attorney, his mental state at the time of his retirement, and the IPEB's failure to apply the VASRD in its decision to correct his record.

APPLICABLE LAW AND POLICY

Title 38 C.F.R § 4.129 discusses the disability rating for mental disorders due to traumatic stress:

When a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted.

Title 10 U.S.C. § 1216a discusses the requirements and limitations on determinations of disability for purposes of retirement:

(a) Utilization of VA Schedule for Rating Disabilities in Determinations of Disability—

(1) In making a determination of disability of a member of the armed forces for purposes of this chapter, the Secretary concerned—

(A) shall, to the extent feasible, 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

(B) except as provided in paragraph (2), may not deviate from the schedule or any such interpretation of the schedule.

(2) In making a determination described in paragraph (1), the Secretary concerned may utilize in lieu of the schedule described in that paragraph such criteria as the Secretary of Defense and the Secretary of Veterans Affairs may jointly prescribe for purposes of this subsection if the utilization of such criteria will result in a determination of a greater percentage of disability than would be otherwise determined through the utilization of the schedule.

(b) Consideration of All Medical Conditions— In making a determination of the rating of disability of a member of the armed forces for purposes of this chapter, 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.

Physical Disability Evaluation System (PDES) Manual

Article 1.D.11. of the PDES Manual states that the JAG's Office of General Law provides legal review for the recommendations of both the IPEB and the FPEB. If the recommended disposition is found legally insufficient, the record is returned to the IPEB or FPEB.

Article 3 of the PDES Manual provides that if a member's fitness for continued duty is in question, a medical board of two medical officers conducts a thorough medical examination, reviews all available records, and issues a report with a narrative description of the member's impairments and an for opinion as to the member's fitness for duty and potential for further military service. If the member is considered unfit, the medical board refers the member to an Informal Physical Evaluation Board (IPEB). The member is advised about the PDES and permitted to submit a response to the medical board report.

Article 4 of the PDES Manual provides that an IPEB shall review the medical board report, the CO's endorsement, and the member's medical records. Article 2.C.2.a. provides that the "sole standard" that a board 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." Article 2.C.2.i. states the following about assigning ratings:

The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (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.

Article 2.C.3.a.(3)(a) provides that, if an IPEB finds that the member is unfit for duty because of a permanent disability, it will “propose” a physical disability rating for the condition. Article 2.A.38. 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 ...”

Article 4.A.12. of the PDES Manual states that members are appointed legal counsel to assist them in responding to the IPEB’s recommendation and the PDES process. Article 4.A.13.c.(1) states that a member may submit a rebuttal to the recommendation of the IPEB and request reconsideration within 30 days of notification. The IPEB “review[s] the rebuttal and reconsider[s] the case if the evaluatee’s rebuttal raises issues that might change the original findings and recommended disposition.” The IPEB may issue a new finding in response to the rebuttal or deny the request for reconsideration and notify the member by memo or email. Then the member has a full week to respond. Article 4.A.13.c.(4) states that a member may reject the recommendation of the IPEB and demand a formal hearing at the FPEB. Article 4.A.13.c.(5) states that a member may “waive continued disability processing and request administrative separation or retirement.” And Article 14.C. states that when a member accepts an IPEB recommendation, the case undergoes a review for legal sufficiency by the JAG’s Office of General Law before the IPEB’s recommendation is approved and implemented.

Article 8.A.1. of the PDES Manual states that a member who has at least a 30% disability rating will be placed on the TDRL “when the disability is not permanent.” While on the TDRL, a member is periodically reevaluated and may be found fit for duty and authorized to reenlist, may be medically separated with a 10% or 20 percent disability rating, or may be medically retired with a 30% or higher disability rating.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant’s military record and submissions, the Coast Guard’s submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The request for reconsideration was properly filed with new material evidence as required by 10 U.S.C. § 1552(a)(3)(D).
2. The applicant alleged that the IPEB failed to apply the VASRD to his disability rating for PTSD and that as a result, he accepted a regular retirement, instead of a medical retirement, which was erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military

