



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

JRE
Docket No: 4103-01
20 December 2001

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
(b) DOD Directive 1241.1, 3 Dec 92
(c) SECNAVINST 1770.3B, 16 Aug 96

Encl: (1) DD Form 149 w/attachments
(2) HQMC memo 6000 HS 17 Oct 01
(3) HQMC memo 1070 JAM7, 4 Dec 01
(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, in effect, that his naval record be corrected to show that he was not released from active duty on 26 February 2001, and that he be retained on active duty until his medical problems are corrected. In the event his primary request is denied, he requests that his record be corrected to show that he was issued a notice of eligibility (NOE) for disability benefits, with entitlement to full pay and allowances less civilian earnings, and military medical care.

2. The Board, consisting of Messrs. McPartlin, Whitener and Zsalman, reviewed Petitioner's allegations of error and injustice on 18 December 2001 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 entered on active duty for special work (ADSW) on 14 October 1997. His period of duty was extended on several occasions, and he remained on ADSW until 30

September 2000. when he was released from active duty. On 27 October 2000, he was issued original orders which purported to order him to ADSW for the period 1 October 1999 [sic] to 29 November 2000. It appears that the orders were issued in order to restore him to active duty so that he would be eligible for medical treatment for gastroesophageal reflux disease (GERD) and an associated stricture of the esophagus. He underwent several procedures to dilate his esophagus, as well as a laparoscopic Nissen fundoplication in an attempt to correct the GERD condition. He underwent a magnetic resonance imaging (MRI) evaluation on 6 November 2000 and was noted to have lower lumbar spondyloarthropathy; L4-L5 mild circumferential disk bulge with mild to moderate facet arthropathy; L5-S1 mild circumferential disk/osteophyte complex with moderate facet arthropathy; and mild to moderate right and left neural foraminal stenosis. He was evaluated by a neurosurgeon on 14 December 2000, and referred to an anesthesia pain clinic for trigger point injections, and to a chiropractic clinic for treatment of chronic low back pain with myofascial features and lumbar spondylosis. He developed left leg numbness on or about 21 February 2001 after undergoing chiropractic manipulation of his spine; consequently, the neurosurgeon recommended he undergo an urgent MRI evaluation.

d. A medical record entry dated 20 February 2001 indicates that Petitioner was undergoing treatment for "status post" esophageal stricture with laparoscopic Nissen fundoplication, treated with Prilosec; and degenerative disk disease, for which he was being followed by the pain, chiropractic, and neurosurgery clinics. The entry also indicates that he would need continued follow-up in those clinics, as well as by physical medicine/therapy for traction, and potential follow-up by gastroenterology. The physician who dictated the entry indicated that Petitioner "... may be released from active duty with authorization for continued care of conditions which began during active service. Should these issues not resolve a Physical Evaluation Board may be required." An MRI was performed on 23 February 2001, with findings as follows:

"The sagittal images demonstrate intervertebral disk desiccation and vacuum disk phenomenon at the level of L5-S1. There is also end plate degenerative change visualized at the level of L5-S1. Vertebral body height and alignment are normal. The central bony canal is patent. The conus medullaris terminates at the normal anatomic level.

Axial images of L2-3, L3-4, L4-5, and L-S1 demonstrate bilateral facet arthropathy. The central bony canal and neural foramen are patent.

IMPRESSION: Multilevel lumbar spondyloarthropathy most severe at the level of L5-S1."

A pain clinic note dated 26 February 2001 indicates that Petitioner had pain radiating from his lower back to his legs, right greater than left, with an intensity of 3-4 on a scale of 10. The pain was exacerbated by movement and prolonged sitting and standing, and it was relieved by rest. Reportedly, his left leg became numb after 15 minutes of driving. The pain was described as stabbing, pulling and burning. Petitioner indicated that he was able to sleep at night, but only in certain positions. He was examined and found to be in no acute

distress. He had full strength, normal sensorium, negative straight leg test, positive left facet loading and sacroiliac joint pain. He was given a diagnosis of chronic low back pain, and prescribed an anti-seizure medication (apparently for neuropathic pain), a narcotic analgesic, and "LESI". He was released from active duty on 26 February 2001. A medical record entry dated 28 February 2001 indicates that Petitioner was to undergo lumbar epidural injection of steroids for his lower back condition, which would be performed over a 2 month period and require a total of three visits to the pain clinic, with four weeks between visits.

