



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

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Docket No. 4487-22
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of the naval record of your late husband, pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 28 November 2022. 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, relevant portions of your naval record and applicable statutes, regulations, and policies.

A review of your late husband's record shows that he enlisted in Navy and commenced a period of active duty on 27 September 1983. After being diagnosed with chronic Hepatitis C and being found unfit for continued naval service, he was transferred to the temporary disabled retired list (TDRL) on 19 December 2002. After his transfer to the TDRL, he applied to the U.S. Department of Veterans' Affairs (VA), which awarded him a combined disability rating of 30% effective 20 December 2002, for lumbar strain (20%), tinnitus (10%), conductive hearing loss (0%), and hepatitis C (0%). Thereafter, he was reviewed by a periodic physical evaluation (PPE) and, on 17 September 2007, he was reviewed by the Physical Evaluation Board (PEB). The PEB determined that he should be removed from the TDRL and receive a 10% disability severance due to his Hepatitis C. In 2007, your late husband filed a petition with this Board seeking relief similar to the relief that you request. On 7 September 2008, this Board informed him that it had denied his petition, finding that he had provided insufficient evidence that either (1) fit for duty on the date of his discharge, or (2) that he was entitled to a disability rating of 30% or higher.

In your petition, you requested that your late husband's naval record be corrected to reflect that he was transferred to the permanent disability retired list (PDRL) as a result of his Hepatitis C, so that you can receive the benefits of a spouse of a military retiree. In support of your request, you contend that while he was on the TDRL, your late spouse was reviewed by a PPE, which recommended his transfer to the PDRL. You have also provided a letter from a physician stating that your late husband's cancer was a direct result of his Hepatitis C.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition. In reaching its decision, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health of the member or to the welfare or safety of other members; the member's disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

The Board determined that, in your late husband's case, he was appropriately transferred to the TDRL and reviewed by a PPE. Even though the examining provider in the PPE recommended his placement on the PDRL, the ultimate adjudicator of your late husband's condition while he was on the TDRL was the PEB. In this case, the PEB determined that the most appropriate finding was a 10% disability finding, which resulted in separation and payment of severance pay. As described above, the Disability Evaluation System evaluates service members for unfitting conditions while they are on active duty. The Board observed that you did not provide any evidence, other than the PPE record that was reviewed by the PEB, to demonstrate that the PEB's findings were incorrect. In fact, the Board observed that evidence contemporaneous to his time on the TDRL tended to support the ultimate finding of the PEB. Specifically, the report of a 22 January 2006 PPE recommended that he undergo another level of treatment, and "[t]he member declined to take the treatment right now as he has taken up a new job and the medication has significant side effects and the patient said that he will not be able to take any time from his work to stay home for the treatment and he said maybe in the next few years he will consider the treatment again." In addition, the Board noted the 20 December 2002 VA rating of 0% for your husband's Hepatitis C condition. These factors tends to support the conclusion that his condition was properly rated by the PEB.

With respect to your evidence stating that his cancer, which manifested years after his separation, was caused by his Hepatitis C, the Board reiterated that the Disability Evaluation System is not designed to address conditions that manifest after discharge. Rather, such claims are within the purview of the VA, because eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based. On the other hand, claims within the Disability Evaluation System are evaluated on the basis of unfitness for military duty. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or 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,

12/19/2022

