



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

JRE
Docket No. 07646-10
15 November 2010

[REDACTED]

[REDACTED]

This is in reference to your request for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

On 4 November 2010, a three-member panel of the Board for Correction of Naval Records, sitting in executive session, conducted the review directed by the United States Court of Federal Claims in an order dated 16 July 2010. The Board considered the administrative record (AR), less AR 1-117, which pertain to your request for further consideration of the your initial application that was denied by the Board on 3 August 2006. The Board also considered an advisory opinion from the Director, Secretary of the Navy Council of Review Boards (SECNAVCORB), dated 28 September 2010, and your response thereto dated 27 October 2010.

The Director, SECNAVCORB, assigns, directs and supervises the activities of the Physical Evaluation Board (PEB) and all other elements of the Naval Disability Evaluation System, and takes final action for the Secretary of the Navy in certain disability cases. The SECNAVCORB advisory opinion was prepared with the advice and assistance of the Director's legal and medical advisors, and was rendered in accordance with the provisions of Secretary of the Navy Instruction (SECNAVINST) 1850.4E.

The Board may deny an application in executive session 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. Petitioners have the burden of overcoming this presumption. See 10 USC 1552, 32 CFR 723.3e. It is not a duty or function of the Board to demonstrate that a record is not erroneous or unjust.

After careful and conscientious consideration of your request, the Board found that you failed to submit sufficient evidence to overcome that presumption of regularity, or to establish the existence of probable material error or injustice in your naval record. In this connection, the Board substantially concurred with the comments contained in the SECNAVCORB advisory opinion. The Board was not persuaded that adjustment disorders were considered disabilities under laws applicable to the military departments on 3 September 1993, or that you were unfit for further service by reason of physical disability when you were voluntary discharged from the Navy in 1993.

The Board also substantially concurred with the advisory opinion dated 13 April 2006 that was provided by physicians who were assigned to the Behavioral Health Clinic, National Naval Medical Center (NNMC). The Board specifically concurred with the findings listed in AR 177, as well as the detailed and erudite explanation of the bases of those findings. The Board disregarded the references to SECNAVINSTs 1850.4D and 1850.4E. The Board disagreed with the Court's determinations that the NNMC advisory opinion is "fatally flawed" and that that you suffered from a "disability" at the time in question.

In cases where a petitioner has not been the subject of a medical or physical evaluation board, the Board or a member of its staff will, as a general rule, request a medical advisory opinion. The opinion serves as a de facto medical board report, i.e., it reports on the state of health of the petitioner and contains a finding that the petitioner fitness for continued service was or was not questionable at the time of his separation from the Navy or Marine Corps. If the petitioner's fitness is considered questionable by the Board or the author(s) of the medical advisory opinion, the Board or its staff will in most cases seek an advisory opinion from the Director, SECNAVCORB, on the issue of the petitioner's fitness for duty at the time of his separation or release from active duty. The Board accepted the determination of the authors of the NNMC opinion to the effect that your fitness for duty was not questionable. The Board would not have requested an advisory opinion from the Director, SECNAVCORB, in your case, but for the fact that the Court determined that your mental disorder qualified as a disability.

The title of SECNAVIST 1850.4C, Disability Evaluation Manual (DEM), enclosure 3, is "MEDICAL CONDITIONS AND PHYSICAL DEFECTS WHICH NORMALLY ARE CAUSE FOR REFERRAL TO THE PHYSICAL EVALUATION BOARD". The Board did not accept the Court's finding to the effect that the absence of the term "Adjustment Disorder" in enclosure 3 as a condition normally cause for referral to the PEB, together with its classification as a non-disabling condition in a later version of the DEM, establishes that an adjustment disorder qualified as a disability in 1993. If correct, the Court's reasoning would suggest that numerous other mental disorders that were not considered disabilities by the PEB at the time in question were in fact disabilities, to include such conditions as paraphilias and other sexual and gender related disorders, attention deficit disorder, and perhaps substance abuse disorders, among others. In this regard, the Board noted that the disorders listed in the preceding sentence do not appear in SECNAVINST 1850.4C, enclosure (3), section O(3), and that similar conditions and disorders are listed in SECNAVINST 1850.4D, section 8013(a)(4), as were adjustment disorders.

Although the Court's decision was also based in part on the absence of the term "adjustment disorders" in SECNAVINST 1850.4C, enclosure 3, section O(3)(a), Personality Disorders, the Court did not cite the next subparagraph, O(3)(b), Transient Personality Disruptions, which states: "Transient personality disruptions of a nonpsychotic nature or **situational maladjustments due to acute or special stress** are generally self-limited conditions and do not render an individual unfit because of physical disability" (emphasis added). The emphasized words appear to include adjustment disorders, which, as noted by the Court, were defined in DSM III-R as maladaptive reactions to an identifiable psychosocial stressor or stressors, which, it was assumed, would remit soon after the stressor ceased.

The Board concluded that you did not submit substantial or credible evidence which is probative of your contentions that you were mentally incompetent and unfit for duty by reason of physical disability at the time of your separation from the Navy. The opinions expressed by a psychiatrist in the report of the psychiatric examination you underwent on 21 June and 28 July 2004, are speculative in nature and of no probative value with regard to the issues of your mental competence or alleged unfitness for military duty. The record is replete with evidence that strongly suggests that you were fit for duty. For example, the Court noted that you had declined to undergo psychological counseling after April 1991; you elected to be discharged in lieu of being transferred from your duty station; your final performance evaluation was positive and contained laudatory comments; and that during the course of your pre-separation physical examination, you did not report the existence of any serious

defects or conditions that you believed had interfered with your performance of military duties. On 6 July 1994, the Department of Veterans Affairs (VA) granted you a 10% rating for a skin condition, and 0% ratings for chronic prostatitis and a fractured right little finger. The VA denied your request for service connection and disability compensation for history of depression, diastasis rectus abdominus, refractive error, residuals of exposure to asbestos, a right elbow injury, and residuals of a chest injury. AR 340-41. The denial of service connection for a history of depression was based on the absence of a diagnosis of any type of mental disorder at the time of your post-service VA mental disorder examination. AR 196.

Your statement of 27 October 2010 contains little substantive information and does not successfully controvert the findings of the Director, SECNAVCORB. You contend that the opinion contains objectionable, misleading, vague, argumentative, and speculative findings and conclusions, but do not clearly articulate the basis for these contentions. Although a mark of 3.8 in military bearing and a lowered ranking among your peers might have been "career buster[s]" had you decided to reenlist and been considered for promotion selection, the evaluations are not adverse and do not suggest that you were unfit for duty.

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.

Sincerely,


W. DEAN PFEIFFER
Executive Director