



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

JRE
Docket No: 799-02
17 December 2002

[REDACTED]

[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 12 December 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 22 October 2002, 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. In addition, it concurred with the rationale of the hearing panel of the Physical Evaluation Board which considered your case on 15 September 1998. A copy of that rationale is also attached. It was not persuaded that you were entitled to an increased disability rating under code 5295, or that you suffered from a ratable neurological condition. In addition, it noted that ratings assigned by the military departments, as well as the Department of Veterans Affairs, are based on the average impairment earning capacity associated with a rated condition, rather than on the actual or anticipated loss of a earning capacity of a specific service member or veteran.

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

d. Despite his injuries and subsequent surgeries, CDR Shook maintained a high level of performance as a dentist, as documented in fitness reports and selection for promotion. His FITREP for the period 1 November 1997 - 24 July 1998, states he performed over 700 procedures on U.S. Coast Guard personnel. He signed this report without rebuttal. In July 1998, almost one month after the RRP findings of UNFIT, he signed his promotion to Commander. On 15 September 1998, ██████████ testified that, as of 24 July 1998, he still thought he was fit for duty and that he was still credentialed as a dentist. He signed his promotion on 1 July 1998 and signed his fitness report on 24 July 1998.

e. During August 1999, ██████████ was hired by the University of Tennessee College of Dentistry, as an Assistant Professor. He stated that teaching allowed him the freedom to not be in one position all the time. Also, the act of sitting and having lateral movement, which is associated with his profession, was a major aggravation to his pain.

f. On 18 September 2000, at the Campbell Clinic, he was diagnosed as having normal coordination. His low back pain had significantly improved since receiving treatment specifically geared toward his back problems.

3. In summary, ██████████ has been able to function as a dental academician with part time clinical responsibilities. Such employment is consistent with his training and experience and could, even, have been compatible with a PEB finding of FIT. The latter was actually discussed at the time his PFR was under evaluation. In any event, both the PEB and VA determined ██████████ disability was best characterized at 10% under VASRD Code 5295. Despite ██████████ obvious frustration, he has managed to adapt functionally at a level compatible with both his PEB and VA findings. Hence, there is insufficient medical evidence to warrant an increase in his disability rating.

██████████
██████████
██████████
██████████

SAN DIEGO HEARING PANEL RATIONALE
IN THE CASE OF

[REDACTED]

A medical board met at Naval Hospital, Pensacola, Florida on 28 January 1998 with a diagnosis of:

1. Low Back Pain Status Post Lumbar Decompression and Fusion (72420)

The Record Review Panel found the member unfit for duty under VA Code 5295, rated his condition at 10% disability and separation with severance pay.

This member appeared before the Panel on 15 September 1998 requesting to be found unfit for duty under VA Codes 5299-5295, rated at 40% disability and placed on the PDRL.

Accepted documentary evidence consisted of:

- Exhibit A - PEB Case File
- Exhibit B - Additional Medical Information
- Exhibit C - Service Record Entries/Fitness Reports
- Exhibit D - PRT Record
- Exhibit E - History and Physical Exam Follow-up by [REDACTED] MD dtd 09 Jul 98
- Exhibit F - Radiographic Report dtd 23 Jul 98
- Exhibit G - Report from [REDACTED] on Findings from Examination & Prognosis dtd 06 Aug 98
- Exhibit H - Ltr from Dr. Peterson dtd 20 Aug 98
- Exhibit I - Radiology Report: Bone Scan dtd 18 Aug 98
- Exhibit J - Nerve Conduction Study & EMG Evaluation by [REDACTED] dtd 24 Aug 98
- Exhibit K - [REDACTED], Biofeedback Therapist dtd 13 Aug 98
- Exhibit L - Updated Prognosis from Dr. Derbes dtd 25 Aug 98
- Exhibit M - Ltr from [REDACTED], Commanding Officer, Naval Dental Center Gulf Coast dtd 09 Sep 98
- Exhibit N thru R - Nonmedical Evidence
- Exhibit S - [REDACTED] Agreement for Dental Additional Special Pay dtd 5/13/98

The member's medical board of 28 January 1998 lists a diagnosis of low back pain status post lumbar decompression and fusion at the L4-5 level, which was done in July 1996. The member has since then missed four PRT's. The member complains of pain after sitting or standing for fifteen to twenty minutes and has experienced no subjective improvement in his condition.

