



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

██████████
Docket No: 5244-22
7043-21

Ref: Signature date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER ██████████ ██████████ ██████████ ██████████,
USMC, XXX-XX-██████████

Ref: (a) 10 U.S.C. § 1552
(b) MCO P1900.16F, Ch. 2, Separation and Retirement Manual (MARCORSEPMAN)

- Encl: (1) Order, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. ██████████ filed 14 July 2022
(2) Opinion and Order in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. ██████████, filed 28 October 2021
(3) BCNR Memo ██████████ Docket No: 7043-21, subj: Review of Naval Record of *[Petitioner]*, 1 May 2022
(4) Defendant's Motion for Voluntary Remand and for a Stay of All Proceedings, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. ██████████, filed 23 June 2022
(5) Petitioner's Medical Record from 1 June 2018 to 1 August 2018, created 6 June 2022
(6) DD Form 2807-1, Report of Medical History, 4 June 2018
(7) Standard Form 600, Health Record: Chronological Record of Medical Care
(8) Plaintiff's Notice of Supplemental Exhibit, in the case of *[Petitioner] v. The United States of America*, in the United States Court of Federal Claims, No. ██████████, filed 2 June 2022
(9) BCNR Memo Docket No: NR20220005244, subj: Advisory Opinion ICO *[Petitioner]*, 29 July 2022

1. Pursuant to reference (a) and in accordance with the Order of the United States Court of Federal Claims (COFC) at enclosure (1), the Board for Correction of Naval Records, hereinafter referred to as the Board, reconsidered its decision in Docket No. 7043-21 in light of additional medical records for the period from June through August 2018, which were not previously available to the Board.¹ These records were provided by the Navy Medicine Record Activity

¹ Docket No. 7043-21 was itself a remand from the COFC, in which the Board was directed to address two specific issues. First, the COFC directed the Board to "[d]etermine how much time it took for *[Petitioner]* to recuperate from his surgery and when, if the Marine Corps had retained him, his medical doctors would have cleared his resignation under [reference (b)]." Second, the COFC directed the Board to "[d]etermine how much back pay *[Petitioner]* is entitled to if it determines that the Marine Corps discharged *[Petitioner]* in violation of [reference (b)]." See enclosure (2). On 13 April 2022, the Board found that *Petitioner's* discharge was not in violation of reference (b) because he was not "undergoing medical treatment" at the time of his discharge, and even if he were undergoing such treatment reference (b) would not mandate his retention. This finding was made without the benefit of the

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subsequent to the Board's decision in Docket No. 7043-21. See enclosure (4).

2. A three-member panel of the Board, sitting in executive session, reconsidered Petitioner's case pursuant to the instructions provided in enclosures (1) and (2), and the regulations applicable to the Board's proceedings, on 11 October 2022. The Board determined that the additional medical records provided for review changed its findings regarding whether Petitioner was, in fact, undergoing medical treatment at the time of his discharge, but did not change its previous conclusions regarding relief. The Board continues to find that Petitioner's discharge was not in violation of reference (b). The names and votes of the panel members will be provided upon request. Documentary material considered by the Board included the enclosures; the entire case file of Docket No. 7043-21, to include all of the enclosures listed on enclosure (3); the additional medical records provided for review; relevant portions of Petitioner's naval record; and applicable statutes, regulations, and policies.

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

a. Paragraphs 3a – 3aa of enclosure (3) are adopted and incorporated herein.

b. On 5 June 2018, Petitioner completed a questionnaire in conjunction with his annual periodic health assessment (PHA). He denied any chest pain; indicated that no health care provider had recommended any surgeries since his previous PHA; listed Ibuprofen as the only medication that he was currently taking; indicated no desire to schedule an appointment with a health care provider; and expressed no concern regarding any other health conditions or health risk exposures not otherwise discussed. See enclosure (5).

