



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

█
Docket No. 3121-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER █, USN,
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Ref: (a) 10 U.S.C. § 1552
(b) DODI 1332.18, Disability Evaluation System, 5 August 2014
(c) SECNAVINST 1850.4E, Department of the Navy (DON) Disability Evaluation Manual, 30 April 2002

Encl: (1) DD Form 149 w/attachments
(2) NAVPERS 1000/4, Officer Appointment Acceptance and Oath of Office, 24 May 2013
(3) Member Data Summary
(4) JDETS Findings and Recommended Disposition Work Card, printed 9 January 2017
(5) BCNR Memo Docket No: NR20220003121, subj: Advisory Opinion ICO [Petitioner], 24 July 2023
(6) NAVPERS 1070/605, History of Assignments
(7) █ Memo 1300 Ser 00/444, subj: Non-Medical Assessment in the case of [Petitioner], 28 October 2016
(8) Department of Veterans Affairs Disability Evaluation System Proposed Rating, 31 January 2017
(9) Findings of the Physical Evaluation Board, Ref. #F217nm09137, printed 24 July 2017
(10) DD Form 214
(11) Department of Veterans Affairs Rating Decision, 17 January 2018
(12) █ Medical Record, 12 February 2019
(13) █ Physical Therapy Clinic Medical Record, 22 January 2019
(14) Findings of the Physical Evaluation Board Proceedings, Ref. #F219nm01564, printed 27 February 2019
(15) Findings of the Physical Evaluation Board Proceedings, Ref. #F219nm03780, printed 5 June 2019
(16) Petitioner's Memo, subj: Petition for Relief ICO [Petitioner], 19 June 2019
(17) Secretary of the Navy Council of Review Board Memo 1850 CORB: 003, subj: Petition for Relief (PFR) ICO [Petitioner], 24 June 2019
(18) Secretary of the Navy Council of Review Board Memo 1850 PEB Index N21900443, subj: Notification of Decision, 5 August 2019

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, hereinafter referred to as the

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Board, requesting that her naval record be corrected to reflect her eligibility for medical retirement benefits for two unfitting disabilities with a combined disability rating of 50 percent.¹²

2. The Board considered Petitioner's allegations of error or injustice on 27 July 2023 and, pursuant to its governing regulations, found sufficient evidence of an error and injustice warranting the relief recommended below. While I agree with the Board's finding of error and injustice, I disagree with the relief recommended by the Board and suggest that you approve the alternative relief indicated below. Documentary material considered by the Board included the enclosures; relevant portions of Petitioner's naval record; and applicable statutes, regulations, and policies.

3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board 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 (DON).

b. Upon graduation from the United States Naval Academy (USNA), Petitioner was appointed as an Ensign in the United States Navy on 24 May 2013. See enclosure (2). She was designated as a Surface Warfare Officer (SWO).

c. On 27 February 2015, a magnetic resonance imaging (MRI) of Petitioner's lower back showed a "broad-based central disc protrusion [in her spine] causing impression upon the thecal sac and posterior displacement of the left S-1 nerve root." See enclosure (4).

d. On 7 August 2015, Petitioner was placed on limited duty (LIMDU) for a period of six months due to diagnoses of lumbago and lumbar neuritis. See enclosure (5).

e. On 31 August 2015, Petitioner was assigned to the staff of the Commander, ██████████ (██████████) ██████████. See enclosure (6).

f. On 7 January 2016, another MRI of Petitioner's lower back showed "a slight interval decrease in the size of the broad based posterior disc protrusion with annular fissure." See enclosure (4).

g. Petitioner was placed on a second period of LIMDU from 21 January 2016 to 8 August 2016 for the same diagnoses referenced in paragraph 3d above. When a third period of LIMDU

¹ The two unfitting conditions claimed by Petitioner were left-sided sciatica, with a 10 percent disability rating, and lumbago with a 40 percent disability rating, consistent with the disability rating assigned to these conditions by the Department of Veterans Affairs (VA).

