



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

JRE
Docket No. 05737-10
28 May 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 28 May 2010. The Board's inquiry was limited to determining whether the failure of officials of the Department of the Navy to defer your separation beyond 15 March 1999 shocked the sense of justice and was therefore unjust. In addition to the information reviewed by the Board when it considered your application on 8 March 2001 and 10 September 2009, the Board considered the petition for reconsideration of post remand decision dated 18 November 2009 (PR1) and the similar petition dated 2 February 2010 (PR2).

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 in your naval record.

The Board noted that in its letter of 19 September 1999, the phrase "you failed to submit sufficient evidence to demonstrate that" was intended to apply to each of the succeeding clauses in the sentence in which the quoted clause appears. Your counsel's contention that the final three clauses of the sentence conflict with the Board's

decision to deny your request for correction of your record (PR2, 3,4) is incorrect.

Your counsel's contention to the effect that the surgical procedures you underwent in March and April 1999 were not "elective" is incorrect. Your counsel failed to invite the Court's attention to the attached "Convalescent Leave Request Form" (AR, 44), in which your physician classified the spinal surgery you were scheduled to undergo on 12 April 1999 as an elective procedure. It is clear that the arthroscopic knee surgery you underwent on 11 March 1989 was also elective in nature, as it was a minimally invasive diagnostic procedure of the same type and purpose as a procedure you had been advised to undergo approximately eight to ten years earlier (AR1, 166, 174; PR2, 9).

The Board did not accept your contention to the effect that your assignment to sea duty for the majority of your career precluded you from receiving necessary medical care (PR2, 15, 16). It appears that you deferred undergoing definitive treatment of your knee and back conditions because you felt that it would be in your best interest and the best interest of the Navy to defer obtaining treatment that might interfere with your performance of duty. In this regard, the Board noted that in your rebuttal to the report of a medical evaluation board (MEB) that was conducted on 10 February 1999 you stated "I felt it my duty to not miss ship's movement as long as I could, at least stand watch" and "as an 'ex' athlete on varsity teams, I had learned to 'play hurt'. In my opinion, wearing a khaki uniform in the US Navy qualifies as being on the 'varsity team'" (AR 247-250). ("Khaki" refers to chief petty officers, warrant officers and commissioned officers of the Navy).

The Manual of the Medical Department, chapter 18, Medical Boards, article 18-5(1)(b) (1996 reprint with changes up to and including change 112, dated 21 February 1996) provided, in effect, that if a member was temporarily unable to perform full duty, but return to full duty was anticipated and it was necessary to follow the patient for more than thirty days before final disposition was made, convening of a temporary limited duty (TLD) board was indicated. Article 18-29 provided, in effect, that TLD was a period of limited duty not to exceed twenty-four months that was authorized in cases where the prognosis was that the member could be restored to full duty within the specified TLD period. Referral to a PEB was indicated when there was a probability that the member would not be physically qualified for full duty after twenty-four months of TLD. Article 18-34(1) provided, in part, that any elective surgical procedure that might affect a member's physical qualification for duty should be completed before the initiation of a medical board.

Secretary of the Navy Instruction (SECNAVINST) 1850.4D, paragraph 1008b, provided, in part, that members should be placed on TLD when the prognosis was that the member could be restored to full military duty within a reasonable period of time, usually sixteen months or less. Paragraph 3102a provided, in part, that a case entered the Navy disability evaluation system when an MEB was dictated for the purpose of evaluating the diagnosis and treatment of a member who was unable to return to military duty because the member's condition most likely was permanent, and/or any further period of TLD was unlikely to return the member to full duty. A condition was considered permanent when the nature and degree of the condition rendered the member unable to continue naval service within a reasonable period of time, normally 12 months or less. Paragraph 3206a provided that elective surgical procedures that might affect a member's physical qualification for duty were to be completed before the initiation of an MEB. Paragraph 10001 provided, in part, that if the MEB believed that the member would be able to return to full military duties within a reasonable period of time, a TLD board would be written. If the member's physical qualification to continue on active duty remained in doubt or the member's physical limitations precluded return to full duty after the prescribed TLD period, the MEB would refer the case to the PEB.

The MEB report dated 10 February 1999 indicates that the prognosis in your case after operative stabilization and potential decompression of your spine, as well as debridement of a suspected lateral meniscus tear, was excellent, with a very high likelihood of full recovery and the ability to resume full active duty status in the Navy (AR1, 125-127). The implementation of the MEB's recommendation that you maintain yourself on active duty and undergo right knee arthroscopy, followed by three months of stabilization training of your lumbar spine, after which you would undergo spinal surgery, would have required that you be retained on active duty for approximately six months or longer. That recommendation could not be implemented because of your impending mandatory separation, which also precluded your being placed in a TLD status. The Board was not persuaded that the referral of your MEB to the PEB was proper, or that the MEB report as written would have been accepted by the PEB under any circumstances.

Your counsel's contention to the effect that the Board is required to provide substantial evidence to prove that the Navy's failure to defer your separation beyond 15 March 1999 was not an injustice is incorrect (PR2, 23). SECNAVINST 5420.193, 19 November 1997, enclosure 1 (codified as 32 CFR 723), section 3e(2), provides that the Board may deny an application if it determines that the evidence

of record fails to demonstrate the existence of probable material error or injustice. The Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Applicants have the burden of overcoming this presumption.

The Board concluded that your separation was proper, and that you have not demonstrated that the failure of Department of the Navy officials to retain you on active duty shocked the sense of justice or was otherwise unjust. 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