



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. 4614-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █
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Ref: (a) Title 10 U.S.C. § 1552
(b) Official Military Personnel File

Encl: (1) DD Form 149 w/attachments
(2) Advisory Opinion dtd 27 Jul 23
(3) Petitioner's Rebuttal to Advisory Opinion received 29 Aug 23

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 Department of Defense disability rating of 40% be reconsidered to be commensurate with his Combat Related Special Compensation (CRSC) rating as well as his rating from the Department of Veterans Affairs (VA).

2. The Board, consisting of █, reviewed Petitioner's allegations of error and injustice on 21 September 2023 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. The Board also considered enclosure (2), an advisory opinion (AO) from a qualified medical professional and enclosure (3), Petitioner's response to the AO.

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. Although Petitioner's 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 the case on its merits.

b. A review of Petitioner's reference (b) Official Military Personnel File (OMPF), reveals Petitioner enlisted in the Marine Corps and commenced a period of active duty on 24 September 2002. On 12 July 2016, Petitioner's command issued a non-medical assessment (NMA), explaining that he had disability conditions that were incompatible with his continued military service. In connection with review of his physical conditions in the Integrated Disability

Evaluation System (IDES), on 31 October 2016, the Department of Veterans Affairs issued its finding of service connected disabilities, consisting of a variety of conditions that totaled 100%.

c. On 9 December 2016, an informal physical evaluation board (IPEB) found Petitioner to be unfit due to lower back pain at 40%. The IPEB found he also had the other following conditions that were not unfitting and did not contribute to his unfitting condition: Cervicalgia; testicular hypofunction; post-traumatic headaches with features of migraine; history of TBI; and PTSD chronic. On 29 April 2017, Petitioner was order to the Permanent Disability Retired List.

d. In his petition, Petitioner requested that his Department of Defense disability rating of 40% be reconsidered to commensurate with his Combat Related Special Compensation (CRSC) rating as well as his rating from the VA. In support of his request, Petitioner contends that post-service he was awarded a VA disability rating of 100% permanently and totally disabled, as well a CRSC rating of 100% combat related. He states that both the VA and CRSC boards found that the majority of his ratings were combat related.

e. To assist it in reviewing Petitioner's request, the Board obtained the enclosure (2) AO. According to the AO, in part:

Petitioner did not provide any medical evidence to support his request to increase his unfitting condition of Low Back Pain to a disability rating higher than his current 40%. Additionally, he did not provide any clinical evidence for any of his PEB determined Category III claimed conditions to be reconsidered as Unfitting and evaluated for a disability rating.

The Informal PEB did not determine his unfitting condition of Low Back Pain was incurred in a combat zone (CZONE), during combat-related operations CR (AC), or was combat related (CR-IW, SW, or HZ). However, in his NMA, Petitioner's Commanding Officer stated Petitioner's injuries occurred in a combat-zone tax exclusion area during his multiple combat deployments to Iraq and Afghanistan and were the direct result of armed conflict, while engaged in extra hazardous service, and by an instrumentality of war. The CO stated Petitioner's disabling conditions arose from his four combat deployments. Clinical records from his in-service health record consistently indicated his LBP originated and worsened during his combat deployments, in part with exposure to multiple blast injuries, as well as the physical stresses of operating while wearing heavy protective personal equipment and carrying heavy loads in uneven terrain. Petitioner also provided evidence in support of his request for his PEB disabling condition to be designated combat-related in that the 2022 CORB, CRSC Board, after investigation into the circumstances of his service-connected conditions, approved his application designating his various VA service-connected conditions as Combat Related (due to Armed Conflict or Conditions Simulating War). This included his PEB unfitting condition of Low Back Pain (as reported by the VA and CRSC Board as Spondylosis, Lumbar Region w/ Intervertebral Disc Disorders).

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After careful review of the available and provided evidence, in my medical opinion, the preponderance of available evidence does not support Petitioner's request for increased disability evaluations (and therefore disability compensation) of his unfitting condition, but does support reconsideration for his PEB unfitting condition as a combat-related condition. Recommended correction of the record would result in the following, applied to the time of discharge (10 June 2017): Unfit for the following conditions with placement on the Permanent Disability Retired List (PDRL):

1. Low Back Pain, VA Code 5242-5243, rated at 40%, permanent and stable, combat related (CR), combat zone (CZ)

This results in a combined rating of 40%.

f. The AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner's request for increased disability compensation, but does support reconsideration of his unfitting condition as a combat-related condition."

g. In response to the AO, Petitioner provided enclosure (3) with new clinical evidence for review. In his rebuttal statement, Petitioner provided new clinical evidence for his request for reconsideration of his Category III conditions for re-characterization to Category I Unfitting Conditions, emphasizing the "expertise and experience" of the medical staff who wrote and submitted the narrative summaries for the MEB. Petitioner also requested increased disability rating for his Category I disabling condition of Low Back Pain based on post-discharge progressive worsening of his back pain resulting in neurosurgical procedure to his Low Back in August 2022. New clinical evidence included post-discharge outpatient clinical records from October 2020 to August 2023 detailing his comprehensive chronic pain treatment for his neck and back conditions, clinic/procedural notes from an August 2022 neurosurgical procedure on his lower back, as well as his August 2017 CRSC approval. Petitioner did not provide any new clinical evidence in support of his request to re-characterize his Category III conditions of cervicgia, Post-Traumatic Stress Disorder, History of traumatic brain injury, or Post-Traumatic Headaches with Features of Migraines for review that was not previously available to the PEB for its decision. Notably, Cervicgia was not cited as an issue in the NMA.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board concluded that there was an error in Petitioner's naval record. Specifically, the Board substantially concurred with the findings of the AO in concluding that the preponderance of objective provided sufficient support for Petitioner's contention that at the time of his discharge his unfitting condition was considered "combat related/combat zone."

With respect to Petitioner's contention that his service disability retirement rating should be increased to be commensurate with his VA rating and CRSC decision, the Board substantially concurred with the finding of the AO that Petitioner failed to provide sufficient medical evidence

to support his request. Similarly, the Board found he did not provide sufficient evidence demonstrating that PEB-determined Category III conditions should be reconsidered as Unfitting and evaluated for a disability rating.

Accordingly, in view of the entirety of the record, the Board granted partial relief as set forth in the recommendation below.

RECOMMENDATION

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

Petitioner's naval record shall be corrected to reflect that at the time of his discharge (10 June 2017), he was found to be:

Unfit for the following conditions with placement on the Permanent Disability Retired List (PDRL):

1. Low Back Pain, VA Code 5242-5243, rated at 40%, permanent and stable, combat related (CR), combat zone (CZ)

This results in a combined rating of 40%.

And no other action.

Note: The Defense Finance and Accounting Service will complete an audit of Petitioner's records to determine if Petitioner is due any back pay.

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. The foregoing action of the Board is submitted for your review and action.
6. 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.

10/5/2023

