



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

JRE
Docket No: 9388-97
26 April 1999

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149
(2) Director, NCPB ltr 5420 Ser 99-14, 11 Feb 99
(3) Director, NCPB ltr 5420 Ser 99-014A, 11 Mar 99
(4) 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 that his naval record be corrected to show that he was permanently retired by reason of physical disability with a combined rating of 40%, or in the alternative, that he was transferred to the Temporary Disability Retired List, and thereafter permanently retired with a 40% rating.

2. The Board, consisting of Ms. Schnittman and Messrs. Bartlett and Schultz reviewed Petitioner's allegations of error and injustice on 15 April 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 enlisted in the Marine Corps Reserve on 11 January 1979. The Report of Medical Examination completed on that date indicates that he had asymptomatic pes cavus. His height was listed as 69.5 inches, and his weight as 203 lbs. His weight had increased to 212 lbs. when the physical was updated on 15 March 1979. He enlisted in the Marine Corps for a term of four years on 15 March 1979, and entered on active duty on that date. Over the course of the next fifteen-plus years, he underwent numerous surgical procedures on his

left lower extremity, and was placed on several periods of limited duty pursuant to the recommendations of three medical boards. A fourth medical board convened on 22 November 1994, with Captain L serving as senior member. The report lists three general diagnoses: left foot pain, left knee pain and left hip pain. Physical examination revealed mild tenderness to palpation over the left forefoot region, with limitation of dorsiflexion and plantar flexion, and no subtalar motion. On 31 January 1995, the Record Review Panel of the Physical Evaluation Board (PEB) made preliminary findings that Petitioner was unfit for duty because of left foot pain, which it rated at 20% under VA code 5272, for ankylosis of the subastragalar (subtalar) or tarsal joint in poor weight-bearing position. On 15 February 1995, Petitioner rejected those findings and demanded a formal hearing. A final medical board report was drafted on 4 April 1995, and contains the same diagnoses as in the 22 November 1994 report. Once again, Captain L was senior member of the board. Petitioner reported "continued forefoot pain typically, feels tight initially and then he develops pain on ambulation after approximately 15 minutes." Physical examination revealed the following pertinent findings concerning the left foot and ankle: multiple well-healed incisions over the left foot, with tenderness to palpation diffusely over the left forefoot; reduced range of motion in the left ankle and subtalar joint; decreased forefoot supination and pronation; hypesthesia over the left posterior foot and heel; neutral alignment of the left hindfoot; lesser toe cock-up deformity with no flexion at the MTP joints; and a neutral angle of gait. Neither of the final two medical board reports contains formal diagnoses of pes cavus, clawfoot deformity, Morton's disease or metatarsalgia. On 31 May 1995, a hearing panel of the PEB determined that Petitioner was unfit for duty because of left foot pain, which it rated at 20% under VA code 5272. On 4 August 1995, Petitioner's former counsel submitted a Petition for Relief to the Director, Naval Council of Personnel Boards, in which he contended, in effect, that Petitioner had been misadvised by his military attorney concerning the issue of pyramiding. He maintained that in addition to the ankylosis of the subtalar joint, Petitioner had a separate and distinct disability of "claw foot (pes cavus)", ratable at 20%. He contended that as the foot and ankle are separate anatomical regions, the rule against pyramiding did not apply, and Petitioner was therefore entitled to a combined disability rating of 40%. The medical advisor to the Director, NCPB, was of the opinion that the rule against pyramiding did apply in Petitioner's case, and recommended that the Petition for Relief be denied. The Director, NCPB, concurred, and denied the Petition for Relief. In her opinion, Petitioner's foot was the major problem, rather than the ankle [subtalar joint], which had been fused years earlier. Petitioner was discharged by reason of physical disability on 1 December 1999, with entitlement to disability severance pay, in accordance with the approved findings of the hearing panel of the PEB.