record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁵

3. The JAG alleged that the applicant is legally estopped from pursuing relief because he dismissed his own Reconsideration Request and waived further review of his disability claim. The applicant averred that he did not dismiss his Reconsideration Request and that he was informed by his attorney over the phone that it had been denied by the IPEB. He claimed that he had submitted a request for a regular retirement only because his Reconsideration Request was denied. The record shows that the applicant’s attorney submitted a Reconsideration Request on September 22, 2009, and the applicant submitted his request for retirement more than six weeks later, on November 4, 2009. There is no documentation of the IPEB’s decision on the Reconsideration Request in the record before the Board, but Article 4.A.13. of the PDES Manual allowed the President of the IPEB to respond to the request by email alone—presumably an email to the applicant’s attorney that no one printed out and entered in the applicant’s medical records. Therefore, given the applicant’s statement and the six-week lapse between his Reconsideration Request and his decision to request a regular retirement, the Board is persuaded that the IPEB had actually denied his Reconsideration Request before he abandoned the PDES process—which takes many months—and requested a regular retirement. Whether the Reconsideration Request was dismissed or denied, however, is not determinative of the outcome of this case because the Federal Circuit has held that a waiver of review of an IPEB determination is not equivalent to a waiver of review by this Board.⁶ The applicant’s acceptance of the IPEB’s recommendation does not estop his appeal to this Board.

4. The JAG argued that it would be improper for this Board to review the applicant’s medical records and establish that the applicant was in fact medically disabled at 50%. The Board disagrees that a further review of the applicant’s medical records is required, however. As the JAG noted, the sole issue before the Board is whether the IPEB erred in offering the applicant a 30% disability rating for PTSD in light of 10 U.S.C. § 1216a and the VASRD at 38 C.F.R § 4.129. The issue before the Board is therefore a question of law and not a question of medical fact. The Board finds that this issue can be resolved without a medical review of the applicant’s records.

5. The VASRD⁷ is a guide in the evaluation of disability resulting from diseases and injuries encountered as a result of or incident to military service. While the VASRD is a Department of Veterans Affairs (VA) regulation, the National Defense Authorization Act for Fiscal Year 2008 mandated that the military services use the VASRD in assigning disability ratings to members. According to 10 U.S.C. § 1216a, the military services “may not deviate from the schedule or any such interpretation of the schedule,” except pursuant to “such criteria as the Secretary of Defense and the Secretary of Veterans Affairs may jointly prescribe.”

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *Van Cleave I*, 402 F.3d at 1343.

⁷ 38 C.F.R. §§ 4.1 *et seq.*

6. VASRD § 4.129 provides that the minimum disability rating that may be assigned for mental disorders caused by traumatic stress that develop in service and are severe enough to bring about the veterans' release from active military service is 50%. On July 14, 2009, the IPEB found that the applicant was not fit for duty due to PTSD and found that his condition was incurred while he was serving on active duty. The IPEB assigned him a disability rating of only 30%, however. In the IPEB's amplifying statement to the applicant, the IPEB acknowledged that it did not apply the VASRD in determining the applicant's disability rating "as the condition is one of long standing due to combat exposure while serving in the U.S. Army in Panama and Desert Storm." According to the JAG's advisory opinion, the IPEB did not apply the VASRD because the applicant's PTSD developed while he was in the Army and was only aggravated by his service in the Coast Guard. Nothing in the VASRD states that a lower disability rating may be assigned if a condition was incurred during a prior enlistment or while serving in a different military service, however. The Board can find no such policy under the PDES Manual, and the JAG cited none. Therefore, the Board disagrees with the Coast Guard that a reasonable interpretation of VASRD § 4.129 could lead to a disability rating of anything less than 50% for a member who is unfit for duty because of service-incurred PTSD.

7. Even if the IPEB's interpretation of VASRD § 4.129 were reasonable, 10 U.S.C. § 1216a prohibits deviation from the VASRD without criteria prescribed by the Secretary of Defense and the Secretary of Veterans Affairs. There is no evidence that such criteria applicable to PTSD were in effect when the applicant was being processed under the PDES, and neither the IPEB nor the JAG mentioned or cited any such criteria. The Board finds that the IPEB's failure to apply the VASRD in determining the applicant's disability rating was a clear legal error under 10 U.S.C. § 1216a and 38 C.F.R. § 4.129. Because the applicant was found unfit for duty due to service-incurred PTSD, the IPEB should have recommended his medical retirement with a 50% disability rating.