e. Petitioner contends that following his release from active duty, he was denied treatment at military medical facilities. He was told that he was ineligible for treatment, despite the "authorization" granted by a Navy physician on 20 February 2001, as noted above. In addition, he reportedly had difficulty obtaining medical care from the Department of Veterans Affairs (VA) because of uncertainty over his military status. He was required to go on extended sick leave from his civilian job during the latter part of May 2001 because of his back pain, and faces termination from that position on 21 December 2001, because he has not been cleared to return to work. VA treatment records indicate that the symptoms associated with his disk disease have worsened since February. His pain has increased, his left leg is weaker, and he has trouble walking because of a foot drop. He occasionally falls down. He had positive straight leg raise findings at 10 degrees of elevation on the left and at 40 and later at 20 degrees on the right; an abnormal gait; and decreased strength in the left leg, with atrophy of the left thigh muscles. Neurological testing results were abnormal, and compatible with a radiculopathy of the L5 nerve root of the left, with mild changes on EMG testing which are suggestive of active denervation and decreased (neurogenic) recruitment. It was felt that in view of Petitioner's motor deficit, neurosurgical intervention might be indicated.

f. In correspondence attached as enclosure (2), a captain, Medical Service Corps, U.S. Navy, by direction of the Medical Officer of the U.S. Marine Corps, advised the Board that upon review of the information provided, "there is not enough information to make a determination on granting" Petitioner's request. He noted that the results of the two MRI Petitioner underwent while on ADSW are not significantly different, and that his physical symptoms were the same. He noted that there "is no medical documentation pertaining [sic] the SNM routine medical evaluation which is generated during discharge from active duty." (NOTE: The VA records described above were not available when he reviewed the file.)

g. In correspondence attached as enclosure (3), the Board was advised by the Head, Military Law Branch, Judge Advocate Division (JAD), HQMC, in effect, that Petitioner was voluntarily released from ADSW on 26 February 2001. Six days prior to his release from active duty, he was seen by LCDR M..., MC, USNR, and was cleared for release from active duty with authorization for continued care of medical conditions which began during active service. LCDR M... also indicated that if the medical conditions did not resolve, Petitioner might eventually become the subject of a physical evaluation board (PEB). In the author's opinion, Petitioner was wrong in his assertions that he had been erroneously or

unjustly released from active duty, and that he will not be able to receive treatment for his continuing medical condition. He noted that LCDR M... was recently contacted by JAD personnel regarding Petitioner's assertions, and the physician again reviewed Petitioner's medical records and specifically stated that Petitioner did not suffer from a medical condition warranting treatment while on active duty. Furthermore, LCDR M... indicated that Petitioner has been eligible for continuing medical care since his release from active duty, and that Petitioner need only report to an appropriate military medical provided and present his medical clearance for release from active duty to receive treatment. The author of enclosure (3) stated that all procedures effecting Petitioner's discharge [sic], specifically, being medically cleared for release from active duty, were in accordance with Bureau of Medicine regulations. In addition, he noted that Petitioner had been the subject of a military police investigation prior to his release from active duty, for taking and failing to report 121 days of annual leave; engaging in unapproved civilian employment; and using false medical appointments as an excuse to remain away from duty. The investigation was "closed as founded" by military police investigators on 15 February 2001, and the results were referred to the Commanding Officer, HQBN, HQMC. To date, that officer has not preferred charges or taken any other disciplinary action against Petitioner. Should Petitioner return to active duty, the CO, HQBN, HQMC, will be required to dispose of Petitioner's misconduct in accordance with the UCMJ and the Manual for Courts-Martial. In conclusion, the author of enclosure (3) recommended that the requested relief be denied.