c. On 6 June 2018, Petitioner completed a DD Form 2807-1 (Report of Medical History) in preparation for his separation physical. In block 8, he listed Clindamycin as his only current medication. In blocks 13g and 16c, he endorsed a history of skin disease(s) and pain or pressure in his chest. In his explanation for his endorsement of a history of skin disease(s) in block 29, he explained that he was diagnosed with Hidradenitis Suppurative (HS) in 2004 at the [REDACTED]; that he underwent two major surgeries in 2006, and had several minor outpatient surgeries, including at [REDACTED] in 2004 while at [REDACTED] School, at the University of [REDACTED], and at [REDACTED] Hospital in [REDACTED], [REDACTED]. In his explanation for his endorsement of a history of chest pain or pressure, he explained that he had "occasional pressure in chest," but that he never sought medical treatment. Petitioner reported no recent or pending treatments (apart from his use of Clindamycin). See enclosure (6).

d. On 21 June 2018, Petitioner was medically cleared for separation.² The examining

medical records which are the subject of the present remand. Having made such finding, the Board did not address Petitioner's entitlement to back pay. Finally, in response to the first issue referred by the COFC, the Board determined that it would have taken Petitioner 67 days to recover from surgery if he had been retained for such treatment. See enclosure (3).

² The medical record entry pertaining to this action informed Petitioner that the finding that he was physically qualified to separate means that no medical condition had been noted that would disqualify him from the performance of his duties or which would warrant processing through the Disability Evaluation System. See enclosure (7).

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provider recommended that Petitioner follow up with his Primary Care Manager on his reported intermittent left-side chest pressure for the previous six months.³ See enclosure (6).

e. On 11 July 2018, Petitioner followed up on his chest pain, as recommended during his separation examination. Petitioner was asymptomatic at the time of this encounter and referred to cardiology for evaluation. See enclosure (5).

f. On 20 July 2018, Petitioner was examined at the [REDACTED] Community Hospital General Surgery Clinic for his HS condition pursuant to the referral made during his separation examination (see footnote 3). The medical provider ordered a magnetic resonance imaging (MRI) of Petitioner's pelvic area to complete the evaluation. He also noted that if the local disease was related to HS, "will plan on excision." See enclosure (5).

g. On 23 July 2018, the health care provider who examined Petitioner on 20 July 2018 entered a recurring plastic surgery referral for Petitioner to revisit the clinic for HS treatment options. The stated end date for this authorization was 15 September 2018. There is no indication in the medical record entry for this event that Petitioner was subsequently scheduled for a surgical procedure. See enclosure (5).

h. On 17 August 2018, Petitioner had a MRI conducted on his pelvic area pursuant to the referral discussed in paragraph 3f above. There is no indication in the medical record entry for this event that Petitioner was subsequently scheduled for a surgical procedure. This was the last encounter recorded in the medical records obtained from the Navy Medicine Record Activity.⁴ See enclosure (5).

i. On 2 June 2022, Petitioner moved the COFC to supplement the administrative record with documents that he asserts were enclosures to his request to remain on active duty. He had not previously included these documents with any filing. Among these documents was an undated appointment slip indicating that Petitioner was scheduled for surgery on 12 September 2018, and for a post-operative appointment on 25 September 2018. Also included was a medical appointment record indicating that Petitioner met with the surgeon on 22 August 2018,⁵ and was scheduled for a post-operative appointment with the same surgeon on 25 September 2018.⁶ Although this document was undated, its contents suggest that it was printed after Petitioner's 22 August 2018 appointment, but before his 24 August 2018 cardiologist appointment.⁷ See enclosure (8).

j. By memorandum dated 29 July 2022, the Board's Physician Advisor provided an advisory opinion (AO) for the Board's consideration. After reviewing all of the additional

³ Although not recorded on enclosure (6), enclosure (5) reflects that the provider also referred Petitioner to plastic surgery for HS.

⁴ The documents discussed in paragraph 3i below are not documents that would be expected to be retained in Petitioner's service medical records.

⁵ This appointment would presumably be to discuss the scheduling of surgical procedure, as it followed closely the completion of the MRI which was to inform Petitioner's treatment options.

⁶ This record also indicates that Petitioner had a cardiologist appointment scheduled for 24 August 2018.