d. The contentions made by Petitioner's attorney in his application to this Board are essentially the same as those in the Petition for Relief, although the attorney added the contention that Petitioner was suffering from metatarsalgia, and had Petitioner examined by Captain L. That officer signed a statement on 20 October 1997 concerning Petitioner's condition, which appears to have been ghostwritten by Petitioner's attorney. Although Captain L indicates that he examined Petitioner on 18 August 1997, a copy of the report of that examination was not provided to the Board. Captain L states that he was he was the

senior member of four medical boards that evaluated Petitioner's medical condition. In Captain L's opinion, after reviewing four medical board reports (there were actually five medical boards, dated March 1993, 8 December 1993, 26 August 1994, 22 November 1994 and 5 April 1995) and Petitioner's medical record, the PEB "...did not properly include a rating for separate physical disabilities for his foot condition." He maintains that Petitioner suffered from two foot conditions not rated by the PEB, one of which met the criteria for a 20% rating under VA code 5278 for clawfoot (pes cavus), and the other which met the criteria for a 10% rating under VA code 5279, for metatarsalgia. In Captain L's opinion, the foot conditions "...make him unfit to perform his military duties, and would be so even if he did not suffer from the ankle condition." Petitioner's attorney conceded that as assigning ratings under both VA codes 5278 and 5279 would amount to pyramiding, Petitioner would accept a merged rating under code 5278, in addition to the rating previously assigned under code 5272.

e. On 11 February 1999, the Board was advised by the Director, NCPB, in effect, that in his opinion Petitioner was unfit for duty because of left foot pain status-post left ankle arteriovenous malformation and subtalar fusion, and consequent claw foot deformity, rated at a combined 40% under VA codes 5272 (20%) and 5278 (20%). On 11 March 1999, upon further review of the case, the Director, NCPB, opined that Petitioner was entitled to a rating of 10% under code 5278, rather than 20%, for a combined rating of 30%. In addition, he recommended that there be a 0% deduction for non-compliance, based on Petitioner's overweight status, which is a category IV condition. He recommended that Petitioner's record be corrected to show that he was permanently retired by reason of physical disability, as his condition is unlikely to change "...in what little time might remain were he retrospectively placed on the Temporary Disability Retired List (TDRL)".

f. In a letter dated 29 March 1999, Petitioner's attorney advised the Board, in effect, that there is no evidence in the record to justify the change in the recommendation of the Director, NCPB, and that if such evidence exists, Petitioner must be given the opportunity to respond to it. In addition, he objected to the addition of overweight as a category IV condition, noting that Petitioner's overweight condition was aggravated by his inability to exercise because of his foot and ankle conditions. In a letter dated 2 April 1999, Petitioner's attorney was advised by a member of the staff of the Board that the reduction in the recommended rating was made because the limitation of motion in Petitioner's left ankle did not approach limitation of dorsiflexion to right angle, which is required for a 20% rating for a unilateral condition under that code. In a letter dated 7 April 1999, which was received by the Board on 16 April 1999, after the Board had completed its review of the application, counsel contends, in effect, the finding concerning the dorsiflexion in Petitioner's left ankle "can only justify his disability in 1995." He notes that Captain L concluded that Petitioner met the 20% disability criteria. Counsel contends that although it is possible that Petitioner did not meet those criteria on 4 April 1995, his condition had deteriorated to the 20% level by 1997. Counsel contends that Captain L's opinion deserves great weight, because Captain L was Petitioner's treating physician, and he examined Petitioner on 18 August 1997, more than two years after the medical report relied upon by the NCPB. Counsel contends that if

the Board decides Petitioner met the criteria for a 10% rating under VA code 5272 in 1995, his record should be corrected to show that he was transferred to the TDRL effective 1 December 1995, and thereafter permanently retired with a combined rating of 40%.

