DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-025

[redacted]
BM1 (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 December 29, 2020, and assigned the case to an attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated June 27, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant, a retired former Boatswain's Mate Petty Officer 1st Class (BM1/E6) in the Selected Reserve who was retired from the Coast Guard on January 10, 2019 (permanent physical disability, 50%, General Anxiety Disorder/Insomnia), asked the Board to correct his record by increasing his disability rating from 50 to 70%. The applicant stated that "his back was rated at 10% at the time of [his] medical board and was also a primary contributor necessitating [his] medical retirement," but was not included in his disability rating.

The applicant requested to appear before the Board via video or telephone; the Chair denied this request.

APPLICANT'S ALLEGATIONS

The applicant claimed that the error or injustice occurred on January 9, 2019, the date he was medically retired from active duty, and that he discovered the error in August 2020.

In his application the applicant alleged that his disability rating should be increased to 70% for the following reasons:

- The severity and degree of the medical conditions that required him to separate from the Coast Guard remain the same today as when he was on active service, however, the

information and evidence were not fully available at the time of his separation from service to prove a 70% rating.

- At the time of his separation from service he suffered from mental health issues but the depths of mental health conditions can require the element of time to prove their true severity of impact. He claimed that "[w]hat he experiences now is what he experienced at the time of discharge" and that "time was not something he could fully afford while going through the medical board process".

- The applicant explained that his inability to sleep and mental health conditions were at the "forefront of everything" at the time of his separation from service but that, at that time, he also suffered from back issues. He claimed that his back was degrading at the time he returned from deployment as evidenced by x-rays that showed that there was "deterioration causing back pain and limited mobility" and that his back issue itself and associated evidence of it was not available until his final months of active duty.

The applicant also provided a separate statement in support of his application:

. . .

> I think one of the greatest considerations to address is the argument could be made these concerns can be addressed by the VA. While in many respects that may be true, given the VA focuses more on the broad impact of service conditions to civilian life. The USCG, like the other branches, focus exclusively on the unfitting nature of a condition and its impact on military duties, anything else is referred to the VA []. That being said, my requests are in line with the scope and purpose of the USCG in terms of definition and responsibility of unfitting conditions. In other words, the depth and true severity of my unfitting conditions [were] not fully known nor was the evidence available at the time of retirement. The conditions have not changed since discharge, normally conditions can worsen with time; however, in this matter, time has revealed a great severity and better understanding that was not known then.
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> Originally, the VA just mirrored the USCG's rating of 50% for the same conditions (August 2019). However, as time went on with treatment and life in general, other aspects of my conditions and symptoms began to crystalize with clarity. So much so, the VA adjusted my rating for the same unfitting conditions to 70% (August 2020) after I applied for individual unemployability. In their decision letter they articulated their decision with the following considerations: Obsessional rituals which interfere with routine activities (OCD), difficulty in adapting to stressful circumstances, depressed mood (MDD), disturbances of motivation and mood, flattened affect, mild memory loss, anxiety, chronic sleep impairment, difficulty in establishing and maintaining effective work and social relationships, panic attacks more than once a week, and occupational and social impairment with reduced reliability and productivity [].
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> Some of the formerly mentioned variables have been in play since the beginning of my service. For instance, my current doctors have recognized obsessive compulsive disorder (OCD) and major depressive disorder (MDD) overlapping with anxiety and insomnia. Moreover, many of the previously mentioned symptoms are a result of all these conditions interweaving together. The evidence for the full picture were there partially at the time of the board, but not fully. My supervisor at the time noted a careful observation:
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> 'I am concerned with [the applicant's] ability to attend school or perform a full-time job. Although I am not a medical professional, based upon my observations as the logistics officer, I do not see how [the applicant] can perform a 40-hour work or school schedule without accommodations.' []

Another notable source is from the doctor that performed a mental evaluation for the medical board: 'The patient's prognosis for his function in the Coast Guard is poor. He is unable to fulfill the duty requirements safely due to his sleep disorder. It is possible that the patient may function appropriately in a less stressful work environment that does not require shift changes, recall status, or 8-hour rest periods. However, given his history, he is susceptible to future sleep issues in times of stress.'

There are of course other sources to consider, but these two highlight the fact the symptoms I am currently experiencing were noticed early on. The inability to work a normal full-time job and the inability to adapt to stressful circumstances was noted, but not necessarily the full severity or root causes. The root causes went unidentified likely because the inability to sleep was the primary concern and anxiety conditions as a source is earlier to spot. Major depression or OCD, however, is not as obvious in some cases. Furthermore, I was only able to work two days a week because the drive was 45 minutes one way. The accommodating work schedule did not necessarily push the severity of everything to the surface as my full-time job is currently doing.

. . .

I believe there [are] three credible variables to consider from observations from my time in the USCG:

(1) LCDR [] noted the concern of not being able to work a full-time job.
(2) The psychologist that noted times of stress may exacerbate my conditions beyond functionality.
(3) Chronic depression throughout my years of service I was not aware of (recent discovery of the condition but reflection with doctors indicates it goes back to first deployment in 2011).

The initial incident on January 20th, 2017[] created a snowball effect of conditions colliding and aggravating others. The VA recognized a flurry of additional conditions and symptomology all having to do with the same unfitting condition that led to medical retirement. Notably, the diagnosis of OCD and Major Depressive Disorder as both contributing to the inability to sleep and overwhelming fatigue. As my wife and I moved to Colorado for health considerations, the degree of my own inabilities became even more apparent.

