



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

ELP

Docket No. 8720-97

3 November 1999

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, 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 14 October 1999. 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. Additionally, the Board considered an advisory opinion provided by the Department of Psychiatry, National Naval Medical Center, Bethesda, MD, dated 19 January 1999, a copy of which is attached.

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.

On 22 November 1972, about five months after your enlistment in the Navy, you suffered serious injuries when the car you were driving was hit by a truck. Your uncle, who was a passenger, was killed in that accident. A narrative summary, prepared upon your admission to a naval hospital on 24 November 1972, stated that after the accident you were taken to Norfolk General Hospital with a serious head injury. You were initially unresponsive with a bilaterally contused lung, a fracture of the left humerus, and a fracture of the scapula. During the course of treatment you made gradual improvement and were discharged to full duty on 29 January 1973.

The record reflects that you reported for duty on board the USS JOHN F. KENNEDY on 17 February 1973. The medical record reflects that you were examined on 2 March 1973 and were found physically fit for mess cooking. Through May 1973, you were seen by the ship's medical department on five occasions for minor ailments

which included a headache, chest cold, constipation, and an injury to your left forearm.

During the eight month period from April to November 1973, you received six nonjudicial punishments (NJP) for possession of marijuana, three instances of absence from your appointed place of duty, failure to obey a lawful order, sleeping in the crew's lounge, assault, and communicating a threat. After your fourth NJP, you were counseled regarding your unsatisfactory behavior and warned that failure to take corrective action could result in discharge under other than honorable conditions.

A 25 February 1974 medical record entry indicated you were seen in sick bay for a headache. You reported that you were hit on the head with a "blackjack" in a police station about a week before and, as a result, you had headaches and recurring episodes of blurred vision. You also reported you had suffered a concussion about a year ago before this incident.

You received an adverse performance evaluation for the period 1 October 1973 to 1 March 1974. The reporting senior stated that you were an "infamous combination of inability, poor attitude and an overall dislike of authority." Your work varied from adequate, when supervised, to non-existent when left alone. You had no initiative, other than to avoid work, and worked only under a threat of the brig. The reporting senior asserted that you were the worst Sailor in the entire department. He stated that you had quick fists and had been in several fights. On one occasion you attacked a shipmate in the berthing compartment and on another, you allegedly attacked a petty officer and two police officers at a Navy exchange gas station.

On 12 June 1974, prior to trial by court-martial, your defense counsel referred you for evaluation of your mental competence. The examining psychiatrist described you as a rational, coherent, alert, oriented, cooperative, and polite young man who was fully aware of the nature of the charges. You expressed trust and confidence in your attorney and showed no evidence of disassociation, delusions, hallucinations, affective symptoms, or organic brain dysfunction. You were considered competent to stand trial.

You received two more NJPs on 13 and 21 June 1974 for a one hour period of unauthorized absence, absence from your appointed place of duty, two instances of failure to obey a lawful order, breach of the peace, and five instances of failure to muster.

On 2 July 1974 you were convicted by special court-martial of 10 specifications of absence from your appointed place of duty, four instances of assault, and disobedience of a lawful order. You were sentenced to confinement at hard labor for five months,

forfeitures of \$217 per month for five months and a bad conduct discharge.

On 29 July 1974 you were taken to the emergency room after you said that you were thrown against your rack. Apparently, there were no witnesses to this incident. Upon arrival in the emergency room, you would not respond to questions and during the general examination, you were in a supine position, grunting, groaning and biting your lip. The examining doctor stated that you refused to stand saying "Can't...can't...can't...put pressure on my leg." He noted "no involuntary spasms. Legs held rigidly in 90 degree knee flexion after sitting down and feigns absence of strength in leg but when transferred to supine position had no difficulty in doing so." Hip and sacral X-rays were within normal limits. The doctor's concluded that your lower lumbar spine was normal and you were malingering. You were returned to the brig.

A medical record entry of 4 September 1974 indicates you continued to complain of pain in your back which radiated down the whole leg to your instep. It was noted that you had not shown up for your medication and had been observed walking normally. However, when seen in sickbay you hobbled with your left leg held out. X-rays were repeated in the sacral and coccyx regions and were negative. On 9 October 1974 your condition was discussed with a doctor at a naval regional medical center, and no physical reason could be found for your pain, abnormal gait, or chronic headaches. Therefore, no determination could be made on whether you were malingering.

On 15 October 1974, the local clemency and parole board requested a psychiatric evaluation. You repeatedly refused to be seen and stated that you did not want clemency or parole, but on 16 October 1974 you were evaluated. At that time, you denied malingering and stated that you had not received the kind of help you needed. The examining psychiatrist noted that you were unwilling to accept the opinion of the medical officer or consultants that there was no organic basis for your complaints. When asked whether there might be a psychophysiologic component, you stated that confinement may have contributed to the problem. The examining psychiatrist noted that when you spoke of the 1972 accident, you claimed that you fractured your pelvis, received a brain concussion, and broke seven ribs. An evaluation of your mental status revealed that you blamed your problems on racial prejudice, but stated that this was secondary to your feelings that you had been deprived of your freedom by being sent to sea and being confined. The examining psychiatrist opined that there was no evidence to support a diagnosis of neurosis, psychosis, or organicity, but there was a strong psychological component to your orthopedic problem. You stated that you did not want clemency but believed that you could finish the remaining nine

months of your enlistment. However, on 17 October 1974 you requested that the bad conduct discharge be suspended and you be restored to duty.

