



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

JRE
Docket No: 8271-98
24 August 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was separated or retired by reason of physical disability.
2. The Board, consisting of Messrs. Milner and Molzahn and Ms. Gilbert, reviewed Petitioner's allegations of error and injustice on 8 July 1999 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.
3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.
 - b. Enclosure (1) was filed in a timely manner.
 - c. Petitioner was evaluated by a medical board on 19 March 1998 and given a diagnosis of obstructive sleep apnea. The medical board noted that Petitioner was using a continuous positive airway pressure (CPAP) device from which he had benefited, and that his symptoms of headaches and daytime somnolence were minimal. As the use of a CPAP was not considered practical for a submariner, such as Petitioner, the medical board recommended that his case was referred to the Physical Evaluation Board (PEB). On 16 April 1998, the Record Review Panel of the PEB made preliminary findings that he was fit for duty. He accepted that finding on 4 May 1998. He was honorably discharged from the Navy on 30 July 1998 for the convenience of the government, by reason of a physical condition, not considered a disability, interfering with the performance of his duty. The

discharge resulted from the determination of submarine force medical officers that he could not be assigned to a ship or boat while using a CPAP device, although there were differing opinions on whether or not the CPAP was necessary, and that he did not want to undergo surgery in an attempt to ameliorate his condition.

d. DOD Instruction 1332.39 of 14 November 1996 provides, in part, that sleep apnea syndrome will be rated at 100% for total industrial impairment, 50% for considerable impairment, 30% for definite impairment, and 0% for mild impairment.

e. DOD Instruction 1332.38 of 14 November 1996 provides, at enclosure (3), part 3, paragraph D.1.b., in part, that when an individual has been found fit by a PEB for a condition which prevents the member from taking the Service physical fitness test, the inability to take the test shall not form the basis for an adverse personnel action against the member.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's situation was analogous to that described in the section of DOD Instruction 1332.38 cited above. It concludes that his administrative discharge because of a condition for which he had been found fit for duty by the PEB is unjust, and warrants the following corrective action.

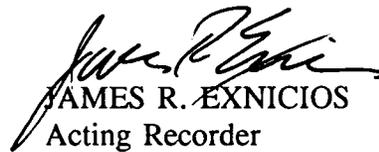
RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was discharged by reason of physical disability on 30 July 1998, with entitlement to disability severance pay, pursuant to 10 U.S. Code 1203, for obstructive sleep apnea, rated at 0% under VA code 6847.

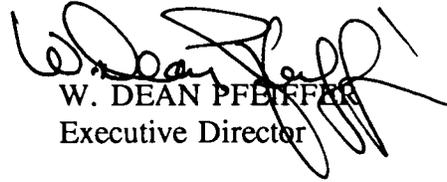
b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEFFER
Executive Director