I have severe occupational and social impairments in all realms of life from social, professional, family, mood, and judgment. Obsessional rituals dominated my functional life, so much that my spouse has filed for divorce and taken our newborn with her (currently in court). Panic attacks have become the norm for life because of the enormous amount of stress. Depression takes away all energy and desire to do anything; it is a daily battle just to do routine activities like personal hygiene. Sleep is still inhibited along with functional energy. Establishing friendships inside of work or outside at church has been near impossible. I have been on short term disability for roughly 30% of the time working my currently job (on it now). Difficulty adapting to stressful circumstances would be an understatement. Lastly, the mood swings and irritability from fatigue make it difficult to hold meaningful conversations at work or socially.

Throughout the two-year process of the medical board, I would suggest I was rather sheltered by the USCG for recovery purposes. I have no complaint as it was certainly needed, but the focal point was the inability to sleep and anxiety condition. The other conditions were already present and at work with the former ones. Therefore, as the OCD and MDD were unrecognized at the time, the true severity of my unfitting conditions was not fully known. It did not take the VA long to see the additional components as my circumstances have been deteriorating rapidly. Therefore, I ask my USCG rating of 50% be adjusted to 70% as the missing pieces have been properly assembled for informational purposes. I have a fight or flight response every time I go to bed, so learning my departure from the military was a combined effort of multiple conditions interwoven together has been helpful.

To support his allegations, the applicant submitted over 400 pages of documents, including copies of his military medical records and records from private psychiatrists who have treated him, documents related to his Medical Evaluation Board (MEB) and Informal Physical Evaluation Board (IPEB), and the rating decision letter from the United States Department of Veterans Affairs ("VA") dated July 23, 2020. Only the evidence that is considered specifically relevant to the applicant's requests for relief will be summarized and included within this decision.

VIEWS OF THE COAST GUARD

On June 11, 2021, a Coast Guard Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Commander, Coast Guard Personnel Service Center ("PSC"), presuming administrative regularity on the part of the Coast Guard and other Government officials, and noting that the applicant has the burden of providing the existence of an error or injustice by the preponderance of the evidence. PSC recommended denial based on lack of evidence that an error or injustice occurred. PSC stated that the Coast Guard does not re-adjudicate a case, as here, once a member is medically retired/separated and advised that the applicant should file a claim with the VA with updated medical evidence, so that any and all medical conditions can then be rated accordingly. PSC noted:

> [T]he applicant was properly separated from the Coast Guard due to physical disability, and was rated based on the medical evidence available at the time. The Coast Guard only rates members who have unfitting medical conditions and the rating is based off the medical evidence available at that time. If a member's condition worsens or improves, the member may file a disability claim with the [VA].

Like PSC, the JAG argued that the applicant was properly separated from the Coast Guard due to physical disability and was rated based on the medical evidence available at the time. If a member's condition worsens or improves, the member may file a disability claim with the VA. Citing to the Physical Disability Evaluations System Manual, COMDTINST M1850.2D, the JAG made the following points in support of recommending denial, noting that the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith[1]:

(1) The Applicant's request to correct the permanent physical disability rating as provided by the Coast Guard was administratively reviewed, and the Coast Guard recommend[ed] that that the Board deny relief. In the course of his physical disability evaluation processing, Applicant elected and was advised by assigned military counsel;
(2) [T]hat representation was utilized to further inform the [IPEB], which resulted in the increase of Applicant's disability rating;
(3) Those findings . . . were accepted by his attorney on his behalf on 07 July 2018, and subsequently approved by CG PSC[];
(4) While Applicant's brief alleges that his condition(s) continued to worsen in severity during his remaining time in service, Applicant accepted his separation as indicated by his signature on the DD Form 214 of 01 January 2019 . . . As the record is silent as to any timely efforts by the Applicant to further inform or update CG-PSC regarding his medical status prior to his separation, it is substantial evidence that the provided disability rating of 50% accurately reflected the severity of his condition at the time of his separation.

[1] *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 5, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

SUMMARY OF THE RECORD

05/19/09 The applicant enlisted in the Coast Guard Selected Reserves as an E1/SR.

2011 The applicant developed anxiety and insomnia while deployed overseas.

11/18/16 The applicant reenlisted as a E6/BM (Boatswain's Mate), after which the applicant was again deployed overseas.

The duties associated with this position included the physical ability to get underway for training and operations, supervising an assigned crew, and tactical boat maneuvers.[2] As the applicant was assigned the night shift he began experiencing issues with falling asleep. After returning from his third deployment, the applicant began having difficulty with his assigned military duties, arriving late to work, feeling exhausted, having difficulty falling asleep, and sleeping long hours.

01/20/17 As a result of the applicant's inability to sleep, the applicant took a prescribed medicine (Ambien) to initiate sleep which caused him to have an allergic reaction that led to his hospitalization. The applicant also reported that he was hospitalized related to his not being able to sleep for nearly 40 hours at the time he took the medicine.

8/10/17 Record of medical exam noted that the applicant reported low back pain, developed while deployed. Record also stated that initial lumbar pain improved, but then transitioned to thoracic pain. A review of the applicant's medical record reflected that he intermittently reported pain and then some relief from back pain. The patient's medical record also indicated that he has a shorter leg on his right side.

