



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

[REDACTED]
Docket No: 6316-21
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED] [REDACTED]
[REDACTED] USMCR (RET)

Ref: (a) Title 10 U.S.C. § 1552

Encl: (1) DD Form 149 w/attachments
(2) Advisory Opinion of 7 Oct 22

1. Pursuant to the provisions of the reference, 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 to reflect that his knee injuries were incurred in the line of duty and that he was entitled to line of duty benefits as of the date his line of duty request was denied on 19 May 2020. He would then like his case remanded to the Physical Evaluation Board for a hearing on his fitness for duty.

2. The Board, consisting of [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 14 November 2022 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 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 was commissioned in the Marine Corps, commenced a period of active duty in April 2003, and was designated a naval aviator. On 15 June 2014, Petitioner was released from active duty and affiliated with the Marine Corps Reserve. While he was on active duty, as evidenced by a notation in his Fitness Report covering the period 1 June 2012 to 31 May 2013, Petitioner injured his knee. As described more fully in enclosure (2), the 7 October 2022 Advisory Opinion (AO)), Petitioner's clinical history was notable for development of bilateral knee pain during his active duty career arising in 2011-2012.

c. While a member of the Reserve component, a not physically qualified (NPQ) package was forwarded to the Bureau of Medicine and Surgery (BUMED) as part of a Medical Retention Review (MRR) process for the Petitioner, relating to his knee conditions. On 5 September 2019, BUMED returned a finding of "not physically qualified for retention in the Marine Corps Reserve due to chronic bilateral knee pain with chondromalacia." On 12 October 2019,

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Petitioner requested a Line of Duty Benefits (LODB) finding, asserting that his bilateral knee condition arose while he was on active duty and was aggravated by his service in the Reserve component. Petitioner's request was denied by the Reserve Medical Entitlements Division (RMED). On 27 January 2020, Petitioner appealed the denial to the Administrative Law Division of the Office of the Judge Advocate General (Code 13). In his appeal, Petitioner included a letter from his Commanding Officer addressing the deficiencies in his original request identified by RMED. On 19 May 2020, Code 13 denied his appeal of the denial of his request for LODB. According to Code 13, Petitioner's injury was identified by an MRI on 6 December 2012, while he was on active duty, but after his MRI, there is no medical documentation addressing the knee injury until 21 April 2016. In addition, Code 13 found that Petitioner's medical records reflected his knee pain was as a result of degeneration, that his medical records consistently noted, "no known cause of pain," and that the record did not contain evidence demonstrating an aggravation of his degenerative knee issues over and above the natural progression of his condition.

d. On 4 February 2021, the PEB recommended a disposition of NPQ to Continue Reserve Status in light of the fact that Petitioner did not have a LODB finding. On 26 February 2021, Petitioner filed a petition for relief with the Secretary of the Navy Council of Review Boards (CORB). On 1 March 2021, the CORB denied the PFR, explaining that, as a reservist without a LODB, the PEB was constrained to only make a determination as to whether Petitioner was physically qualified to continue in the Reserve, and not empowered to make a decision as to fitness. A fitness determination is only appropriate where a reservist has a LODB, which can only be decided by the Chief of Naval Personnel. Thus, according to the CORB, because the Petitioner had not issued a LODB letter from the appropriate authority, his disability is non-compensable and the PEB acted properly in making its NPQ finding, as opposed to a fitness determination. Petitioner ultimately retired from the Marine Corps Reserve effective 29 March 2022.

e. In his petition, Petitioner requested correction of his records to indicate his bilateral knee injuries were incurred in the line of duty and he was entitled to LODB. He contends his LODB Appeal was erroneously denied by Code 13. He further contends that he provided clinical evidence establishing service aggravation in his reserve career of bilateral knee conditions that originated during his active duty career, which did not respond to a range of therapies and treatments, and eventually rendered him not physically qualified to continue his Reserve service. He asserts that the PEB and CORB relied upon the flawed Code 13 denial of his LODB appeal, which therefore limited the PEB to determination of NPQ to continue reserve status vice referral for fitness determination and possible medical retirement. Thus, according to Petitioner, he requests correction of his records to show his knee injuries were incurred in the line of duty and that he is entitled to LODB, and therefore a remand of his case back to Disability Evaluation System for adjudication.