You received your ninth NJP for failure to obey a lawful order on 16 December 1974. Clemency and restoration to duty were denied on 22 January 1975.

On 12 February 1975, you were admitted to the hospital complaining of severe back pain and an inability to move your arms and legs. X-rays were taken and an orthopedic consultation was requested. This evaluation suggested that you either suffered a conversion reaction or were malingering. All laboratory data were within normal limits. After you were treated with individual and group therapy, without any medication, the staff was convinced that your behavior was consciously manipulative and you were diagnosed as having a passive-aggressive personality disorder with overt manipulation. It was concluded that your long-standing personality disorder rendered you unsuitable for useful service, repeated episodes of passive-aggressive behavior could be expected, and neither psychiatric hospitalization nor outpatient psychotherapy was warranted. You were recommended for return to duty.

On 16 June 1975, the Navy-Marine Corps Court of Military Review (NMCCMR) affirmed the findings and sentence of your 2 July 1974 special court-martial. One judge dissented from that decision. The Court of Military Appeals denied a request for review on 5 September 1975 and you received the adjudged bad conduct discharge on 10 October 1975.

Your medical record reflects that on 8 September 1977, nearly two years after your discharge, you went to the Portsmouth Naval Hospital emergency room complaining of back pain. At the time, your status was unknown to the hospital staff and you were told to return the following morning for evaluation. You left only to return a short while later where you collapsed after firing a .22 caliber pistol into your shoulder. You were revived within minutes and complained of severe headaches, longstanding backaches, and an inability to move your right arm. After treating your wounds, records were reviewed and it was noted that you had made similar complaints in the past and been diagnosed with a passive-aggressive personality with overt manipulation. The medical record indicates that you were to be transferred to a civilian hospital for follow-up general surgery and psychiatric evaluation.

The post-service medical records which you have provided show that you were referred for admission to a hospital on 4 February 1982 by a mental health center after you claimed to be depressed and had attempted suicide in the past. However, you failed to go

to the hospital, but went to the local police station instead, where you claimed that you would commit a crime if you were not hospitalized. After being involuntarily committed, a psychological evaluation conducted on 20 February 1982 indicated that your mother stated that you were well adjusted until the 1972 automobile accident. She said that you were in a coma for about three days and had not been "right" since then, had not done well socially or in jobs since discharge, and had been hostile toward your family. You reported that you suffered from headaches since 1974 which had increased in intensity since 1980. You claimed that you saw a neurologist in Maryland in 1980, at which time you underwent a "brain scan" which revealed a mass in your right brain area. You failed to follow-up on this because you were never able to obtain certain Navy medical records. You were referred to the neurology clinic for evaluation, where an electroencephalogram (EEG) and other tests were within normal limits. An extensive neurology work-up was also normal. However, your scores on neuropsychological testing did not equate with reported educational and vocational achievements. These results suggested a strong emotional component underlying your performance. It was felt there might be an organic brain condition related to the automobile accident, but a neurological work-up, including a brain scan, would be necessary to make such a determination. You were discharged from treatment on 12 March 1982 with diagnoses of dysthymic disorder; dependent personality traits; and possible left cerebral hemisphere disorder. It was noted that several days after discharge from treatment, you returned and requested that the hospital complete a physical examination form for social security disability, stating that your job was not working out. A retrospective analysis by the examining psychiatrist suggested the possibility of malingering, and that your goal during the foregoing hospitalization may have been to avoid work and obtain disability benefits.

Outpatient records from the District of Columbia General Hospital, essentially a compilation of progress notes of your treatment from 1986 through 1989, indicate that you were diagnosed with paranoid schizophrenia in 1986.

The advisory opinion of 19 January 1999 states that a review of available medical records does not substantiate a diagnosis of schizophrenia. Further, the opinion states that those records do not suggest that your head injury and subsequent mental problems were a contributing factor in the multiple disciplinary infractions and subsequent court-martial conviction. However, it was opined that medical records from 1986 to 1987 substantiate a personality disorder with paranoid, schizoid, antisocial, histrionic, and narcissistic traits.

Prior to responding to the foregoing advisory opinion, counsel referred your records to a psychiatrist, who opined that you

experienced a profound psychological trauma in the 1972 accident, and that the abrupt change in your behavior upon your assignment to the JOHN F. KENNEDY suggested that you were dominated by a wish to be punished in order to relieve the feelings of guilt associated with your uncle's death. The psychiatrist noted that you had been diagnosed as a paranoid schizophrenic, presumably during a course of vocational rehabilitation in the mental hygiene system, but little descriptive evidence was found of this disorder in the progress notes of your outpatient treatment records. The psychiatrist believes that you developed a major psychiatric disorder, best described as chronic post traumatic stress disorder (PTSD) and a paranoid personality disorder. He further opined that with the history of a head injury and continuing symptoms pertaining to your central nervous system, an organic brain syndrome should not be ruled out. He noted that although repeated neurologic examinations did not conclusively suggest a localized lesion, a current brain scan with careful neurologic examination would clarify this possibility.