10/28/17 Fitness for Duty/Diagnostic Evaluation provided by USAF Psychologist on an outpatient basis after meeting with the applicant on October 5, 2017 and October 13, 2017. The psychologist's notes from this encounter stated that the applicant was referred for both a diagnostic evaluation and a fitness for duty evaluation. During this fitness for duty evaluation, just prior to his anticipated medical evaluation board, the applicant reported "that he was in good health" and "denied any other chronic medical concerns outside of sleep issues." The applicants only reported medical hospitalization was related to his adverse reaction to Ambien. The applicant's back is not mentioned in this evaluation.

The Clinical Impression/Summary from this encounter included the following notes:

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[2] *See* USCG Boat Operations and Training Manual, Volume 1, COMDTINST M16114.32.

Diagnosis: Z80.52 Insomnia Disorder; R/O Unspecified Anxiety Disorder.

Clinical Impression/Summary: The pt reports a relatively long history of problems with sleep initiation due to ruminative thinking at bedtime. The pt's sleep disorder symptoms have worsened during periods of stress and irregular sleep-wake patterns. Over the past 10 months, the pt has consistently reported dissatisfaction with sleep quantity and quality, which has led to clinically significant impairment in occupational functioning. The pt reports daytime impairments (e.g. cognitive impairments) as well as nighttime sleep difficulties. He is unable to meet the demands of his job (e.g., 8-hour rest cycle, 30 minute recall status), and given his sleep impairments is at risk for accidents both at work and on his commute to and from work. The pt presumably suffered from Insomnia Disorder prior to his recent deployment where he worked night shift. It is likely that the shift work exacerbated his sleep condition, worsening his symptoms and leading to a significant sleep debt. The pt was previously diagnosed with Circadian Rhythm Disorder (Shift Work Type), but with this condition it is commented that the sleep symptoms resolved after reverting to a day-work routine. The pt's insomnia symptoms have persisted despite a change in work schedule (though they have improved significantly). Therefore, the diagnosis of Insomnia Disorder appears to best account for his current sleep difficulties.

It is not possible at this time to determine if there is a psychiatric condition that accounts for the pt's rumination that interferes with sleep initiation. The pt reported that his ruminative style pre-dates any sleep disorder symptoms, but it is difficult to accurately assess the severity of any anxiety symptoms due to the co-morbid sleep disorder symptoms. Although the pt's sleep disorder symptoms have reportedly improved over the past several months, he still has significantly impaired sleep, and also reported failure to achieve REM sleep during a sleep study. A diagnosis for an anxiety condition will not be given at this time as the pt should be re-evaluated following proper diagnosis and treatment of his sleep disorder. It is possible that appropriate management of the pt's biological or organic sleep disorder will resolve night-time ruminations, leading to sleep onset with an appropriate length of time (e.g., less than 30 minutes).

Prognosis: The pt's prognosis for his function in the Coast Guard is poor. He is unable to fulfill the duty requirements safely due to his sleep disorder. It is possible that the pt may function appropriately in a less stressful work environment that does not require shift changes, recall status, or 8-hour rest periods. However, given his history, he is susceptible to future sleep issues in times of stress (e.g., deployments, changing shifts, etc.).

. . .

RECOMMENDATIONS:

1. Refer for Medical Evaluation Board as pt is unable to fulfill occupational requirements at this time.
2. Follow all recommendations of sleep specialist (i.e. complete recommend[ed] sleep studies).
3. Recommend cognitive-behavioral treatment from a psychologist trained in clinical health psychology.

PLAN/DISPOSITION:

1) Next scheduled session: None; evaluation complete.

10/30/17 The applicant was referred to an MEB based on finding that he is unable to fulfill occupational requirements at this time.

11/03/17 **MEB OPINION**

The member's current evaluation shows ANXIETY, CIRCADIAN RHYTHMN DISORDER and INSOMNIA. The symptoms have improved with the use of medications. The member continues to c/o anxiety and difficulty sleeping but less severe while taking medication. The member complains of feeling 'groggy' and has trouble concentrating while taking the medication. The member has not been FFFD during these treatments and will not be able to return to a full duty status as the diagnoses and medications are disqualifying with no recommendation to perform Coxswain duties.

DIAGNOSIS:
1) GENERALIZED ANXIETY DISORDER.
2) CIRCADIAN RYTHMN DISORDER.
3) INSOMNIA – CHRONIC.

PRESENT TREATMENT: The member is currently under the evaluation and treatment of a VA Neuropsychiatrist []. The member is taking chronic antidepressants as a sleep aid. Continued psychotherapy has been recommended.

PROGNOSIS: POOR TO CONTINUE A MILITARY CAREER. Due to the nature of the member's condition, the use of disqualifying medications and the uncertainty of when or if his condition will resolve; the member is expected to never be fit for full duty as he cannot perform the duties required of his rate and rank.

IT IS THE OPINION OF THE BOARD:

1) The diagnosis of Chronic SLEEP DISORDER secondary to ANXIETY, INSOMNIA and CIRCADIAN RHYTHMN DISORDER is correct and member's condition is chronic.

2) [The applicant] will require continued mental health evaluation and chronic medication management. He will not return to a full duty status.

3) Personal appearance of the [applicant] before the IPEB would not be deleterious to the member's physical or mental health.