f. In connection with reviewing this petition, the Board obtained enclosure (2), which was considered favorable to Petitioner. According to the AO, the Petitioner provided evidence through both military and civilian clinical and non-clinical records containing documentation of knee pain with accompanying X-Ray and MRI evidence of degenerative changes to the linings of his knee joints and indications of "ongoing arthritis or remote osteochondral injury" as early as 2012. The AO explained that, throughout his career, Petitioner compensated for his increasingly

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symptomatic knee conditions by implementing self-care strategies such as modulation of physical activities and treatment by his civilian healthcare providers including orthopedic specialists. However, according to the AO, Petitioner's increasing occupational impairment led to referral to the MRR process and eventually being found NPQ to Continue Reserve Status based on his knee conditions. The AO found that the PEB and CORB decision letters indicated that Petitioner's lack of a LODB rendered his disability noncompensable. But, according to the AO, "lack of medical records documenting medical conditions is not uncommon for reservists whose primary avenue for medical care (including conditions stemming from active duty service or incurred/exacerbated performing reserve duties) is through civilian healthcare services." After careful review of the entirety of the materials, the AO ultimately found, edited for formatting:

After reviewing Petitioner's available clinical and non-clinical records, in my clinical opinion, adequate documentation exists that Petitioner's disabling condition of Right and Left Knee Pain with Chondromalacia was incurred during his active military service and further aggravated by the physical and occupational demands of continued active and reserve military service as a Naval Aviator, which supported his request for designation of his condition to be found in the Line of Duty.

Given the PEB's finding of Unfitness, but disposition limitation to 'Not Physically Qualified' due to the absence of LODB status, had Petitioner been granted LOD status, the PEB could have rated the disabling conditions, and likely recommended referral to the Temporary Disabled Retirement List (TDRL) or Permanent Disabled Retirement List (PDRL).

Had his condition been ratable for disability under the Veterans Administration Schedule for Rating Disabilities (VASRD), he would likely have been rated under the most applicable diagnostic code 5003, Degenerative Arthritis, as established by X-Ray findings for both knees at a 10% disability rating (X-Ray evidence of involvement of 2 or more major joints but without occasional incapacitating exacerbations).

g. The AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides support for Petitioner's contention that his medical condition arose during his active duty military service, was aggravated during his reserve duty military service, and should have resulted in LOD status designation with consideration for referral to the Disability Evaluation System for a determination of unfitness and possible disability benefits."

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting relief. Specifically, the Board concurred with the findings of the AO. As described in the AO, adequate documentation exists that Petitioner's disabling condition of Right and Left Knee Pain with Chondromalacia was incurred during his active military service and further aggravated by the physical and occupational demands of continued active and reserve military service as a Naval Aviator, which supported his request for designation of his condition

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to be found in the Line of Duty. Therefore, the documentary evidence demonstrates that the Petitioner should have been reviewed for an unfitting condition determination and not solely for physical qualification to serve in the Marine Corps Reserve. Therefore, the Petitioner should be reviewed by the PEB as set forth in the Recommendation below.

RECOMMENDATION

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

Petitioner's record shall be corrected to reflect Petitioner's 27 January 2020, appeal to the Administrative Law Division of the Office of the Judge Advocate General (Code 13) for line of duty benefits was granted.

Within 60 days of this decision, the PEB shall conduct a determination of Petitioner's fitness to perform the duties of his office, grade, rank, or rating, based on medical records available when he was reviewed by the PEB for his physical qualification to remain in the Marine Corps Reserve, and assign a disability rating as required by applicable regulations. The Petitioner shall be afforded all of the rights afforded individuals within the Disability Evaluation System, including, but not limited to, the assignment of a Physical Evaluation Board Liaison Officer.

That no other changes be made to Petitioner's record.

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.

12/12/2022

[REDACTED]

Executive Director

[REDACTED]