



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

JRE

Docket No. 11128-09
28 October 2009

[REDACTED]

[REDACTED]

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 in which you requested that your record be corrected to show that you were retired by reason of physical disability.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 22 October 2009. 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. In addition, the Board considered the advisory opinion furnished by the Director, Secretary of the Navy Council of Review Board (SECNAVCORB) dated 6 August 2009, a copy of which is attached, and your rebuttal thereto.

After careful and conscientious consideration of the entire record, and notwithstanding the recommendation contained in the advisory opinion from the Director, SECNAVCORB, 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 concluded that in view of your failure to disclose your pre-service history of posttraumatic stress disorder when you applied for enlistment, it would not be in the interest of justice to correct your record to show that you were retired by

reason of physical disability due to posttraumatic stress disorder.

The Board found that you underwent a pre-enlistment physical examination on 9 January 2003, and completed a DD Form 2807-1, Report of Medical History, on that date in which you denied having any significant medical history, to include a history of nervous trouble of any sort (anxiety or panic attacks), frequent trouble sleeping, counseling of any type, depression or excessive worry, and evaluation or treatment for a mental condition. Significantly, you failed to disclose that you had experienced symptoms of posttraumatic stress disorder that you had experienced prior to enlisting, such as hypervigilance, increased startle response, nightmares, flashbacks, social isolation, and avoidance, as indicated in a medical record entry dated 18 October 2004. You experienced similar symptoms after you were wounded in Iraq in 2004. A Department of Veterans Affairs (VA) medical record entry dated 15 November 2006 indicates that you experienced periods of "hypervigilance, reexperiencing and avoidance" after a traumatic event which occurred prior to your enlistment; thereafter you dropped out of school for six months and later attended an alternative high school; you "received little professional treatment" after the traumatic event; you attended a university for several months but were not "able to cope"; you continued to experience some posttraumatic symptoms, were shaken by world events, and decided to join the Marine Corps. In hindsight you were "able to conceptualize this choice [enlistment] as being somewhat counter phobic", and stated "Intellectually, I knew I was unprepared to cope."

The Board also concluded that the provisions of 38CFR4.129 would not be applicable to your case even if it were to disregard the manner in which you procured your enlistment and determine that you are entitled to disability separation or retirement. In the Board's opinion, the provisions of title 38, Code of Federal Regulations, part 4.129 (38CFR4.129) required VA rating officials to apply a convalescent rating, rather than a minimum rating, to mental disorders due to traumatic stress. As such, the provisions of 38CFR4.129 were inapplicable to service members who underwent military disability evaluation prior to the enactment of the National Defense Authorization Act of 2008 (Public law 110-181). Furthermore, 38CFR4.129 pertains to cases where a mental disorder develops in service. Your disorder developed prior to your enlistment. The Board also found that reference (c) to the advisory opinion was issued to ensure that the cases of former service members who are entitled to apply to

the Physical Disability Board of Review (PDBR) will be adjudicated under the same standards regardless of whether they opt to apply to the PDBR or a service correction board such as the Board for Correction of Naval Records. As you were not discharged by reason of physical disability, you are not entitled to apply to the PDBR, and the provisions of reference (c) to the advisory opinion are not explicitly applicable to your case.

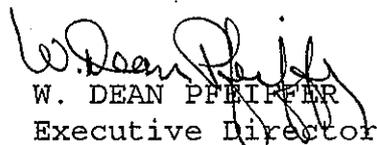
The fact that the Department of Veterans Affairs (VA) has rated your disability at 100% since 20 April 2005 is not probative of the existence of error or injustice in your naval record. The Board found that the general rating formula for mental disorders is contained in 38CFR4.130. A rating of 100% generally requires a finding of total occupational and social impairment due to such symptoms as gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. A rating of 70% generally requires evidence of occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a work-like setting); inability to establish and maintain effective relationships. A rating of 50% generally requires occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships. At the time of your discharge there were modifications to the rating schedule for mental disorders prescribed by the Secretary of Defense which were more stringent

than the general rating guidance and generally resulted in lower ratings than those assigned by VA rating officials. It appeared to the Board that VA rating officials relied primarily on your subjective reports in assessing the degree of impairment caused by your mental disorder. As you demonstrated when you applied for enlistment, you not a reliable historian concerning your mental disorder. Since you concealed your history of posttraumatic stress disorder in order to procure your enlistment in the Marine Corps, the Board was very skeptical of the self-serving representations you made to VA officials when attempting to maximize your entitlement to VA disability compensation. The Board noted that although your disability is currently rated at 100% by the VA, which suggests that you are severely socially and occupationally impaired, likely incapable of forming and maintaining relationships, and unemployable, among other things, you are attending an Ivy League university and are a member of a university athletic team.

In view of the foregoing, 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