4) Disclosure to the [applicant] of information relative to his physical or mental condition would not be deleterious to that condition. If discharged into one's own custody, the [applicant] will not constitute a danger to self or the public safety.

5) The [applicant] is not likely to become a public charge.

IT IS THE RECOMMENDAITON OF THE BOARD:

1) That the member be discharged from the USCG due to the disqualifying condition as stated. The member does not meet the standards for retention in the USCG as described in accordance with COMDTINST M 6000.1F.16.b; 19.c.3. After all adequate treatment has been provided the member remains not fit for duty.

The LCDR and CDR signed this document, as the submitting and reviewing providers.

11/03/17 That same day, the applicant submitted a rebuttal statement to the MEB findings:

1. The following information in this memorandum will be an attempt to provide further clarity on all relevant topics pertaining to the medical evaluation board, summarized chronologically needed details, and comment on various statements in the medical notes [].

2. The overall severity of my conditions has ebbed and flowed throughout my military tenure; always in varying degrees and never consistent enough to normalize any patterns until recently. The first time I saw a medical provider for these conditions was in 2014 []. The provider indicated she wanted me to try adapting to my circumstances further and allow more time to elapse to see if my body would compensate. I expressed interest in trying medications for I was struggling inconsistently on and off for three years at that point. However, the provider did not feel comfortable with providing any at the time; she expressed an interest to take a more natural approach without depending on any medications. My symptoms of inconsistently initiating (Insomnia) and maintaining sleep; in conjunction with fluctuating anxiety would continue to vary until my third deployment [] in 2016.

3. At the very onset I was placed on the night shift, at first sleep patterns were somewhat normal. The average time to fall asleep was strictly to ninety minutes. From previous deployments I was on nights as well, but no longer than 4 weeks. I'd been switching from nights to days typically every 4 to 6 weeks until October 2016. From October 2016 until January 20th, 2017, I was consistently working the night shift from 1800 to 0600. After about six weeks my sleep quality was beginning to deteriorate, it was taking longer and longer to initiate sleep; in addition, I was experiencing daily fatigue, and unable to fall asleep no matter how tired I was. Eventually, my symptoms that led to my initial hospitalization (Adverse reaction to Ambien, January 2017), averaging 1-2 hours of sleep, 3 sleepless nights in a 14 day period, and I was up for nearly 40 hours leading up to a hospitalization.

4. I was placed on the day shift immediately following almost a week of SIQ. I was still experiencing sleep difficulties, but not to the same degree as the night shift. Upon returning stateside and being placed on medical hold, I was referred to a civilian psychologist, and psychiatrist. In addition, I've recently begun seeing a psychologist associated with the Department of Veterans Affairs that specializes in sleep disorders[].

5. The medical providers [] gave the following diagnostic codes:

a. Unspecified Anxiety Disorder (Civilian Psychologist/Generalized Anxiety Disorder (Civilian Psychiatrist)
b. Insomnia Disorder
c. Circadian Rhythm Sleep-Wake Disorder, Shift work type

6. The two specialists differed on the type of anxiety disorder, nevertheless, they both agreed there was some type of anxiety disorder at work overlapping with a sleep disorder. I believe the psychiatrist gave a diagnosis of Generalized Anxiety Disorder because at the time I was very anxious regarding many things. For example, I was struggling on a daily basis with falling asleep with no effective medication, my symptoms were progressively worsening impacting social and occupational areas of my life. The fear of not being able to fall asleep was creating a snowball effect with everything. So, it is very probable this is what led to her diagnosis.

7. In October of 2017, I saw a military psychologist [] for the purpose of diagnostic evaluation and fitness for duty assessment. After two sessions she discussed the possibility of changing the diagnostic codes for better clarity. However, after reading the final report (which I was not present for) she decided to go with an Insomnia rating only [].

8. The military psychologist [] concluded the Circadian Rhythm Sleep-Wake Disorder no longer applies. I would have to strongly disagree with this conclusion, as this type of condition not only aggravated my sleep conditions it also brough about many symptoms that did not previously exist and of which I am still recovering from:

a. Significant sleep debt causing lack of REM sleep [].
b. Daily fatigue affecting social and occupational areas of life [].
c. Occasional sleepless nights that impact ability to safely drive and reporting late to work [].

d. Difficulty with initiating sleep (even with medication) on some nights, and also waking up throughout the night interrupting the quality of sleep [].
e. In addition, I believe it should be of particular note that all of my providers, which consist of a civilian psychologist, civilian psychiatrist, sleep doctor, and two Veterans Affairs psychologist, one of whom specializes in sleep psychology, diagnosed some variation of Circadian Rhythm Disorder [].

9. Additionally, [] the provider stated it was not possible to determine if a psychiatric condition existed at the time, and that I should be reevaluated at a later date. Therefore, she removed the anxiety condition from the diagnostic coding. However, I was afforded the opportunity to see two psychologists through the VA and evaluated by both in October of 2017. The psychologist who specializes in sleep disorders mentioned all three of my original conditions in her progress reports []. Moreover, the second clinic psychologist gave the following diagnosis after her own assessment [].

a. Circadian Rhythm Disorder, Unspecified
b. Anxiety Disorder, Unspecified
c. I start therapy with the sleep psychologist starting in November 2017. There have already been permanent variables instituted in my daily life as a result of a circadian sleep disorder; strict 24-hour cycles with the same wake up time, and the necessity to see the sunlight first thing in the morning. All of which did not exist prior to January 2017.

