



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 5132-00
15 January 2002



Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 9 January 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the Director, Naval Council of Personnel Boards, dated 2 August 2001, a copy of which is attached, and your response thereto.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion, as well as the rationale of the hearing panel of the Physical Evaluation Board which considered your case on 22 April 1999. A copy of that rationale is also attached.

In addition to the above, the Board concurred with the finding of the Judge Advocate General of 22 October 1998, that you were not entitled to a Notice of Eligibility (NOE) for Disability Benefits. The statement of the Judge Advocate General that you may be awarded disability retirement or severance pay if the Physical Evaluation Board determines that your condition was incurred or aggravated during a period of continuous active duty of more than 30 days does not provide any basis for granting your request. In this regard, your attention is invited to SECNAVINST 1850.4D, paragraph 2038b, which defines the term "while entitled to receive basic pay", and provides that the term shall not be construed to entitle any member not on active duty, who, at the time of separation from active duty, was considered fit to continue naval service, to benefits under 10 U.S. Code, chapter 61, because of an increase in

impairment occurring while the member was not entitled to basic pay. The Board was not persuaded that you were unfit for duty when your periods of extended active duty terminated, or that any condition incurred while you were on extended active duty recurred during subsequent periods of service, or was aggravated thereby. It concluded that the issue of compensation for injuries and/or illnesses incurred during your military service is within the purview of the Department of Veterans Affairs, which awards benefits for conditions it classifies as "service connected", without regard to the issue of fitness to perform military duty.

In view of the foregoing, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
NAVAL COUNCIL OF PERSONNEL BOARDS
720 KENNON STREET SE STE 309
WASHINGTON NAVY YARD DC 20374-5023

IN REPLY REFER TO

5240
Ser: 01-22
2 Aug 01

From: Director, Naval Council of Personnel Boards
To: Executive Director, Board for Corrections of
Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE
OF [REDACTED]

Ref: (a) Your ltr JRE:jdh Docket No: 5132-00 of 7 Jun 01
(b) SECNAVINST 1850.4D

1. This letter responds to reference (a) which requested comments and a recommendation regarding Petitioner's request for correction of his records. The Petitioner contends a Notice of Eligibility (NOE) should be granted and a PEB be convened to determine if he has a spinal injury or disease that was aggravated or incurred while on active duty.

2. The Petitioner's case history, contained in reference (a), was thoroughly reviewed in accordance with reference (b) and is returned. The following comments are provided:

a. Per paragraph 3309 of reference (b), Petitioner's spinal condition would appear not to have rendered him unfit for duty as an aviator while on active duty in either the U.S. Marine Corps from 1967 to 1971 or the U.S. Navy from 1972 to 1982. This is particularly true for non-aviator duties.

b. The major progression of the Petitioner's lumbar spinal condition appears to have occurred subsequent to his active duty service. The Petitioner's current condition can be tied to the stresses associated with his post-service employment by Lockheed Martin. His condition was especially aggravated by his 31 October 1996 work-related acute trauma.

c. Petitioner's cervical spine symptoms appear to have largely developed over the 12 year period following his discharge from active duty and while in the employ of Lockheed Martin and serving, intermittently, in a reserve

SAN DIEGO FORMAL PEB RATIONALE
IN THE CASE OF

The informal Physical Evaluation Board found the member not physically qualified for retention in the Naval Reserves on 03 February 1999.

This member appeared before the formal PEB on 22 April 1999 requesting to be found unfit for duty under VA Codes 5299-5295 (lumbosacral strain) at 40% and 5299-5293 (intervertebral disc syndrome) at 60% for a total of 80% disability and placed on the PDRL. The member's formal board was continued to 28 April 1999 to give the member time to present additional medical evidence to the board.

Accepted documentary evidence consisted of:

- Exhibit A - PEB Case File
- Exhibit B - None
- Exhibit C - SECNAVINST 1850.4D § 1002, 1003 & 2004
- Exhibit D - Deleted
- Exhibit E - DOD F 1332.38, dated 14 Nov 96 pages 21,35,36,40
- Exhibit F - Additional Medical Information
- Exhibit G - Additional Professional Data
- Exhibit H - Memo from CAPT J. S. Murphy dated 28 Apr 99

The member appeared before the formal board without ever having had a medical board. Furthermore, the member's request for an NOE for his neck injury was denied. The member requested to be rated for lumbosacral strain and cervical intervertebral disc syndrome. These will be addressed seriatum.