Enclosure (1)

The physical examination in the medical board notes no spasm. It reports decreased lateral bending by 50% and decreased extension by 60% to 65%. Forward flexion, however, is very good to the extent the member can flex forward to six inches short of the floor. The motor examination was reported 5/5 and reflexes were +2 equal bilaterally. Sensory examination was intact and there was no muscle wasting or asymmetry noted. X-rays revealed instrumentation in the lumbar spine area with good consolidation of the fusion especially between the right transverse processes. The impression was low back pain. A follow-up examination by the member's civilian neurologist of 7/8/98 reported essentially the same findings. There was a normal motor exam and +2 symmetrical reflexes without muscle wasting or asymmetry reported. The only positive finding was decreased sensation on the left great toe. The impression was low back pain.

The member asserts he is unfit and complains of pain in his back and down his left leg. He testified that he cannot sit for more than fifteen or twenty minutes, however, the member sat comfortably throughout a sixty-five minute hearing. The member submitted multiple exhibits to support his contention that he is unfit. Exhibit B is a CT scan of 7/23/98 reporting no abnormal activity in the lumbosacral spine. Exhibit C is a fitness report covering the period 1 November 1997 to 24 July 1998 that rates the member at or above standards in all categories. Box 37, concerning mission accomplishment and initiative, rates the member at 5, greatly exceeding standards. In the narrative section of the fitness report it notes that the member performed over 700 procedures on U. S. Coast Guard personnel. The member, in his testimony, tended to minimize his accomplishments as reflected in the fitness report. He stated that his commanding officer was overly generous. However, the member signed his fitness report on 24 July 1998 without any rebuttal. The member testified that, as of 24 July 1998, he still thought he was fit for duty. The member also testified that he is still credentialed as a dentist.

Exhibit J is an EMG report of 24 August 1998 that mentions that the member's left calf is slightly smaller than his right, but this reveals no clinical significance because the gastroc muscle testing is 5/5 bilaterally. The member's deep tendon reflexes are symmetrical and +2 everywhere except +1 bilaterally in the ankles. The impression was a normal EMG except for slight slowing in the left common perineal nerve. This was interpreted as an EMG consistent with chronic denervation in the L4-5, S1 distribution on the left. It should be noted that the motor exam was 5/5 throughout except for the tibialis anterior muscle which was 5 on the right and 4.5 on the left. Apart from that, there was no evidence submitted of any objective findings of neurologic residuals.

Exhibit M is a letter from the member's new commanding officer that says the commanding officer can "no longer count on [the member] to perform his current duties as a dental officer". However, the member testified that the commanding officer did not write a special fitness report

Enclosure (1)

[REDACTED]

concerning his inabilities and the member also testified that he is currently still credentialled as a dental officer.

Exhibit S is a copy of the member's agreement to remain on active duty for dental additional special pay dated 13 May 1998. The member testified that as of 13 May 1998 he did consider himself to be fit for duty.

Per SECNAVINST 1420.1A, promotion should be delayed if "there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified". However, it should be noted that the member was promoted to Commander on 1 July 1998 and signed his new commission. At that time, he states he still considered himself fit for duty, despite being counseled on his Record Review Panel findings on 24 June 1998.

The member's testimony was that he thought he was unfit now, but fit throughout the spring of 1998. On close questioning, the member was rather vague about when he decided that he was unfit. However, the member was rated unfit by the Record Review Panel as of 9 June 1998 and the member signed his promotion on 1 July 1998. Furthermore, the member signed his fitness report on 24 July 1998.

In sum, the member has dramatic subjective complaints with only minimal objective neurologic findings after his back surgeries. Based on the documentary record, if this member were requesting to be found fit for duty, the Hearing Panel would unequivocally find him fit for duty. However, this member repeatedly asserts that he is unfit. Therefore, after careful consideration of all relevant medical evidence, viewed in a light most favorable to the member, the Hearing Panel finds the member unfit for continued naval service and recommends that he be separated and rated under VA Code 5295 at 0% disability.

Enclosure (1)