10. In the recommendations [] the provider recommended to follow through with a second multiple latency tests. However, it should be noted that I personally requested this; it was not required by the sleep doctor. After consulting with my medical providers, more especially the sleep psychologist, [] they do not need nor request a second sleep study at this time. Moreover, they are in agreement that my lack of REM sleep is likely due to a significant sleep debt [that] occurred from October 2016 to June 2017. I can testify that my sleep quality feels it is slowly beginning to recover. Although I still experience issues with initiating and maintaining sleep throughout the night, along with daily fatigue limits.

11. The current medication I am under, Mirtazapine, has stabilized my sleep problems to a degree (no longer incurring significant sleep debt as before), but I am still actively recovering. I look forward to starting therapy with the sleep psychologist (November 2017) [] with the hopes of normalizing and stabilizing sleep patterns further. She is confident that her program will help to reset my circadian sleep rhythms, but also help with an overactive sympathetic nervous system while trying to initiate sleep.

Notably, the applicant's back was not mentioned once in his lengthy rebuttal statement.

11/28/17 Memorandum re MEB Command endorsement for [the applicant], from CDR PSU to CG PSC, in which the CDR noted the applicant's duties as a tactical coxswain, that the member currently served in a limited duty capacity where his current duties consist of maintaining rescue and survival equipment and logs, performing MPC cards on boats, issuing body armor, and clerical work. The CDR endorsed that the applicant be found not fit for duty and separated from the Coast Guard, and that the applicant's current medical condition was incurred in the line of duty and not as a result of his own misconduct, noting that the member is currently incapable of being put into the fleet and being required to perform the prescribed duties associated with his grade and rate.

04/20/18 Memo signed by LCDR and LT discussing the nature and duration of the applicant's reduced work schedule and how his work schedule has affected other members in the unit, including:

> [The applicant] has been on a two-day duty schedule each week since 02 Feb 2018. While the usual duty day runs from 0730-1600, [the applicant's] schedule [runs] from 0930-1430. Even with this schedule, [the applicant] struggles to report to work on time. He often appears tired in the morning when he reports but tries to project and maintain a positive attitude. He is unable to operate any heavy equipment and is restricted from boat/ship duty. While he can drive to work, he does so cautiously. Prior to 02 Feb 2018, [the applicant] was required to report on days that he did not have appointments that would prevent him from coming. He was frequently unable to report. We hoped to develop a predictable duty schedule and gradually increase [the applicant's] schedule until he could report for a three, four, and five-day workweek. At this time, however, we have not made any increases. As I mentioned [] I am concerned with [the applicant's] ability to attend school or perform a full-time job. Although I am not a medical professional, based upon my observations as the Logistics Officer, I do not see how [the applicant] can perform a 40-hour work or school schedule without accommodations.
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> [] The leadership and members of [] support [the applicant] as he attempts to overcome his condition and recommended the reduced work schedule. However, such accommodation can be perceived as unfair for others and require others to unexpectedly adjust their schedule when he is late or unable to function from a sleepless night. Just as I am concerned about [the applicant's] ability to maintain a full-time job, I am similarly concerned about the impact his symptoms have upon maintaining work relationships.

04/25/18 Memorandum response from CWO2 IPEB regarding the applicant's request for reconsideration of the IPEB's initial decision, stated:

> 1. After a thorough review of new information, provided by the member's council, the board found sufficient evidence to support the increase in disability levels for DC 9499-9400, Insomnia rated analogous to Generalized Anxiety Disorder to 50 %. This decision was based on the following information.
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> a. DC 9499-9400: Insomnia rated analogous to Generalized Anxiety Disorder. Sufficient documentation was found within the reconsideration package that supports the claim that although the member's work schedule has been changed to day work only and no night shift, the member is still unable to perform his required duties and is limited to working only 2 days per week. The member continues to report late due to excessive fatigue and drowsiness. His condition has caused him to tire easily after only a few hours and also [a]ffects his concentration and ability to process commands. As such, the requirements for 50 percent level disability have been met.
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> 2. Withstanding the above information, it is determined by the board that the new combined rating should be 50 percent, and the member placed on the permanent disability retirement list.
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> …
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> 4. In accordance with PDES Manual 4.A.13.d, the member must accept or reject the IPEB's findings within 7 calendar days of receipt or it will be deemed the member has rejected the February 1, 2018, findings.

05/03/18 The IPEB Findings and Recommended Disposition noted that the applicant's medical conditions prevented him from performing the duties required of a service member of his rank and primary rating, found him unfit for continued duty by reason of physical disability, and placed him on the permanent disability retired list. Specifically, the IPEB provided the applicant a 50 percent disability for insomnia

rated analogous to generalized anxiety disorder with occupational and social impairments 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-term 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. The IPEB did not rate the applicant for circadian rhythm disorder, pyramiding, stating that "the evaluation of the same disability under various diagnoses is to be avoided." The IPEB further found that the applicant's physical disabilities were not combat-related within the meaning of 10 U.S.C. § 1413A, and that substantial evidence demonstrates that the applicant was mentally unfit and cannot perform regular or customary assigned duties. Three IPEB Board members signed in acknowledgement (CWO2, CAPT, CDR) on May 3, 2018.