² Alternatively, Petitioner requested that the Board correct the Physical Evaluation Board's (PEB) erroneous finding that her left-sided sciatica was not separately unfitting, and find that she is entitled to medical disability retirement with a combined disability rating of 30 percent. As another alternative, Petitioner requested that the Board either correct the PEB's erroneous, premature designation of her lumbago condition as stable, or remove the injustice created by the PEB's refusal to reassess the lumbago condition on 5 June 2019, and find that Petitioner is entitled to medical disability retirement for her lumbago condition with a disability rating of 40 percent.

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was requested to allow for continued treatments, Navy Personnel Command mandated initiation of the PEB process. See enclosure (5).

h. By memorandum dated 28 October 2016, the ██████████ provided a non-medical assessment (NMA) of Petitioner's performance to inform the PEB process. This NMA reported that Petitioner was in fact working outside of her specialty due to her back pain. Specifically, she had been pulled off of sea duty due to her inability to stand for extended periods of time,³ and was serving as a Public Affairs Officer. The ██████████ assessed that Petitioner had good potential for continued service if transferred out of the SWO community, and strongly recommended her for retention. See enclosure (7).

i. On 30 September 2016, a Medical Evaluation Board (MEB) convened to review Petitioner's medical diagnoses. See enclosures (4) and (5).

j. On 7 November 2016, the VA conducted a Compensation and Pension (C&P) examination of Petitioner pursuant to the Disability Evaluation System (DES) Pilot Program, which diagnosed Petitioner with degenerative arthritis of the spine, intervertebral disc syndrome (IVDS), and bilateral L5 radiculopathy. Her medical records reflect that her back pain began while she was enrolled at USNA, with episodic back spasms, and that her condition worsened in 2013 with more chronic and constant lower back pain and intermittent shooting pains down the lateral right leg into the top of her foot. Five months later, this progressed to include her left leg/foot. This pain with radiation down both legs continued despite physical therapy, multiple epidural steroid injections, and a trial spinal cord stimulator. See enclosure (5).

k. On 25 November 2016, the MEB recommended that Petitioner's case be referred to the PEB.⁴ See enclosures (4) and (5).

l. On 18 December 2016, Petitioner's case was referred to the PEB. See enclosure (4).

m. On 23 January 2017, an informal PEB (IPEB) convened to review the MEB findings, and found Petitioner to be unfit for lumbago, with related diagnoses of right- and left-sided sciatica. See enclosures (4) and (5).

n. On 31 January 2017, the VA proposed disability ratings of 20 percent for lumbago; 10 percent for right-sided sciatica; and 10 percent for left-sided sciatica, based upon the results of the C&P examination referenced in paragraph 3j above. See enclosure (8).

o. On 1 June 2017, Petitioner was promoted to the rank of Lieutenant (LT). See enclosure (3).

p. Petitioner requested reconsideration of the IPEB's findings referenced in paragraph 3m above based upon a neurological evaluation conducted on 7 July 2017 which indicated "Chronic

³ Petitioner had previously been assigned to the ██████████ (██████████). See enclosure (6).

⁴ Specifically, the MEB assessed Petitioner for lumbago with bilateral sciatica, right-sided sciatica, and left-sided sciatica.

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denervation changes in the Left L5 innervated muscle groups, suggestive of chronic left L5 radiculopathy.” See enclosure (5).

q. On 21 July 2017, the IPEB reconsidered Petitioner’s case and found Petitioner to be unfit due to lumbago with related right-sided sciatica, and for the separately unfitting condition of left-sided sciatica. The former condition was assessed as stable and assigned a disability rating of 20 percent, while the latter condition was assessed as unstable and assigned a disability rating of 10 percent.⁵ Based upon these findings, the IPEB recommended that Petitioner be placed on the Temporary Disability Retired List (TDRL) with a combined disability rating of 30 percent. See enclosure (9).

r. On 27 September 2017, Petitioner was honorably discharged from the Navy, and was transferred to the TDRL the following day. See enclosure (10).