⁷ This record reflects that Petitioner kept his appointment with the surgeon at 1500 hours on 22 August 2018, but that his cardiologist appointment scheduled for 1400 hours on 24 August 2018 was still pending. Accordingly, it had to have been printed after completion of the first appointment but prior to the second appointment.

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medical records provided, the Physical Advisor reiterated his previous estimate from Docket No. 7043-21 that Petitioner would have required a total of 67 days after surgery to return to duty (one week of hospitalization and two months of convalescent leave). He also opined that the available clinical records clarify that Petitioner was under the care of a surgeon at the time of his separation with scheduled dates for surgery and outpatient clinic post-operative follow up.⁸ See enclosure (9).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board determined that Petitioner's discharge from the Marine Corps was not in violation of any applicable regulations.

Based solely upon the evidence provided by Petitioner in enclosure (8), which had not been previously made available to the Board or reflected in Petitioner's medical records, the Board reversed its previous conclusion that there was no evidence to support Petitioner's contention that he was "undergoing medical treatment" at the time of his discharge. Enclosure (8) suggests that Petitioner began undergoing medical treatment with the plastic surgeon as of his appointment on 22 August 2018. Prior to this appointment, Petitioner's condition was being assessed to provide him treatment options, as the surgeon's own entries in Petitioner's medical records reflect that the results of the 17 August 2018 MRI would inform his treatment options. The Board presumes that it was at the 22 August 2018 appointment, which was likely Petitioner's first interaction with the surgeon following the MRI, that the surgical procedure was scheduled for 12 September 2018. Accordingly, Petitioner was, in fact, undergoing medical treatment at the time of his discharge.

Despite finding that Petitioner was undergoing medical treatment at the time of his discharge, the Board continued to find no error or injustice in Petitioner's discharge. As noted in enclosure (1), there are two competing interpretations of the relevant provision of reference (b).⁹ On the one hand, the Government argued that the first substantive clause of the regulatory provision makes it clear that retention beyond an established separation date for medical treatment is for the "convenience of the government," and therefore discretionary. On the other hand, Petitioner argued that the mandatory language of subparagraph (a) guaranteed his retention upon his written consent. Between these two competing interpretations, the Board adopts the latter because the former would render meaningless other parts of the same regulation and would be unsustainable if applied across the force. Specifically, paragraph 8111 provides criteria to evaluate a request to remain on active duty beyond a contractual obligation, cautions commanders and physicians to exercise discretion in extending Marines beyond their contractual obligation for medical purposes, elevates the approval authority for modification of an approved separation date to the Commandant of the Marine Corps (MMSR-4),

⁸ This AO was provided to Petitioner for comment both via regular mail by letter dated 12 August 2022, and via e-mail dated 10 August 2022. Petitioner was provided 30 days to provide any matters in rebuttal, but did not do so.

⁹ Paragraph 1008.1 of reference (b) provides, in relevant part, that:

"A Marine *may be retained for the convenience of the U.S. Government* beyond the established in the following cases:

- a. Hospitalized, undergoing medical treatment, or not physically qualified for release... A Marine on active duty who is hospitalized, *undergoing medical treatment*, or who is found not physically qualified for release *will, with the Marine's written consent... be retained on active duty* until disposition of the case is made by medical authorities except in the case of [several situations not applicable]." (*emphasis added*)

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and establishes the procedural requirements for such requests. Evaluation criteria and approval authorities would serve no purpose if the extension on active duty for medical treatment was automatic upon a written request. Accordingly, this entire paragraph would be rendered meaningless by Petitioner's interpretation of the relevant provision of reference (b). Further, the Petitioner's interpretation would be unsustainable, as it would mandate retention on active duty for any Marine who seeks elective medical treatment at any time prior to their discharge date. Therefore, the Board found the Government's interpretation to be more supportable. At the very least, Petitioner contention that he did not need to make a formal request to delay his separation, but rather that he only had to "consent to being retained on active duty" to meet "all the conditions precedent to granting such a request" is not accurate.