First, with respect to the member's "lumbosacral strain", it must be noted that the member does not have lumbosacral strain. Rather, the member traces his lower back pain to May 1973 when he alleges an accident in ejection seat training while in AOCS. There is no record of this accident, but the member complained of back pain a few days after the alleged event. It must be noted that the member continued to serve on active duty from AOCS in 1973 until 1982. The member had a board of flight surgeons in 1974 which found him NPQ for his back. The member appealed that and was found PQ and allowed to fly in non-ejection seat aircraft which he did on active duty until 1982. After that time, the member continued to serve in the reserves. The member has been receiving a 10% disability from the VA for a "spinal disc condition" while he has continued to serve in the reserves.

The member testified that all his fitness reports were in the top 1% until he stopped drilling in March 1997. The member testified that his cessation of drilling status was secondary to his neck surgery. At no time, while a reservist, did the member assert that he could not perform his duties because of his back. The

[REDACTED]

member performed and passed all PRTs until his 50th birthday in October 1996.

In the member's appeal letter of 28 August 1998, the member references an evaluation done in April 1994 by his neurosurgeon, Dr. Mehdizadeh. His private neurosurgeon states quite clearly that the member has degenerative joint disease of his lumbosacral spine and not a lumbosacral strain. Moreover, the member continued to serve in the reserves after that time and at no time failed to carry out his duties because of his lumbosacral degenerative joint disease. There is no documentation anywhere in the member's record that he ever failed to carry out his assigned duties because of problems with his lower back.

The member also wished to be rated for his cervical intervertebral disc syndrome. The member has a report of disability from his civilian neurosurgeon, Dr. Mehdizadeh, dated 29 May 1997 that states the member's neck complaint was a result of an injury at his civilian job lifting boxes out of his car on 31 October 1996 (note for the record that, in another report, Dr. Mehdizadeh states that the injury occurred on 1 November 1996). As a result of this injury, the member suffered a C5-6 disc herniation which was operated on 27 January 1997 with a diskectomy and fusion at the C5-6 and C6-7 levels.

The member appeared at the formal board with normal motion in both arms and without any apparent muscular wasting or asymmetry in his upper extremities. The member was able to look left and right a minimum of 45 degrees. The member was also observed looking down enough to read documents on the table in front of him. There is no documentation in the record that the member is unfit to carry out the duties of a Captain in the United States Navy. The member initially testified that he was unable to move his neck in spite of the observations of the formal board. A week later, after a continuance (to be discussed infra), the member testified that he, in fact, can move his neck but refrains from doing so because he claims it causes pain.

There are no data to suggest that the member's herniated nucleus pulposus was in any way related to his naval service. The member's own claims, corroborated by his civilian neurosurgeon, make clear that the member sustained an acute injury at his civilian job. There were only 88 days between the injury and the surgery, during which time the member was not on active duty in the Navy. Thus, there was no opportunity for any service aggravation. This is consistent with the member's having been denied an NOE.

The member asserts some sort of Navy duty aggravation, but this simply flies in the face of the evidence which clearly indicates an acute injury while working as a civilian. Even by a clear and

[REDACTED]

convincing standard of evidence, the proximate cause of the injury was the civilian job. DOD instruction 1332.38 subparagraph E3.P1.3.4.1.3.2. makes clear that, if the proximate cause of the injury is unrelated to naval service, any resulting disability would not be ratable. Thus, even stipulating that the member is unfit, this condition would not be ratable. Most importantly, there were no data to suggest that the member is currently unfit due to this condition. The member appears to have had successful surgery and has no evidence that he cannot do routine duties in the United States Naval Reserve. This does not address duties in a flight status which constitute special duty and are not the focus of the formal board. The member testified that his fitness reports have always ranked him in the top 1% up to his last drill in March 1997. Thus, by the member's own testimony, he has performed at or above standards. The member was found NPQ because of his neck surgery, but the member always performed adequately regardless of his history of back pain.

At the close of the initial hearing, the member stated that he felt the hearing had been inadequate because he had pertinent information that had not been presented to the formal board. The member characterized this information as corroboration of his alleged disability. The formal board granted a one week continuance to allow the member to present the information he deemed pertinent to his case. The member returned on 28 April 1999 with his information in the form of Exhibits F, G, and H.

Exhibit F contained various X-ray reports, MRI reports and Dr. Mehdizadeh's notes, all of which had already been referenced, excerpted or summarized in the PEB case file or in the previously submitted exhibits. Remarkably, the reports from the member's civilian neurosurgeon contained in Exhibit F reinforce the member's fitness. A 29 December 1997 letter from Dr. Mehdizadeh notes the member's low back complaints since 1973 and reports that the member was able to function in spite of "flare-ups lasting 1 to 3 days at times." The letter then notes the acute injury here dated 1 November 1996 at the member's civilian job while unloading boxes from the trunk of his car. This led to the member's cervical fusion on 28 January 1997. This letter reinforces two things: First, the member's neck injury was at his civilian employment and was an acute injury requiring surgery within 90 days during which the member was not on active duty. Thus, there was simply no opportunity for any service aggravation.