s. On 11 January 2018, the VA conducted another C&P examination on Petitioner, which found continued lower back pain and sciatica (with radicular pain in both legs). It was noted that certain flare-ups render her functionally impaired, as she reported occasionally waking up unable to move. Petitioner was diagnosed with degenerative arthritis of the spine and IVDS. See enclosure (5).

t. On 17 January 2018, the VA awarded Petitioner service-connection for IVDS with cervical strain, with a 20 percent disability rating; radiculopathy, left upper extremity, with a 20 percent disability rating; and radiculopathy, right upper extremity, with a 20 percent disability rating. Each of these claims were made effective 28 September 2017 (i.e., the day after Petitioner left active duty). Her combined disability rating for these conditions (and other unrelated service-connected conditions) for the purposes of VA disability compensation was 70 percent. See enclosure (11).

u. On 22 January 2019, Petitioner received a periodic physical examination (PPE) of her unfitting and previously assessed unstable left-sided sciatica condition which resulted in her placement on the TDRL. This examination found that Petitioner “continues to have stable, significant bilateral radicular pain that limits physical activity (cannot run) despite conservative management.” Her neurological examination was noted for “decreased sensation to pinprick along lateral aspect of leg and dorsum of foot with mildly decreased [right] patellar reflex.” The forward flexion of Petitioner’s thoraco-lumbar spine was measured at 20 degrees, down from the 90 degrees observed during the 2016 MEB. This examination found that Petitioner “continues to not be fit for duty due to significant radicular pain that limits physical activity.” See enclosures (12) and (13).

v. On 26 February 2019, the IPEB convened to review Petitioner’s unstable and unfitting condition. The IPEB found that Petitioner’s left-sided sciatica, which was previously deemed unstable, had stabilized and was therefore permanent. However, it also found that condition, like its right-sided counterpart, to be related to Petitioner’s lumbago condition, and therefore not a separately unfitting condition. This had the effect of removing the separate disability rating of

⁵ The VA proposed disability ratings of 20 percent for lumbago; 10 percent for right-sided sciatica; and 10 percent for left-sided sciatica, based upon the C&P examination referenced in paragraph 3j above. See enclosure (9).

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10 percent for the left-sided sciatica condition from the calculation of Petitioner's combined disability rating, leaving her with only a 20 percent disability rating for lumbago (with associated left- and right-sided sciatica). The IPEB did not reassess Petitioner's lumbago or associated right-sided sciatica, as those conditions had already been determined to be stable and permanent. As a result of this adjustment to Petitioner's disability rating, the IPEB recommended that Petitioner be separated from the TDRL with severance pay.⁶ See enclosure (14).

w. Petitioner subsequently appealed the IPEB findings referenced in paragraph 3v above. She appeared before the formal PEB (FPEB) on 14 May 2019, requesting a finding of unfitness for lumbago at a 40 percent disability rating, and for the separately unfitting condition of left lumbar radiculopathy at 10 percent, for a combined disability rating of 50 percent and placement on the Permanent Disability Retired List (PDRL). The FPEB affirmed the findings of the IPEB, specifically finding Petitioner's lumbago to be an unfitting condition most appropriately rated at 20 percent based upon the VASRD. The FPEB noted that Petitioner had accepted the findings of the 21 July 2017 IPEB which had assessed Petitioner's unfitting lumbago condition at 20 percent, so there was no need to reassess the status of that condition. The FPEB further determined that Petitioner's left-sided sciatica condition, which was previously determined to be a separately unfitting and at the time unstable, "does not preclude the continued performance of duties and is not separately unfitting or contributing to the unfitting condition." The FPEB specifically did not dispute that Petitioner has left-sided sciatica, but found that other than the decreased sensation noted during her TDRL PPE there is no documentation of any motor deficits from this condition that would prevent her from performing the duties of her office. Accordingly, the FPEB affirmed the IPEB's previous recommendation that Petitioner be separated from the TDRL with severance pay. See enclosure (15).