CONCLUSION:

The Board concludes that the available evidence is insufficient to demonstrate that Petitioner's foot pain was properly rated under VA code 5272 applicable to ankylosis of the subastragalar joint, or that he should have received a disability rating in excess of 10% for that pain. In this regard, it finds the medical board reports dated 22 November 1994 and 4 April 1995 deficient. The authors of those reports failed to adequately describe or diagnose the various conditions afflicting Petitioner's left lower extremity, and the reports should have been returned by the PEB for further action. It is unclear to the Board why the PEB selected a rating under the code applicable to ankylosis of the subastragalar joint, given the fact that the authors of medical board reports focused on Petitioner's forefoot pain rather than the subtalar ankylosis. In addition, the basis for the PEB's determination the subastragalar joint was ankylosed in poor weight-bearing position is not evident from the contents of the medical board report. The Board questions the validity of the determination of the current Director, NCPB, that Petitioner's forefoot pain and clawfoot deformity are consequent to arteriovenous malformation and subtalar degeneration, because, as noted above, Petitioner was found to have pes cavus when he underwent his pre-enlistment physical examination on 11 January 1979, several years before either of the noted hindfoot conditions was diagnosed or treated. The Board noted that at first glance, Captain L's statement seemed to contain an erudite description of Petitioner's left lower extremity conditions and the effect thereof, but upon further consideration, it was found to contain little more than a bald assertion that Petitioner's conditions met the criteria for a combined rating of 40%. The Board finds Captain L's statement inadequate for rating purposes because his conclusions are unsupported, and he did not address the aforementioned deficiencies in the medical board reports which resulted in the apparently erroneous application of a rating under VA code 5272. In addition, his statement does not reflect any specific findings made during his August 1997 examination of Petitioner, and he does not explain why he did not include a diagnosis of subtalar ankylosis or fusion together with those of foot, knee and hip pain found in the fourth and fifth medical board reports.

Notwithstanding the foregoing, the Board was reluctant to deny Petitioner's request at this time. Given the deficiencies in the medical board reports, and the strong recommendation of the Director, NCPB, that Petitioner be retired by reason of physical disability, the Board concludes that it would be in the interest of justice to correct Petitioner's record to show that he was transferred to the Temporary Disability Retired List on 1 December 1995, rather than discharged with entitlement to severance pay. This would permit him to undergo a thorough examination, the results of which would provide a basis for assigning a disability rating which accurately reflects the degree of disability caused by his left foot and/or ankle conditions. The report of examination should address, as a minimum, the effects of the

fusion of the subtalar joint on his ability to perform his duties during the 1985-1995 period, a complete description of the metatarsalgia, claw foot deformity, pes cavus, altered hindfoot mechanics and persistent forefoot adduction, the relationship of the conditions of the hindfoot to those of the forefoot, the EPTE nature of the pes cavus deformity, an explanation of the finding that the subtalar joint is ankylosed in poor weight-bearing position, the effects of his overweight condition, and such other information deemed necessary to permit the PEB to determine which conditions render him unfit for duty, i.e., claw foot (pes cavus); or status-post fusion of subtalar joint, left; or both conditions. It notes that upon correction of his record, Petitioner may remain on the Temporary Disability Retired List until 30 November 2000.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was released from active duty on 1 December 1995, and transferred to the Temporary Disability Retired List the following day, with a combined disability rating of 30% for the following two category I conditions: status-post fusion of subtalar joint, left, rated at 20% under VA code 5272, and claw foot (pes cavus), EPTE, service aggravated, rated at 10% under VA code 5278; that there was a 0% deduction from the combined rating for non-compliance (category IV condition); and that he was found to have two category III conditions, namely, left hip pain and left knee pain, and a category IV condition, overweight.

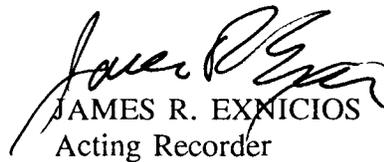
b. That he be accorded a periodic physical examination as soon as practicable. Current address: PO Box 213, Nicholson, PA 18446.

c. That the remainder of his request be denied.

d. 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 PFEIFFER
Executive Director