h. In response to enclosures (2) and (3), Petitioner contends, in effect, that he was entitled to be retained on active duty for continuing treatment of his back and esophageal conditions. He believes enclosure (3) is flawed, fraught with misinformation, threatening in tone, and designed to assassinate his character, without providing accurate medico-legal information. He believes that the opinion was designed to divert attention from the fact that this is a medical case. He feels that the inclusion of information concerning the military police investigation was unwarranted and malicious, and that the information has no bearing on the issues presented in his petition. He states that medical authorities called for his return to active duty (in October 2000) after it became evident that he had serious unresolved medical problems when released from active duty. Members of the Reserve Affairs staff at HQMC, in response to the call for his return to active duty in a medical status, decided to put him in a regular leave status. They had found leave which had not been cleared "off the books" because of administrative error, and he was placed on leave because it was easier for them to do so than to "cut a completely new medical orders package." Once they realized their error, an investigation was started on the premise that he had contrived a way to get additional leave. In his opinion, this was an attempt to cover their mistake. He contends that the investigation did not pertain to the allegations listed in enclosure (3), and that only the wording of the first allegation listed therein is "anyway near" to what was actually stated as part of the investigation. The other two allegations listed "were never told to me to be part of any investigation against me." He submits copies of two sworn statements he made during the course of the investigation, which he believes speak for themselves. He states that the implication that there are outstanding charges against him, and the insinuation that he left active duty in order to escape punishment, are rubbish. He states that the CO, HQBN,

HQMC, made the decision to "drop the allegations" after being advised by Petitioner to charge him so that he could respond within the military justice system, or drop the allegations. He notes that he would not have been permitted to leave active duty had charges been pending against him. He states that some of the comments contained in enclosure (3) reek of blackmail type threats and strong-armed tactics. He states that he requested a copy of the report of investigation, but was told by the CO, HQBN, HQMC, that he could not be given a copy because no charges had been preferred, and that the investigation had been closed and was to be expunged. He states he was also told that the investigation "could not be brought up again". He maintains that the findings of the investigation are irrelevant to his request for correction of his record, and asks the Board to ignore results of the investigation.

i. Petitioner contends, in effect, that he was not voluntarily released from active duty on 26 February 2001, as is erroneously stated in enclosure (3). He maintains that he was denied treatment at a Navy pain clinic on 28 February 2001 because he did not have the right status in their entitlements computer system, due to his release from active duty to the Individual Ready Reserve. He indicates that he saw LCDR M... for about 10 minutes on 20 February 2001. He had not seen that physician before that date, and he has not seen him since then. LCDR M... reviewed some information on his computer, and then sent Petitioner on his way. LCDR M... did not see any of the information provided by Petitioner's treating physicians after 20 February 2001, pertaining to the severity of his condition, treatment regimen, and future treatment needs. In addition, he brought LCDR M...'s "authorization" letter to three clinics at NNMC Bethesda, where he had been treated prior to his release from active duty, and was told that he was not entitled to receive treatment. He appealed that determination to the Chief of Hospital Administration, but was unsuccessful. Official's assigned to the Patient Advocate's office attempted to secure care for him, but were unable to do so. He was then directed to the Bureau of Medicine and Surgery, Code 25, but again met with no success. After being denied support from within the command structure of the Marine Corps Reserve, he filed his petition with the Board. He notes that he has been under the care of the VA for the past six months. Appointments at VA facilities are scheduled months apart, hospital resources are limited, and the quality of care available at those facilities is mediocre at best. His back and leg conditions have degenerated since he was released from active duty, and he was forced to take sick leave from his civilian position during late May 2001. He was subsequently placed on leave without pay, and his civilian employment is scheduled to be terminated on 21 December 2001 because of his inability to work a full day. He wants his petition to be granted so that he will be able to receive quality medical care and a fair assessment of his physical status. He notes that if Marine Corps officials are worried about his reaching the 18 year sanctuary, which would require his retention on active duty until he completes 20 years of active duty service, they should not be, as he signed a waiver of his sanctuary rights when he entered on active duty in 1997, and he would be willing to sign another waiver. He submits a detailed personal statement in which he describes the incapacitating effects of his lower back and esophageal condition.

j. Petitioner's Career Retirement Credit Record reflects that he has accrued 4968

active duty points, which equates to 13.8 years of active duty service.

k DOD Directive 1241.1, Reserve Components Incapacitation Benefits, (reference (b)), paragraph 6.2, provides, in effect, that a Reserve member who is hospitalized or becomes incapacitated while on active duty orders for a period of 31 days or longer shall be retained on active duty until qualified to return to full military duty, or until final action has been taken by the disability evaluation system (DES). Paragraph 4.3.3 provides that a Reserve member shall be determined to be unable to perform military duties if, under Service procedures, the member would be determined to be medically unfit for worldwide (deployable) duty. Paragraph 6.5 provides that incapacitation for periods of over one year, or permanently disabling conditions, should be processed as soon as recognized through the DES for disability separation or retirement.

