



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

JRE
Docket No. 06907-08
18 May 2009

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) SECNAV CORB ltr 5220 CORB:02, 1 Oct 08
(3) 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 "with a disability rating" for headaches, vice discharged by reason of a "condition, not a disability" due to headaches.

2. The Board, consisting of Ms. [REDACTED] and [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 14 May 2009 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 on 7 June 2006. He was evaluated by a medical board on 3 December 2007, and

given diagnoses of headaches with mixed features, including migraine, tension and rebound; and possible occipital neuralgia. The medical board report indicates that he experienced the sudden onset of the headaches after feeling a "pop" in the back of his head while doing calisthenics with his unit. On 14 March 2008, the Physical Evaluation Board (PEB) made the preliminary finding that Petitioner was fit to continue on active duty. The PEB noted that although Petitioner complained of constant throbbing headaches with occasional photophobia, which precluded him from standing watches and caused him to be away from work for four to six hours per week, he was capable of performing his duties as a unit diary clerk. Petitioner accepted the finding of fitness on 8 April 2008, and his case was finalized by the President, PEB on 15 April 2008. A medical record entry dated 9 June 2008 indicates that in the opinion of a neurologist, it was unlikely that Petitioner's headaches would improve to the point of his "being able to carry out the demanding duties" required of an active duty Marine, and that he should receive a "MEDSEP". Petitioner was involuntarily discharged from the Marine Corps on 11 July 2008 for the convenience of the government due to a condition, not a disability, namely, migraine headaches.

d. On 24 July 2008, the Department of Veterans Affairs (VA) awarded Petitioner disability ratings of 50% for posttraumatic headaches, 30% for an anxiety disorder, 20% for cervical spine strain, 10% for tinnitus, and 0% for allergic rhinitis and alopecia areata (spotty hair loss), for a combined rating of 80%. The rating for headaches was based on Petitioner's report that the headaches occurred four times per day and lasted four to five hours at a time, which caused him to stay in bed and not do anything "heavy".

e. The VA schedule for rating disabilities lists the following ratings criteria for headaches under code 8100:

With very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability.....	50
With characteristic prostrating attacks occurring on an average once a month over last several months.....	30
With characteristic prostrating attacks averaging one in 2 months over last several months:	10

f. In correspondence attached as enclosure (2), the Director, Secretary of the Navy Council of Review Boards, advised the Board, in effect, that the available evidence is inadequate to warrant the requested corrective action. He stated that his

conclusion was based largely on the 11 December 2007 Non-medical Assessment that was provided to the PEB by Petitioner's commander, which indicates that Petitioner's condition had not interfered significantly with his ability to perform his primary duties as a unit diary clerk, and that he remained a "productive member of the Marine Corps administrative structure". Although the commander emphasized Petitioner's impairment with respect to more physically demanding duties such as performing the physical fitness test and deploying in certain settings, those aspects of duty performance cannot form the sole basis for a finding of unfitness for continued naval service. Petitioner's situation highlights the difference between VA and military disability determinations. VA determinations are manifestation/symptom oriented, whereas military determinations are performance based. In his opinion, it does not appear that Petitioner met the threshold of unfitness for duty.

CONCLUSION:

Upon review and consideration of all the evidence of record, notwithstanding the comments contained in enclosure (2), and after resolving doubt in Petitioner's favor, the Board concludes that he was unfit for duty by reason of physical disability because of his headache condition, and should have been transferred to the Temporary Disability Retired List, rather than discharged for the convenience of the government by reason of a condition, not a disability. The Board was not persuaded, however, that any of the other conditions rated by the VA rendered him unfit for duty. As such, there is no basis for assigning disability ratings to any of those additional conditions.

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 discharged for the convenience of the government on 11 July 2008.

b. That Petitioner's naval record be further corrected to show that on 10 July 2008, while he was entitled to receive basic pay, the Secretary of the Navy found him unfit to perform the duties of his rank by reason of physical disability due to headaches with mixed features, which were incurred while

Petitioner was entitled to receive basic pay; that the disability is not due to intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; that the disability is considered to be ratable at 30% in accordance with the Standard Schedule for Rating Disabilities in use by the Department of Veterans Affairs at the time the Secretary found Petitioner unfit, Code Number 8100; that the disability is not combat-related; and that as accepted medical principles indicate the disability may be of a permanent nature, the Secretary directed that Petitioner be released from active duty on 11 July 2008, and transferred to the Temporary Disability Retired List pursuant to 10 U.S. Code 1202.

c. That Petitioner be afforded a periodic physical examination as soon as practicable. Current address:

[REDACTED]

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

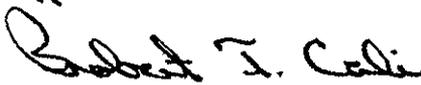
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

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


For W. DEAN PFEIFFER

Approved:

5-27-09

Robert T. Call
Assistant General Counsel
(Manpower and Reserve Affairs)