x. By memorandum dated 19 June 2019, Petitioner, through counsel, submitted a petition for relief (PFR) to the Director, Secretary of the Navy Council of Review Board (CORB), requesting to be found unfit for lumbago with a 40 percent disability rating and placed on the PDRL. She asserted that her TDRL PPE found, contrary to the July 2017 IPEB, that her lumbago condition was not stable, since it found the forward flexion of her back to be at 20 degrees, down from 90 degrees recorded during her MEB. As such, she argued that it was an error for the July 2017 IPEB to assess her lumbago condition as "stable for rating purposes." In this regard, she cited to reference (b), which provides that the findings of previous examinations will be considered as administratively final for conditions for which the Service member was placed on the TDRL, *unless there is a correction of error in favor of the Service member*. See enclosure (16).

y. By memorandum dated 24 June 2019, the CORB Director denied Petitioner's PFR, finding the decision of the FPEB to be valid and in compliance with references (b) and (c). Specifically, the CORB Director stated that the decision not to reassess Petitioner's lumbago condition was proper since only those conditions for which she was placed on the TDRL were considered unstable and therefore subject to review. See enclosure (17).

⁶ A medical retirement is authorized only when the individual combined disability ratings for unfitting conditions is 30 percent or higher according to the VA Schedule for Rating Disabilities (VASRD). Individuals found unfit for continued service, but with a disability rating of less than 30 percent, are medically separated with severance pay, but not entitled to medical retirement benefits.

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z. By memorandum dated 5 August 2019, the PEB President notified the Chief of Naval Personnel of the FPEB's findings and requested that Petitioner be separated from the TDRL with severance pay but without further disability benefits. See enclosure (18).

aa. Petitioner contends that it was an error for the Navy to separate her from the TDRL with a 20 percent disability rating for lumbago.

(1) Petitioner asserts that the FPEB's finding that Petitioner's left-sided sciatica was not separately unfitting was an error. Specifically, she argues that her left-sided sciatica made her unable to reasonably perform the duties of her office, grade, rank, or rating, and that the Navy erred by failing to consider the combined effect for the lumbago when assessing whether the sciatica qualified as unfitting and by requiring evidence of "motor deficits" (other than decreased sensation) to find the sciatica unfitting. In this regard, Petitioner asserts that the 2017 IPEB was correct in finding her left-sided sciatica to be separately unfitting, as it rendered her unable to reasonably perform the duties of her office, grade, rank, or rating. Further, her left-sided sciatica did not improve between 2017 and 2019, but rather had worsened, so nothing had changed to justify changing the previous finding that it was separately unfitting from the lumbago condition. Petitioner further asserts that the FPEB erred by highlighting no documentation of "motor deficits" from her left-sided sciatica, as this is not a requirement in reference (b). She also asserts that the Navy erred by failing to consider the combined effect of other disabilities, as required by reference (b).

(2) Petitioner asserts that the Navy should have rated her left-sided sciatica separately at 10 percent in accordance with the VASRD. That was how the Navy had previously rated it, and it is also how the VA rated it. Nothing had changed with regard to this particular condition to justify any change to these previous ratings.

(3) Petitioner further asserts that the Navy erred in 2017 by finding her lumbago condition to be stable. In this regard, she asserts that the TDRL PPE in 2019 revealed that her lumbago condition had worsened since 2017, so it clearly was not stable at that time that determination was made. Further, she asserts that it should not have been assessed as stable in 2017, because it was directly associated with her diagnosed IVDS which the Navy found to be unstable.⁷ As a result of this error, the rating determination for her lumbago condition was not revisited in 2019, by which time it had worsened sufficiently to justify a 40 percent disability rating, as evidenced by the VA's determination.⁸ In support of her claim that it was an error for the 2017 IPEB to find this condition stable, Petitioner highlighted a note in enclosure (4) by the IPEB's medical officer which stated that the "condition is considered unstable as symptoms may change."

See enclosure (1).

⁷ Appendix 4 to Enclosure 3 of reference (b) provides that "[a] disability will be determined stable when the preponderance of medical evidence indicates the severity of the condition will probably not change enough within the next 5 years to increase or decrease the disability rating percentage."