05/07/18 The applicant's appointed counsel, for himself and on behalf of the applicant, acknowledged by his signature that (1) he had reviewed the findings in light of the record of the applicant's case, 10 U.S.C., Chapter 61, the Veteran's Administration schedule for rating disabilities, applicable Coast Guard personnel regulations, and other applicable materials, and accepted the IPEB findings and recommended disposition.

07/08/18 The JAG's designee signed at his direction acknowledging that (1) the proceeding are in accepted form and are technically correct; (2) the findings are supported by the evidence of the record; (3) the recommended disposition is supported by evidence of the record. The JAG's designee had the opportunity to but did not provide any additional comments.

08/27/18 CDR-PSC-PSD-MED signed as the final approving authority for the Commandant the findings and recommendations of the IPEB.

09/12/18 By memo dated September 12, 2018, Commander of the Coast Guard Personnel Command (CG PSC-RPM-3) ordered (1) that the applicant shall detach from all duties effective January 9, 2019 and be retired from the Coast Guard by reason of permanent physical disability effective January 10, 2019; (2) approved the findings of the IPEB that the applicant's current conditions are unfitting and that he shall be permanently retired with a 50% disability rating, none of which are considered combat-related within the meaning of 10 USC § 1413a.

01/09/19 The applicant was separated from active duty by reason of permanent physical disability. His DD-214 showed "honorable" as the characterization of discharge; "disability, permanent" as the narrative reason for separation; SFJ (permanent disability retired) as his reenlistment code; and RE-2 (ineligible to reenlist due to retired status) as his separation code. The DD-214 was signed by the applicant. At the time of separation, the applicant was paygrade E6 and had three years and

eighteen days of active service, and six years, seven months and seven days of inactive service, for a total of nine years, seven months and twenty-five days of service.

On August 10, 2019, the VA issued a rating decision for the applicant, noting that the applicant filed an original disability claim that was received on November 30, 2018 and stating that the VA had made the following decisions: (1) service connection for generalized anxiety disorder, insomnia and circadian rhythm disorder is granted with an evaluation of 50 percent effective January 10, 2019; (2) service connection for lumbosacral strain and degenerative arthritis of the spine is granted with an evaluation of 10 percent effective January 10, 2019. Regarding the basis for the decision as to the applicant's spine the VA noted:

Service connection for lumbosacral strain and degenerative arthritis of the spine has been established as directly related to military service. (38 CFR 3.303, 38 CFR 3.304)

The effective date of this grant is January 10, 2019. Service connection has been established from the day after your discharge from active duty. When a claim of service connection is received within one year of discharge from active duty, the effective date is the day after discharge. (38 CFR 3.400)

An evaluation of 10 percent is assigned from January 10, 2019.

We have assigned a 10 percent evaluation for your lumbosacral strain and degenerative arthritis of the spine on:

- Combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees

Additional symptom(s) include:

- Painful motion upon examination

The provisions of 38 CFR § 4.40 and § 4.45 concerning functional loss due to pain, fatigue, weakness, or lack of endurance, incoordination, and flare-ups, as cited in DeLuca v. Brown and Mitchell v. Shinseki, have been considered and applied under 38 CFR § 4.59.

A higher evaluation of 20 percent is not warranted for lumbosacral strain unless the evidence shows:

- Combined range of motion of the thoracolumbar spine not greater than 120 degrees; or
- Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 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. [citations omitted]

08/21/20 The VA awarded the applicant a combined rating of 60%; this rating was increased to 80% on April 30, 2020, as a result of the VA reevaluating the applicant's claim for generalized anxiety disorder, insomnia and circadian rhythm disorder.

APPLICABLE LAW AND POLICY.

Title 10, Armed Forces, Subtitle A, General Military Law, Part II, Personnel, Chapter 16, Retirement or Separation for Physical Disability at Section 1201 provides the applicable statutory authority.

10 U.S.C. § 1201 - Regulars and members on active duty for more than 30 days: Retirement

(a) Retirement.--Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

(b) Required determinations of disability.--Determinations referred to in subsection (a) are determinations by the Secretary that –

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either –

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is 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; and either –

(i) the disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service);

(ii) the disability is the proximate result of performing active duty;

. . .

The Physical Disability Evaluation Systems Manual, COMDTINST M1850.2D (2006), Chapter 2, in effect at the time of the applicant's retirement discusses policies related to fitness for duty in relevant part:

2.C. Policies.

. . .

2. Fit For Duty (FFD) and Not Fit for Duty (NFFD). The following policies relate to fitness for duty.

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. Each case is to be considered by relating the nature and degree of physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be

expected to perform in his or her office, grade, rank, or rating. In addition, before separation or permanent retirement may be ordered:

(1) there must be findings that the disability

(a) is of a permanent nature and stable; and
(b) was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.

(2) to warrant retirement, the length of service and degree of disability requirements prescribed in clause 3 of 10 U.S.C. §1201 must be satisfied.

. . .

(4) The member must be in a status whereby entitled to basic pay at the time that the determination of unfitness for duty is made

. . .

b. The law that provides for disability retirement or separation (10 U.S.C. 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. . . . The following policies apply.

1. Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

a. the member, because of disability, was physically unable to perform adequately in his or her assigned duties;

. . .

f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluee is not fit for duty by reason of physical disabilities

. . .

(5) the presence or one or more physical defects that are sufficient to require referral for evaluation or that may be unfitting for a member in a different office, grade, rank, or rating; or

. . .

i. 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. A member may have physical impairments that are not unfitting at the time of separation but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the DVA for disability compensation after release from active duty.

