



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

[REDACTED]
Docket No. 6639-16

SEP 11 2017

[REDACTED]
Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of 10 USC 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 27 July 2017. The names and votes of the members of the panel will be furnished upon request. 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 contained in Director CORB ltr 5220 CORB: 002 of 2 May 2017 and your rebuttal.

A review of your record shows you entered service with the Marine Corps Reserve in October 1985 after a period of active service. You served as a criminal investigator for approximately 30 years before a 13 May 2015 medical board referred you to the Physical Evaluation Board (PEB) for Thoracic Aortic Aneurism (TAA) and superior labral tears from anterior to posterior (SLAP) in your shoulders. On 3 June 2015, the PEB determined you were fit for continued naval service despite your disability conditions. You requested a formal hearing that also found you fit for continued naval service on 9 September 2015. Finally, you filed a Petition for Relief (PFR) with Director, Secretary of the Navy Council of Review Boards that was denied on 8 December 2015 resulting in your release from active duty on 31 December 2015. On 30 January 2016, you suffered multiple intracranial hemorrhages after you had returned to your civilian employment. You requested to be transferred to the Retired Reserve (Awaiting Pay) and were transferred on 31 December 2016.

The Board carefully considered your arguments that you were erroneously found fit for continued naval service by the PEB and denied due process. You assert that you should be placed on the disability retirement list due to the disability conditions. Unfortunately, the Board disagreed with your rationale for relief. In making their findings, the Board substantially

concurred with the advisory opinion contained in Director CORB ltr 5220 CORB: 002 of 2 May 2017.

You raised multiple arguments regarding the adjudication of your PEB case that the Board considered individually before rendering their decision. First, you argued that the PEB denied you due process by considering evidence not presented into the record and reaching a different interpretation of the 2010 American Heart Association (AHA) guidelines that you entered into evidence. In your opinion, you felt the PEB had an affirmative duty to provide you an opportunity to consider their contrary interpretation of the guidelines before your case was decided. The Board concluded the actions of the PEB did not amount to error or a denial of due process. As pointed out by Director, Secretary of the Navy Council of Review Boards in his letter denying your PFR on 8 December 2015, you provided the PEB with the AHA guidelines and should have been aware that it could be considered in adjudicating your case. The Board agreed with the Director's conclusion that the PEB is not required to present each service member an opportunity to comment on conclusions, contrary or not, that the PEB reaches in a case. The Board concluded that the PEB's decision to research an issue to familiarize themselves does not create a right to rebut the results of their research, nor is it required under the applicable regulations. In the Board's opinion it is no different than if the PEB already possessed a previously researched understanding of the AHA guidelines that was contrary to your case and chose not to comment on it during the hearing. A decision by the PEB not to disclose each and every contrary position to a service member's assertions does not create a due process violation since that would create a situation where PEB members would be required to present every conclusion to service members for argument prior to finalizing their decision. The Board concluded that the PFR process fills that due process role by allowing service members to argue perceived errors by the PEB. Additionally, the Board did not agree with your assertion that the Board relied upon an unsubstantiated medical opinion simply because they researched AHA guidelines provided by you. Simply reaching a different conclusion based on a different interpretation of guidelines does not make it an unsubstantiated conclusion. The Board felt that adopting such a standard would render every PEB decision contrary to a previous medical opinion as suspect. The PEB's role is to consider the evidence and apply the standards set forth in the regulations in determining whether a service member is unfit for continued naval service. The Board did not see any evidence that the PEB in your case did anything outside the scope of their authority or in violation of the regulations. For the above reasons, the Board also determined that your PFR on this issue was properly denied by Director, Secretary of the Navy Council of Review Boards. Finally, the Board also concluded that, even if your claim of improper consideration was considered true, it would be harmless error since you received additional reviews of your disability conditions by Director, Secretary of the Navy Council of Review Boards and this Board. Second, you raise a number of reasons by the PEB misconstrued medical evidence to find you fit for continued military service. The Board found insufficient evidence to support your assertions that the PEB and Director Secretary of the Navy Council of Review Boards reached an incorrect decision in your case. Specifically, the Board relied upon the rationale used in the advisory opinion that showed your conditions did not create a substantial occupational impairment for a number of years leading up to your PEB case. In particular, the Board was impressed by your last Fitness Report ending on 31 October 2015 that showed your performance was outstanding. This evidence convinced the Board that you were capable of performing extremely well in your MOS despite the existence of your disability

conditions. In the Board's opinion, this excellent performance evaluation showed that you were able to perform the duties of office, grade, rank or rating at the time of your discharge from active duty. Ultimately, the medical evidence provided by the many medical experts that examined your conditions was considered but the Board felt there was conclusive evidence contained in your performance evaluations that addressed the ultimate question of your fitness for continued naval service. Accordingly, the Board was unable to find an error or injustice warranting a correction to your record and denied your application.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issue(s) involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

Finally, the Board wanted to express their condolences to you regarding your current condition. By every measure, you were a model Marine and served the Marine Corps professionally and honorably throughout your career. The Board was impressed by your exemplary service and saddened by the suffering you experience due to your intracranial hemorrhages.

It is regretted that the circumstances of your case are such that favorable action cannot be taken at this time. You are entitled to have the Board reconsider its decision upon the submission of new and material evidence. New evidence is evidence 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,

A large black rectangular redaction box covering the signature of the Executive Director.

Executive Director