⁸ Per the VASRD, lumbago should be rated at 20 percent based on a "forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 90 degrees." A 40 percent rating is warranted for a forward flexion of less than 30 degrees. Petitioner's forward flexion had decreased by 2019 to 20 degrees.

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bb. By memorandum dated 24 July 2023, the Board's Physician Advisor provided an advisory opinion (AO) for the Board's consideration. Based upon his review of Petitioner's application, along with her service and medical records, he opined that the preponderance of the evidence supports Petitioner's contention that the 2017 PEB erred in assessing Petitioner's lumbago condition as stable, and that all of her conditions should therefore have been reassessed at the time of her TDRL PPE. All three of her unfitting conditions (lumbago, right-sided sciatica, and left-sided sciatica) arose from a common physiologic origin, were equally likely to have their symptoms change over time, and were equally likely to benefit from any "trials of advanced pain management techniques." He also noted that multiple evaluations conducted from the time of Petitioner's placement on the TDRL until her PPE/FPEB, consistently documented chronic and debilitating pain and a deteriorating range of motion resulting in occupational/functional impairment. Given the common physiologic etiology for all three conditions, as well as the primary impairing symptoms most consistently contributing to the social and occupational impairments, were attributable to the Category I unfitting condition of lumbago, the Board's Physical Advisor opined that it would be consistent with the evidence to consider the right- and left-sided sciatica as Category II conditions related to the lumbago. Accordingly, he recommended that Petitioner's record be corrected to reflect that she was found unfit by the PEB with placement on the PDRL for the following unfitting conditions:

1. Lumbago, VA Code 5243, rated at 40%, permanent and stable, not combat related (NCR), non-combat zone (NCZ).

2. Right- and Left-Sided Sciatica, VA Code 8520, Related Category II Diagnoses, not combat related (NCR), non-combat zone (NCZ)

This finding would result in a combined rating of 40 percent. See enclosure (5).

BOARD CONCLUSION:

Upon careful review and consideration of all the evidence of record, the Board found the existence of an error and resulting injustice warranting partial relief.

The Board substantially concurred with the AO's conclusion that it was an error for the 2017 IPEB to find Petitioner's unfitting lumbago (with related right-sided sciatica) to be stable, while finding her left-sided sciatica to be unstable. These conditions arose from the same physiological origin, so it was illogical for the IPEB to find that Petitioner's lumbago with associated right-sided sciatica would probably not change enough within the following five years to increase or decrease the disability rating percentage, while at the same time finding that her left-sided sciatica condition was likely to change enough to increase or decrease the disability rating percentage. The notable worsening of her condition reflected by the 2019 TDRL PPE highlights the fallacy of the 2017 IPEB's conclusion in this regard. Unfortunately, that error prevented reassessment of Petitioner's lumbago condition in 2019. This produced the unjust, and illogical, result that Petitioner was assigned a lower disability rating in 2019 despite the fact that her condition had demonstrably deteriorated since 2017.

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The Board did not, however, concur with the AO's conclusion that Petitioner's lumbago condition would have necessarily been reassessed at a 40 disability rating if considered by the PEB in 2019, therefore warranting her placement on the PDRL. In this regard, the Board determined that it had insufficient information upon which to make such a finding. Accordingly, the Board determined that the most appropriate course of action is to return Petitioner's case to the PEB to reassess all of Petitioner's unfitting conditions and to determine the correct disability rating to be assigned to them.

BOARD RECOMMENDATION:

In view of the above, the Board recommends that the following corrective action be taken to remedy the error and injustice identified:

That Petitioner's naval record be corrected to reflect that the July 2017 IPEB assessed Petitioner's lumbago (with related right-sided sciatica) to be unstable, vice stable. All other findings and recommendation of the 2017 IPEB should remain unchanged.

Within 60 days of this decision, the PEB shall commence of review of all of Petitioner's unfitting conditions, not limited to those which it erroneously found to be stable, and make a new fitness determination with respect to those conditions and assigned appropriate revised disability ratings as they appeared to the PEB in 2019.