l. The policies contained in reference (b) have been implemented in SECNAVINST 1770.3B, Management and Disposition of Incapacitation and Incapacitation Benefits for Members of the Navy and Marine Corps Reserve Components, (reference (c)). It is applicable to members of the Reserve components, including those on ADSW, but excluding Training and Administration of Reserve (TAR) and Active Reserve (AR) personnel. Active duty is defined as full-time duty in the active military service of the United States, limited to active duty for training (ADT), initial active duty for training (IADT), and ADSW. Physical incapacitation is defined as any medical impairment due to injury, illness, or disease, regardless of degree, which reduces or precludes an individual's ability to perform the duties of his or her office, grade or rating. Paragraph 8b provides that a Reservist who incurs a physical incapacitation while performing inactive duty training, while on annual training, ADT, IADT (2nd increment), or ADSW orders for 30 days or less, or while traveling to or from such duty must be released from duty no later than the conclusion of the period of duty as stated on the order at the time the physical incapacitation occurred and application for a Notice of Eligibility (NOE) for disability benefits under the instruction has been applied for. Paragraph 8c provides that a Reservist who incurs a physical incapacitation while on a continuous set of orders for 31 days or more is considered an active duty member and is not normally eligible for an NOE. These members will be retained in an active duty status until they are found "fit for release" or the PEB has issued a notification of Decision per the Disability Evaluation Manual.

m. In several previous cases, the Board has authorized the issuance of an NOE to Reservists who were not considered incapacitated at the time of their release from active duty, but became incapacitated shortly thereafter, and were unable to continue their civilian employment. It is notable, however, that those cases were decided when previous iterations of the DEM were in effect. Under the provisions of those instructions, in cases where a Reservist had not been retained on active duty and was not in receipt of an NOE, the PEB would find the member physically qualified or not physically qualified, rather than fit for duty or unfit for duty. A finding that the member was not physically qualified would result in the member's discharge without entitlement to disability benefits administered by the Department of the Navy, unless the member was eligible for Reserve retirement. The

current regulation, SECNAVINST 1850.4D, provides as paragraph 3309b, that a service member who has served on active duty for 30 [sic] days or more, has been released from active duty, and is now in an inactive duty drilling status and requests referral to the PEB for a condition alleged to have been incurred or aggravated while on active duty, shall be processed into the DES and the PEB shall determine and record whether the member is fit or unfit for continued service. Reservists in this instance who are found unfit for duty warrant disability retirement or separation pay.

CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the comments contained in enclosure (2) and (3), the Board concludes that Petitioner was incapacitated prior to his release from active duty, and not fit for release from active duty. In this regard, it notes that Petitioner had a moderate to severe degenerative condition of his lower spine, which has increased in severity since his release from active duty and is likely to result in the loss of his civilian employment and termination of his military career. In addition, it notes that the physician who cleared him for separation did so with the proviso that he be authorized continuing care for conditions incurred on active duty. He indicated that Petitioner was in need of continued medical treatment in the pain, chiropractic, physical medicine/physical therapy, and neurosurgery clinics, as well as potential follow-up with the gastroenterology department, and that referral of Petitioner to the physical evaluation board might be required should his medical issues not resolve. The Board believes the physician's determination that Petitioner was fit for release from active duty would have been different had he not been under the mistaken belief that Petitioner would continue to be entitled to medical care from military health care providers.

Given the chronic nature of Petitioner's conditions, and the length of time he has been incapacitated, the Board believes that he should be referred to the DES as soon as possible for a determination of his fitness for duty and entitlement separation or retirement by reason of physical disability.

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 not released from active duty for special work on 26 February 2001, and that he has been retained on active duty since that date.
- b. That Petitioner be evaluated by a medical evaluation board (MEB) within sixty days of the date of approval of this recommendation, and that the findings and recommendation of the MEB be referred to the Physical Evaluation Board for action.

c. That so much of Petitioner's request for corrective action as exceeds the foregoing be denied.


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

4. 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.

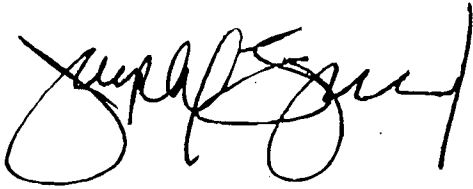
ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

Reviewed and approved:



JAN 9 2002

JOSEPH G. LYNCH
Assistant General Counsel
(Manpower And Reserve Affairs)