In its review of your application the Board conducted a thorough review of both service and medical records, and the post-service medical records you provided. The Board specifically noted counsel's contentions to the effect that prior to the 1972 accident you were fully functional, the accident left you psychologically traumatized due to your uncle's death, your performance and conduct declined to an unacceptable level as a result of the trauma, your mental condition was never properly diagnosed until after your discharge, and you have been mentally disabled and marginally employable since 1972. Counsel asserts that your undiagnosed disabilities were at the root of your inability to conform to the requirements of Naval discipline, and led to your punitive discharge. The Board noted that all of your disciplinary problems occurred after the 1972 automobile accident, and counsel's argument that without proper counseling, you dealt with your grief by inappropriately rebelling and disregarding established rules of conduct. Counsel points out that every time you were examined, you reported the automobile accident but not the death of your uncle. Counsel asserts that this shows the grief you felt over his death, and further noted that you experienced additional grief when your father died 13 months later. Counsel also asserts that it is reasonable to presume, given the absence of the hospital medical records, that when you reported aboard JOHN F. KENNEDY, the chain of command and medical personnel were unaware of the injuries and psychological trauma. The Board also noted that counsel's assertions that you should have been processed for an administrative discharge after your third NJP when you would have been eligible for a general discharge and, had this occurred, you never would have been court-martialed. Counsel also claims that had the effects of your head injury been known at the time of your court-martial, you might not have been convicted or, even if

you were, a bad conduct discharge would not have been imposed. Counsel further asserts that the presence of a serious undiagnosed mental disorder constitutes strong support for disability retirement, or at the very least, a separation under honorable conditions.

After careful consideration of the foregoing, the Board concluded that the foregoing factors and contentions, were insufficient to warrant disability retirement or recharacterization of your discharge given your record of nine NJPs and a special court-martial conviction. The Board could not agree with counsel's contentions that the 1972 automobile accident caused psychological trauma which developed into a major psychiatric disorder rendering you incapable of conforming to military discipline and authority. While the Board agrees that you most probably did suffer some degree of psychological trauma as a result of the death of your uncle and the injuries you sustained in the automobile accident, those factors did not excuse subsequent misconduct or relieve you of responsibility for your actions. Neither the evidence of record nor the evidence submitted in support of your application provides any indication that you were unable to distinguish right from wrong, or suffered from a condition which excused you of responsibility for your actions. The Board noted that prior to your special court-martial conviction you were found competent and no evidence of disassociation, delusions, hallucinations, affective symptoms, or organic brain dysfunction was found. The Board could not determine with certainty whether the court was aware of your automobile accident, but it appeared that since your defense counsel ordered a competency evaluation, he most likely was aware of the accident and would have offered such information as a matter in extenuation and mitigation.

The Board noted that post-service hospital records in 1982 suggest that you may have an organic brain condition related to the automobile accident. However, a conclusive diagnosis cannot be made without further neurologic examinations and a brain scan, and you apparently have not undergone any such examination. The Board also noted that post-service records indicate that you were diagnosed as a paranoid schizophrenic sometime in 1986/87. However, this diagnosis appears to be questionable since neither the advisory opinion nor counsel's psychiatrist found little descriptive evidence of this disorder in the outpatient records provided. The Board also could not ignore the multiple notations in the various medical records that you were a manipulative malinger.

With regard to your psychiatrist's opinion that you suffered from PTSD, a paranoid personality disorder and a possible organic brain syndrome, the Board noted that like the other doctors who evaluated you subsequent to your discharge, he did not observe

you during the time of your service. While your psychiatrist believes you suffered from PTSD, such a diagnosis has not been confirmed by psychological testing. Even if you suffered from PTSD, such a disorder would not normally excuse misconduct. You were diagnosed as having a passive aggressive personality during service. However, personality disorders are not disabilities under the law for which an individual may be processed for physical disability and, once again, do not excuse misconduct. While medical records document a number of physical problems after the accident, medical authorities believed they were psychological in nature since no organic basis could be found for your pain. It appeared to the Board that your physical problems did not warrant referral to the physical disability processing system. Even if they did, your court-martial conviction and discharge would have terminated any such processing. The Board was not persuaded, now 25 years later, that you suffered from any mental condition of such severity that it excused you of responsibility for the misconduct which led to your conviction and discharge. The Board concluded that your conviction and discharge were effected in accordance with applicable law and regulations and the discharge appropriately characterizes your service. The Board further concluded that you were guilty of too much misconduct to warrant recharacterization of your discharge to under honorable conditions. Accordingly, 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

Copy to:
Mr. Kevin J. Barry
Attorney at Law