There is also a progress report from Dr. Mehdizadeh dated 5 April 1994 which references an EMG and MRI showing mild S1 radiculopathy and degenerative joint disease at the L5-S1 disc space, but no evidence of herniation. This is very significant because the member continued to serve adequately in the United States Naval Reserve for almost three more years. By the member's own

[REDACTED]

testimony, he continued to drill until found NPQ for his neck surgery.

Exhibit G was a biography of significant assignments and accomplishments. The exhibit is quite remarkable in that it totally refutes the member's claims to a disability derived from his 1973 "back injury." It is, in fact, an unrelenting tale of how the member has performed quite well from AOCS until the mid 1990s. No where is there one scintilla of evidence to suggest that the member has ever been unable to perform because of his "back problem."

In Exhibit H, the member refers to "objective medical evidence." The objective medical evidence shows the member has some degenerative joint disease in his lumbosacral spine. In evaluating any individual, it is of paramount importance to remember that the mere presence of a diagnosis is not synonymous with disability. It must be established that the medical disease or condition underlying the diagnosis actually interferes significantly with the member's ability to carry out the duties of his rank and rate. The performance standard for evaluating a member's fitness is Navy-wide. The standard is not an idiosyncratic, subjective standard tailored to each individual. The issue is not whether the individual is one hundred percent of some previous level of performance, but rather whether the member meets the minimum Navy standards of performance. The best evidence of fitness is the fact that this member has served adequately in active and reserve components of the United States Navy from 1973 until 1997 and never failed to carry out his duties because of his back.

Objective medical evidence also shows unequivocally that the member's neck injury was suffered at his civilian job. It was an acute injury that led to surgery within 90 days while the member was not on active duty. Thus, there is no possibility of service aggravation. Moreover, there is no evidence to show that the member is unable to serve now, because the record indicates successful surgery. If the member were asking to be found PQ, it is likely the board would accommodate him. However, the member makes pellucidly clear that he is not interested in continued service. In fact, the member requests 80% disability. The member claims that he cannot even put on his underwear by himself.

Therefore, after careful consideration of all relevant medical evidence, the formal board finds that the member is not physically qualified for his cervical intervertebral disc disease with limitation of mobility and chronic pain syndrome. This is not a ratable condition as it is unrelated to naval service. Further, the formal board notes for the record its unanimous opinion that the members complaint of low back pain is not in any way a separately unfitting condition.

Subj: DISABILITY EVALUATION FINDINGS OF THE PHYSICAL EVALUATION BOARD ICO [REDACTED]

AUTHENTICATION

[REDACTED] USN
PRESIDING OFFICER

OTHER PANEL MEMBERS:

CAPT [REDACTED] MC, USN
COL PATRICIA WILLIAMS, USMCR

COUNSELING CERTIFICATION: ALL COUNSELING REQUIREMENTS OF SECNAVINST 1850.4D HAVE BEEN MET.

[REDACTED]
[REDACTED] SS, JAGC, USNR

MEMBER'S STATEMENT OF UNDERSTANDING:

I understand that the finding of NOT PHYSICALLY QUALIFIED is subject to legal and Quality Assurance reviews, and approval by the President of the PEB. The findings letter, signed by the President, PEB, is the final determination and can only be changed if a Petition for Relief from Final Action (PFR) is accepted by the Director of the Naval Council of Personnel Boards (NCPB). A PFR must be received by the Director no later than 15 days from receipt of the final determination. I have been counseled concerning the provisions of paragraph 5005 of SECNAVINST 1850.4D.

[REDACTED] USNR 28 APRIL 1999
RANK, NAME, AND SIGNATURE OF MEMBER DATE

FOR ACTIVE DUTY MEMBERS - COMPLETE MAILING ADDRESS OF COMMAND HOLDING MEMBER'S SERVICE RECORD.

FOR TEMPORARY DISABILITY RETIRED LIST (TDRL) MEMBERS, COMPLETE HOME ADDRESS AND DAYTIME PHONE NUMBER.

[REDACTED]
[REDACTED]
HOME: [REDACTED]



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2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE:jdh
Docket No: 5132-00
16 January 2002

[REDACTED]
ATTORNEY AT LAW
[REDACTED]

Dear [REDACTED]

This is in reference to your interest, as attorney, in the case of
[REDACTED]

Enclosed is a copy of a letter to [REDACTED] informing him that
his application has been denied.

It is regretted that a more favorable reply cannot be made.

Sincerely,

W. DEAN PFEIFFER
Executive Director