

**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. 2019-076**



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**CLARIFICATION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and pursuant to 33 C.F.R. § 52.73 upon receiving a Request for Clarification from the Judge Advocate General (JAG) and for amendment of the Order issued in this case on August 26, 2020.

This Clarification, dated February 11, 2022, is approved and signed by the three duly appointed members who were designated to serve on the Board in this case.

**BACKGROUND SUMMARY**

In 2009, the applicant was assessed by an Informal Physical Disability Evaluation Board (IPEB) that determined that he was not fit for duty due to PTSD. According to the Veteran Affairs Schedule for Rating Disabilities (VASRD), 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 members' release from active military service is 50%. However, the IPEB assigned the applicant a disability rating of only 30% because the applicant's condition was due to combat exposure while serving in the U.S. Army. The Board determined that the IPEB's failure to apply the 50% rating required by the VASRD was an error. Therefore, the Board granted the applicant's request to 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.

**REQUEST FOR CLARIFICATION**

On August 26, 2020, the Board received a Request for Clarification from the JAG in this case. In the request, the JAG made three arguments:

- First, the JAG argued that the Board was acting outside of its statutory mandate in holding the Coast Guard accountable for a non-final agency action. The JAG stated that the mandate of the Board is to correct military records. According to the JAG, a military record is the documentary reflection of a final agency action. The JAG argued that in this case, the IPEB's 30% rating was an interim decision and should be considered a non-record.

- Second, the JAG argued that the Board erred in granting the applicant's request when he submitted a knowing, voluntary, and intelligent waiver of the PDES process.
- Third, the JAG asked the Board to clarify whether the Coast Guard is permitted to schedule a follow-up examination of the applicant within six months of his separation to determine whether a change in his disability rating is warranted. The JAG stated that according to 38 C.F.R. § 4.129, a rating agency must schedule an examination within a six-month period following the member's separation to determine whether a change in evaluation is warranted. The JAG argued that the Board's decision prohibited the Coast Guard from doing a follow-up examination of the applicant as required by regulation.

The BCMR forwarded a copy of the Coast Guard's Request for Clarification to the applicant and invited him to respond. The applicant submitted a response stating that the request showed that there was a dispute between the Board and the JAG's office and that he had no further arguments.

### FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction over this matter in accordance with 10 U.S.C. § 1552. BCMR regulations at 33 C.F.R. § 52.73, state the following:

If the intent or import of the final decision is not clear to the Coast Guard, if the Coast Guard believes that executing all or part of the order in the final decision is beyond the Coast Guard's authority, or if the Coast Guard believes that the order is incomplete because of an oversight, the final decision shall be returned to the board for clarification or technical amendment.

2. The JAG's first two legal arguments could have been submitted to the Board in the advisory opinion but were not, and they cannot properly be addressed after the fact by clarification or technical amendment. Neither the claim that the applicant's disability rating was not a record that the Board could correct nor the claim that the Board should deny relief because of the applicant's waiver constitute arguments that the intent or import of the final decision is unclear, that the relief directed by the Board is beyond the Board's authority, or that the order is incomplete because of an oversight. Therefore, the Board finds that these two issues may not properly be raised in a Request for Clarification. The Board rejects these two arguments and declines to amend the Board's prior order in this case because of them.

3. The Coast Guard's third argument, regarding 38 C.F.R. § 4.129, however, clearly constitutes a request for clarification of the Board's order. In its decision, the Board ordered the Coast Guard to correct the applicant's record to show that he was medically retired with a 50% disability rating for PTSD "in accordance with 38 C.F.R. § 4.129." According to 38 C.F.R. § 4.129, "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." Therefore, as the Board expressly cited this regulation in the order, the Board finds that the Coast Guard is permitted to schedule a follow-up examination of the applicant within six months of his separation to determine whether a change in his disability rating is warranted.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER UPON CLARIFICATION**

The Board's order in the Final Decision remains in force and effect. The Coast Guard shall correct the applicant's record to show that he was medically retired with a 50% disability rating for PTSD in accordance with 38 C.F.R. § 4.129. The Coast Guard shall expeditiously implement this Order and may exercise its option under 38 C.F.R. § 4.129 to reevaluate his disability rating within six months of this clarification.

February 11, 2022

[REDACTED]

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