That Petitioner's naval record be corrected in any manner necessary to effectuate the revised findings of the PEB, to include referring this decision and any subsequent decision by the PEB to the Defense Finance and Accounting Service (DFAS) to conduct an audit of Petitioner's finance records to determine what, if any, back pay, benefits, or allowances may be due Petitioner as a result of any corrections made by the Board through the PEB.

That a copy of this record of proceedings be filed in Petitioner's naval record.

That no further corrective action be taken on Petitioner's naval record.

EXECUTIVE DIRECTOR CONCLUSION:

While I concur with the Board and the AO that it was an error for the PEB to assess Petitioner's lumbago condition as stable in 2017, which resulted in the injustice of failing to reassess her conditions in 2019, I disagree with the Board's conclusion that there is insufficient evidence upon which to make a conclusion regarding the appropriate fitness determinations and disability ratings. Petitioner provided medical evidence from a military medical provider at the Walter Reed National Military Medical Center reflecting that her conditions had deteriorated such that her forward flexion had decreased from 90 percent to 20 percent. The VASRD rating criteria are not subjective, and Petitioner's documented symptoms clearly would have met the criteria for a 40 percent disability rating for lumbago. Further, the Board has a Physician Advisor for this very purpose. The Physician Advisor was hired, in part, due to his extensive experience in the DES, so he is more than qualified to advise the Board in this regard. His review of the medical evidence and documented medical opinion provides sufficient basis for the Board to make a conclusion in this regard. Finally, it is simply unnecessary and, arguably, inappropriate to send

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this case back to the PEB for reassessment, because the PEB was the source of the error identified. At the very least, the Board's recommendation to refer Petitioner's case back to the PEB is a waste of time and resources, since Petitioner clearly proved her case with medical evidence produced by military medical providers. The Secretary, acting through the Board, is empowered to correct Petitioner's naval record in any way he deems necessary to correct an error or remove an injustice. In my opinion, the correction necessary to correct the error and remove the injustice identified in this case is clear and articulated by the Board's Physician Advisor in his AO. Accordingly, I recommend that you disapprove the Board's recommendation, and alternatively approve that made by the Board's Physician Advisor based upon his expert medical opinion.

EXECUTIVE DIRECTOR RECOMMENDATION:

In view of the above, I recommend that the following corrective action be taken on Petitioner's naval record:

That Petitioner's naval record be corrected to reflect that the July 2017 IPEB assessed Petitioner's lumbago (with related right-sided sciatica) to be unstable, vice stable. All other findings and recommendation of the 2017 IPEB should remain unchanged.

That the findings of the 2019 PEB be corrected to reflect that Petitioner was unfit for the following conditions, and that the PEB thus recommended that Petitioner be placed on the PDRL:

1. Lumbago, VA Code 5243, rated at 40%, permanent and stable, not combat related (NCR), non-combat zone (NCZ)
2. Right- and Left-Sided Sciatica, VA Code 8520, Related Category II Diagnoses, not combat related (NCR), non-combat zone (NCZ)

Resulting in a combined rating of 40%.

That Petitioner's record be corrected to reflect her placement on the PDRL pursuant to the correction recommended above.

That a copy of this record of proceedings be provided to DFAS to conduct an audit of Petitioner's finance records to determine what, if any, back pay, benefits, and allowances may be due to her as a result of these correction, taking into account any appropriate off-sets.

That a copy of this record of proceedings be filed in Petitioner's naval record.

That no further corrective action be taken on Petitioner's naval 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 titled matter.

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5. The foregoing action of the Board is submitted for your review and action.

9/29/2023



ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

- Board Recommendation Approved (Partial Relief – I concur with the Board’s conclusions and therefore direct the relief recommended by the Board above.)
- Executive Director’s Recommendation Approved (Full Relief – I concur with the Executive Director’s conclusion, and therefore direct the relief recommended by her above.)
- Board Recommendation Disapproved (Deny Relief – I do not concur with the Board’s conclusions, and therefore direct that no corrective action be taken on Petitioner’s naval record for the following reason(s): _____

_____)

10/6/2023

