



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

[REDACTED]
Docket No: 6253-21
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO FORMER MBR [REDACTED],
XXX XX [REDACTED] USMC

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected by increasing your PEB disability rating to 40% resulting in your placement on the disability retirement list.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 2 December 2021, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of the naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner entered active duty with the Marine Corps in August 2014. After injuring his back during training, Petitioner underwent a discectomy in November 2017. However, after his pain symptoms continued, a medical board diagnosed him with Low back pain, Lumbosacral Spondylosis with radiculopathy, and Scoliosis while referring him to the Physical Evaluation Board (PEB). On 21 June 2018, the PEB found Petitioner unfit for Low back pain and Lumbosacral Spondylosis with radiculopathy and assigned him a 40% disability rating. Based on the recommendation of the PEB, Petitioner was transferred to the Temporary Disability Retirement List (TDRL) after his release from active duty on 31 August 2018.

c. On 9 March 2020, Petitioner underwent a periodic TDRL examination. This examination documented that his condition remained largely unchanged since his placement on the TDRL but contained three goniometer measurements of Petitioner's forward flexion of the spine that measured consistently at 40 degrees. Based primarily on these measurements, the PEB found Petitioner unfit for continued naval service but reduced his disability rating to 20% in accordance with the rating criteria contained in 38 CFR § 4.71a. A formal PEB hearing reached the same conclusion despite Petitioner providing a new forward flexion of the spine measurement of 5 degrees. A Petition for Relief was filed by Petitioner but denied on 24 February 2021 based on the conclusion that the range of motion measurements taken as part of the periodic TDRL examination was more indicative of the severity of his condition than the measurement taken in January 2021. The denial letter based this conclusion on the

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lack of medical evidence or explanation as to why his range of motion deteriorated following his periodic TDRL examination.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting relief. Specifically, the Board concluded no error was made by the PEB in reaching their conclusions but determined it was in the interests of justice to allow Petitioner to undergo another periodic examination to substantiate his actual range of motion of his spine. Similar to the PEB, the Board was unable to determine why Petitioner's range of motion would deteriorate so severely in such a short period of time. Regardless, they felt it would be an injustice to dismiss his medical evidence without providing him another opportunity for verify his condition through another periodic examination. Accordingly, they determined Petitioner should be reinstated to the TDRL for another PEB adjudication after being provided an opportunity to attend a second periodic TDRL examination.

In making these findings, the Board took into consideration that Petitioner would be required to repay any severance pay received. They determined a waiver of recoupment was not appropriate based on the circumstances of his case.

RECOMMENDATION

In view of the above, the Board directs the following corrective action.

Petitioner was reinstated to the Temporary Disability Retirement List effective the date of his discharge from the Marine Corps. The sole purpose of his reinstatement is so he may undergo a physical examination and have the Physical Evaluation Board make a final determination of his disability status in accordance with Title 10, U.S. Code, Section 1210. All due process rights associated with the Disability Evaluation System will be afforded to the Petitioner as part of the Physical Evaluation Board review.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

[REDACTED]
Deputy Director
[REDACTED]