3. Required Findings by the IPEB, FPEB, and PRC.

a. Evaluee on Active Duty for More than 30 Days (other than a ready reservist on active duty under an involuntary recall due to delinquency in drill). In these cases, the board shall make one of the following findings:

. . .

3. Not Fit for Duty by Reason of a Physical Disability. If the board finds the evaluee not fit for duty by reason of physical disability, the board shall make the finding Not Fit for Duty. The board shall then

a. propose ratings for those disabilities which are themselves physically unfitting or which relate to or contribute to the condition(s) that cause the evaluee to be unfit for continued duty. The board shall not rate an impairment that does not contribute to the condition of unfitness or cause the evaluee 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 evaluee unfit for military service or which contribute to his or her inability to perform military duty. This policy applies to those evaluees whose initial entry into the PDES occurs subsequent to 9 July 1987. In accordance with the current VASRD, the percentage of disability existing at the time of evaluation, the code number and diagnostic nomenclature for each disability, and the combined percentage of disability will be provided.

. . .

3.A. Purpose: The purpose of a Medical Evaluation Board (MEB) is to evaluate and report upon the present state of health of any member who may be referred to the MEB by an authority convening authority and provide a recommendation as to whether the member is medically fit for the duties of his or her office, grade, rank, or rating.

. . .

8. In any situation where fitness for continuation of active duty is in question.

. . .

F. General Procedure for Medical Evaluation Board.

1. An MEB reviews and reports upon any evaluee whose case has been referred for consideration. It conducts a thorough physical examination to evaluate the member's general health. Additionally, all impairments noted shall be separately evaluated in accordance with the VA Physician's Guide for Disability Evaluation Examinations, including psychiatric examination when indicated. It shall obtain and examine available records to formulate a conclusion regarding the member's present state of health and the recommendation for future action.

2. An MEB is not a forum for conducting a formal hearing, taking other than medical evidence, or making determinations required of physical evaluation boards . . . It presents a clear medical picture of the case in question making all pertinent diagnoses or prognoses and giving a medical opinion as to the evaluee's fitness for retention and recommendations for future action.

. . .

G. Medical Evaluation Board Report.

. . .

3. Preparing the Narrative Summary, SF-502

a. The Narrative Summary shall present a summary of the pertinent data concerning each complaint, symptom, disease, injury or disability presented by the evaluee, which causes or is believed by the MEB to cause impairment of the evaluee's physical condition.

. . .

3. set forth data to permit a reviewer to conclude whether the evaluee suffers impairment of health in any respect, and the degree thereof. Such evidence is needed for use in rating disabilities in the event the evaluee is later found to be unfit to perform the duties of grade or rating. All evidence bearing upon the permanent or temporary character of impairment of any organ, system, or part shall be completely set forth.

b. The MEB report shall neither assign a percentage rating nor make reference to the VASRD rating codes.

c. Every narrative summary shall be reviewed and commented upon by a Coast Guard medical officer.

4. Recommendation of an MEB.

a. Based on the physical condition found, the MEB shall recommend one of the following dispositions.

. . .

(2) Dispositions which may lead to separation from the Service, where the member is

(a) not fit for duty because of possible physical impairment (referral to the IPEB)

. . .

H. Evaluee Notification

1. Unless it is considered that the information contained in the board's report might have an adverse effect on the evaluee's physical or mental health:

a. the evaluee shall be furnished a copy of the board's report.
b. significant findings, opinions, and recommended disposition shall be brought to the evaluee's attention.
c. the PDES shall be explained and the evaluee shall be counseled by a qualified (knowledgeable) person with a working knowledge of the system.

2. Complete the Evaluee's Statement Regarding the Findings of the Medical Board Report, CG-4920, and refer it to the evaluee's command for the evaluee's signature. . . .

3. The evaluee shall be afforded an opportunity to submit a statement in rebuttal to any portion of the board's report. If the evaluee submits a rebuttal, the board shall, if practicable, review the rebuttal and make changes to the report or prepare additional comments, as deemed appropriate...

. . .

4.A. Policy Governing the IPEB.

1. Purpose. The IPEB is a permanently established administrative board convened to evaluate the following on the basis of records only:

a. the fitness for duty of active duty and reserve members.

. . .

3. Authority. The IPEB evaluates the fitness for duty of all evaluees whose cases are referred to it for consideration by CGPC-adm-1.

. . .

12. Policy Concerning Legal Counsel for the Evaluee.

a. Appointment of Legal Counsel for the Evaluee. Legal counsel for the evaluee will be assigned by the Commandant (G-L).

b. Counseling Procedures. Upon designation by an evaluee and receipt of a copy of the IPEB findings and recommended disposition, legal counsel shall normally contact the evaluee within 5 working days. Legal counsel shall advise the evaluee of the disability process and of the evaluee's right in light of the IPEB's findings and recommended disposition.

. . .

13. Policy Concerning Action Following IPEB Findings and Recommended Disposition.

. . .

b. When an evaluee is found Fit for Duty or Not Fit for Duty by Reason of Condition or Defect Not a Physical Disability, the evaluee may not accept or reject, but may submit a written rebuttal within 30 calendar days of notification...

. . .

c. After being counseled on the IPEB's Not Fit for Duty findings, and recommended disposition, it is the evaluee's responsibility to take one of the following actions to continue PDES processing:

(1) Request reconsideration and submit, if available, information not previously presented to the IPEB.