8. The record shows that the applicant—while suffering from PTSD—gave up on the PDES process, waived his right to a formal hearing before the FPEB, and requested a regular retirement when the IPEB refused to apply the VASRD and rejected the sound legal argument for a 50% disability rating in his Reconsideration Request. The JAG argued that the applicant's waiver of his right to a hearing prevented the Coast Guard from correcting its legal error, and so he should not receive a 50% rating in the interest of justice. The Board disagrees. Under the PDES Manual, both the IPEB and the FPEB are convened to assess a member's physical fitness for duty and degree of disability. Any legal advice and legal sufficiency reviews are provided to both boards by the Office of the JAG.⁸ Therefore, the applicant had every reason to believe that the IPEB was following legal advice from the Office of the JAG and no reason to believe that the legal advice would change if he demanded an FPEB. And in fact, to become final, the IPEB's recommendation must have survived legal review by the Office of the JAG despite VASRD § 4.129, 10 U.S.C. § 1216a, and the Reconsideration Request, which expressly pointed out their applicability.⁹ Therefore, despite his waiver of his right to an FPEB, the Board finds that the applicant was entitled to retirement with a 50% disability rating in accordance with VASRD § 4.129.

⁸ COMDTINST M1850.2D, Article 1.D.11.

⁹ COMDTINST M1850.2D, Articles 1.D.11. and 4.C.

9. The applicant asked the Board to retroactively place him on the TDRL because, he alleged, the IPEB's failure to do so violated federal administrative law. There is nothing in the VASRD that expressly required the Coast Guard to place him on the TDRL. Instead, § 4.129 states that after assigning the member a disability rating of at least 50%, "the rating agency shall ... schedule an examination within the six-month period following the veteran's discharge to determine whether a change in evaluation is warranted." In addition, the IPEB found that the applicant's disability was permanent and stable, and placement on the TDRL is appropriate only when a disability is thought not to be permanent and stable.¹⁰ Moreover, the applicant did not claim in his Reconsideration Request that his disability was not permanent and stable.

10. The applicant argued that if he had been placed on the TDRL, he would have received a 100% disability rating pursuant to the VA evaluation in 2012, which was backdated to his date of retirement. But the applicant was in fact examined by the VA soon after he retired. On March 11, 2010, the applicant received a decision from the VA assigning him a 50% disability rating for PTSD. Therefore, the preponderance of the evidence in the record does not support the applicant's claim that he should have or would have received a disability rating higher than 50% through the PDES if the Coast Guard had properly retired him with a 50% disability rating and reevaluated him six months later pursuant to VASRD § 4.129. Nor is there substantial evidence that his disability rating would have been lowered to 30% six months after his retirement.

11. The Coast Guard has admitted and the applicant has proven by a preponderance of the evidence that the IPEB committed a legal error by failing to apply VASRD § 4.129, which required assignment of a 50% disability rating to his PTSD. In light of his rebuttal to the IPEB's proposal of a 30% rating, the Board is persuaded that the applicant would have elected to be medically retired with a 50% disability rating had the IPEB and its legal reviewer properly applied VASRD § 4.129 and 10 U.S.C. § 1216a. However, given that his disability was deemed permanent and stable, the Board finds no grounds for placing him on the TDRL. Although the Coast Guard claimed that correcting his record to show that he was medically retired with a 50% disability rating would not entitle him to any additional benefits, the applicant strongly disagreed. And a 50% disability rating from the Coast Guard constitutes a permanent minimum disability rating that, unlike VA ratings, cannot be lowered and that could, if his VA rating were lowered below 50%, place him in a higher priority group for treatment at the VA.¹¹ Accordingly, the Board will direct the Coast Guard to correct his record to show that he was medically retired with a 50% disability rating for PTSD, instead of being administratively retired. His requests for placement on the TDRL and for a rating higher than 50% are denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁰ COMDTINST M1850.2D, Article 8.A.1.

¹¹ See U.S. Department of Veterans Affairs, "VA priority groups," available at <https://www.va.gov/health-care/eligibility/priority-groups/> (last viewed on March 20, 2020).

ORDER

The application of BM1 [REDACTED] USCG, for correction of his military record is granted, in part. The Coast Guard shall correct his record to show that he was medically retired with a 50% disability rating for PTSD in accordance with 38 C.F.R. § 4.129. All other requests are denied.

March 20, 2020

