



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

JRE
Docket No. 04090-09
19 February 2010



This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the 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 19 February 2010. 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.

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.

You enlisted in the Marine Corps on 22 September 1997. On 21 August 2000, while still on active duty, a Department of Veterans Affairs (VA) rating official determined that you were entitled to vocational rehabilitation services due to a spinal disorder that was ratable at 20% or higher. On 29 September 2000, the Physical Evaluation Board (PEB) determined that you were fit for duty notwithstanding your lower back condition, and directed that you be returned to duty. On 31 August 2001, you completed a Report of Medical History in which you falsely denied that you had ever submitted a claim for pension or

disability benefits. You were examined by a military health care provider on that date and found qualified for separation. You were released from active duty on 21 September 2001 by reason of completion of required active service, and assigned a reentry code of RE-1A. You submitted a claim to the Department of Veterans Affairs (VA) on 22 September 2001 for disability benefits for lumbosacral strain, insomnia and radiculopathy of the left leg and foot. You reenlisted in the Marine Corps on 31 January 2002. The available records do not indicate whether or not you disclosed the aforementioned VA claim at that time. You began to seek medical care for low back pain on a very frequent basis about three months after you reenlisted, and continued to do so for the remainder of your naval service. On 21 March 2003, the VA awarded you disability rating of 0% for radiculopathy and lumbosacral strain from 22 September 2001 to 30 January 2002, when the ratings were suspended due to your return to active duty. The VA denied your request for service connection for insomnia.

Due to your continued complaints of low back pain, the paucity of objective evidence of spinal disability, and the determination that there had not been a significant change in the lower back condition since it had been evaluated by the PEB several years earlier, medical authorities recommended that you be discharged for the convenience of the government by reason of a condition, not a disability, which interfered with your service. You were so discharged on 6 January 2004. The VA increased the rating for lumbosacral strain to 20% effective 7 January 2004. You submitted a claim for service connection for depression on 12 October 2004, and the VA awarded you a rating of 30% for a mood disorder associated with lumbosacral strain on 31 August 2006, with an effective date of 12 October 2004.

The Board concluded that your receipt of service connection and disability compensation from the VA is not probative of the existence of error or injustice in your naval record. In this regard, the Board noted that the VA assigned ratings to the lumbosacral strain and radiculopathy without regard to the issue of your fitness to reasonably perform military duty prior to your discharge, and that the rating you received for a mood disorder was based on your condition more than eighteen months after you were discharged from the Marine Corps. The VA did so in accordance with its regulations, which do not apply to the military departments, which permit the VA to assign and modify disability ratings at any time after a veteran has been separated or retired.

In the absence of evidence which demonstrates that you were unfit for duty on 6 January 2004, the Board was unable to recommend any corrective action in your case. 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