. . .

(2) Accept the findings

. . .

> d. Should the evaluee fail to take one of the actions in article 4.A.13.c. within 30 calendar days from the date of receipt of written notification of the IPEB's offer by legal counsel, the conclusive presumption is that the evaluee is accepting the IPEB findings and recommended disposition, and the case will be forwarded to the Commandant (G-LGL) for legal review.

Article 1.F. of the Coast Guard Medical Manual, COMDTINST M6000.1F (August 2014) provides the following guidance on fitness for duty:

. . .

> **1.F.1.c.** Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or reserves on extended active duty considered permanently unfit for duty shall be referred to a Medical Evaluation Board (MEB) for appropriate disposition. Reservists in any status not found 'fit for duty' six months after incurring/aggravating an injury or illness, or reservists who are unlikely to be found 'fit for duty' within six months after incurring/aggravating an injury or illness shall be referred to a Medical Evaluation Board. See Reserve Policy Manual, COMDTINST M1001.28 (series), Chapter 6, "Reserve Incapacitation System."

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The applicant requested a telephonic hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[3]

3. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

4. When considering allegations of error and injustice, the Board begins its analysis by presuming an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.[4] Absent specific

[3] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[4] 33 C.F.R. § 52.24(b).

evidence to the contrary, the Board presumes that the members of Coast Guard have acted "correctly, lawfully, and in good faith" in preparing their evaluations.[5]

5. The applicant asked that his current disability rating of 50% assigned by the Coast Guard be increased by 20% to 70% percent to take into account his back condition. He claimed that his back condition was rated at 10% at the time of his MEB and that his back was also a primary contributing factor necessitating his medical retirement. The applicant alleged that his back deterioration was noted and diagnosed by the VA while he was going through the medical board process but that he was unable to get it added as an unfitting condition with the Coast Guard because the information from the VA was not available until the end of the board. As proof, he provided evidence that the VA granted a rating of 10% for back pain, service connected, effective the day after he separated from service.

6. According to Chapter 2.C.2.a of the 2006 Physical Disability Evaluation System Manual, COMDTINST M1850.2D (2006), in effect at the time of the applicant's retirement, "[t]he 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."

7. There is no documentation in the applicant's medical record to suggest that the applicant was unable to adequately perform his Coast Guard duties due to his back condition. While his medical record does at times mention that he reported that he was suffering from intermittent mild back pain to his medical provider, there is nothing in the applicant's record to reflect that his back was an unfitting condition. In fact, the applicant acknowledges this in his application when he states: "the information and evidence . . . was not fully available at the time to prove a 70% rating. In other words, the evidence is available now to suggest the proper rating is a 70 [percent] disability rating." Further, the applicant denied any other chronic medical concerns apart from sleep issues during the October 2017 Fitness for Duty/Diagnostic Evaluation.

8. The Coast Guard argued that the applicant was properly separated from the Coast Guard due to physical disability and was rated based on the medical evidence available at the time; that the Coast Guard only rates members who have unfitting medical conditions based on the medical evidence available at that time; and that if a member's condition worsens or improves, the member may file a disability claim with the VA. The Board agrees with the Coast Guard. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the VA 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. The Board further finds that the fact that the VA subsequently rated the applicant's back condition is not evidence that the Coast Guard erred in not rating his back condition at the time of his medical retirement. Evidence of injury or impairment is insufficient to demonstrate the existence of a physical disability as a basis for retirement and the existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the VA does not of itself provide justification for, or entitlement to, separation

[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).

or retirement from military service because of physical disability for his Coast Guard service. Nor does the VA's later decision to increase the disability rating assigned for generalized anxiety disorder, insomnia, and circadian rhythm disorder, mean that the rating assigned at the time of the applicant's medical retirement was incorrect.

9. The Board accordingly finds that the Coast Guard has acted correctly, lawfully, and in good faith, and that the applicant has failed to meet the burden of proof required by 33 C.F.R. § 52.24(b) for the following reasons: (1) The applicant's request to correct the permanent physical disability rating as provided by the Coast Guard was administratively reviewed and in the course of his physical disability evaluation processing, the applicant elected and was advised by assigned military counsel; (2) Counsel represented the applicant before the IPEB with his consent, which resulted in an increase in the applicant's disability rating; (3) The applicant, through counsel, accepted the findings, and the findings were subsequently approved by CG PSC, who is the final decision maker on this issue; and (4) The applicant accepted his separation as indicated by his signature on the DD Form 214 dated December 4, 2018.

10. The Board therefore finds that the disputed record is presumptively correct, and the record contains no persuasive evidence that substantiates the applicant's allegations of error or injustice in his official military record. Pursuant to the Physical Disability Evaluations System Manual, COMDTINST M1850.2D, the applicant was properly separated from the Coast Guard due to physical disability and was rated based on the medical evidence available at the time. The Coast Guard only rates members who have unfitting medical conditions and the rating is based on the medical evidence available at that time. If a member's condition worsens or improves, the member may file a claim with the VA.

11. Therefore, upon review of the applicant's record, the actions taken by the Coast Guard in this case, and applicable Coast Guard regulations and policy, the Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard erred in assigning the applicant's disability rating. Accordingly, his request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of Retired BM1 [redacted] USCG, for the correction of his military record is denied.

June 27, 2024

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