Regardless of the correct interpretation of the relevant provision, Petitioner failed to comply with the procedural requirements to request a delay to his approved separation date. Paragraph 8111.1a of reference (b) establishes the procedural requirements for such requests. Specifically, such requests must be submitted on a NAVMC 321M form. There is no evidence that Petitioner submitted such a form. To the contrary, enclosure (8) reflects that Petitioner submitted his request on a NAVMC 10274. This form indicates that he enclosed a NAVMC 118, which is labeled "Administrative Remarks," and supporting medical documentation, with this request. It also includes a reference to a "JUSTIFICATION" apart from the enclosures, but it is not apparent what this entry refers to. Petitioner has not provided the documents referenced on the NAVMC 10274 for the Board to assess whether he substantially complied with the regulatory process in making this request. The NAVMC 321M had to be submitted to his commander, but the evidence suggests that Petitioner submitted his request directly to MMSR-4 which necessitated a delay in returning it to the command for the statement required by paragraph 8111.1(a)(2) of reference (b).¹⁰ There is no evidence that this command statement was ever provided, which is not surprising since Petitioner waited until four days prior to his scheduled separation date to initiate his request to remain on active duty, and further delayed the review process by failing to follow the published procedures when he finally did. As Petitioner did not follow the procedures established by reference (b) to submit his request for an extension on active duty for medical treatment, he did not provide the "written consent" for his extension on active duty envisioned by reference (b).

In addition to Petitioner's failure to follow the published procedures for requesting a delay in his separation date and to do make such a request in a timely manner, Petitioner was fully cleared for separation. There was nothing about his HS condition, for which he scheduled surgery just nine day prior to his scheduled separation date, which rendered him unfit for separation during his separation examination on 21 June 2018, and the surgeon who scheduled Petitioner's surgery took no action to delay Petitioner's separation for medical purposes.¹¹ Accordingly, Petitioner's medical condition was arguably disposed of by medical authorities for separation purposes.

Finally, in addition to finding no error in Petitioner's separation from the Marine Corps, the Board found nothing unjust about the circumstances of his discharge. First, Petitioner voluntarily requested to resign from the Marine Corps. His request was approved, and he was assigned his requested separation date. Second, Petitioner's medical treatment was clearly elective in nature. There was

¹⁰ See paragraphs 3u – 3w of enclosure (3).

¹¹ The Board finds it likely that this surgeon was not aware of Petitioner's scheduled separation date when he scheduled Petitioner's surgery for a date after his approved separation. The surgeon worked at an Army facility, and was not likely to be privy to Petitioner's administrative status unless he was so informed by Petitioner.

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nothing unjust about the Marine Corps' failure to extend Petitioner on active duty beyond his approved separation date based upon his untimely decision to seek an elective surgical procedure which he could have pursued at any time prior to the last minute. Third, Petitioner was primarily to blame for his own failure to be extended on active duty. Petitioner waited until 27 August 2018 to request a delay to his approved separation date of 31 August 2018 for medical treatment. He knew of the scheduled surgery on 22 August 2018, but did not initiate his request at that time. Further, he could have made the request as early as 20 July 2018, when the surgeon ordered an MRI for the purpose of determining treatment options. By waiting so long to request a delay to his separation date, and then failing to follow the proper procedures to do so when he finally did make such a request, Petitioner made it virtually impossible for the Marine Corps to process such a request. Finally, and most importantly, Petitioner was not denied the medical treatment he sought due to his separation. Petitioner was entitled to receive precisely the same treatment through the VA upon his discharge from the Marine Corps. Accordingly, there was simply nothing unjust about the circumstances of Petitioner's discharge which would warrant any equitable relief from this Board.

Having found no error or injustice in Petitioner's separation from the Marine Corps, the Board did not address the issue of how much back pay may be due Petitioner. From the Board's perspective, there no basis to award him any back pay.

The Board reaffirms its finding from Docket No. 7043-21 that Petitioner would have taken 67 days to recover from surgery.¹² This conclusion is based solely upon the AO provided for Docket No. 7043-21, with which the Petitioner concurred. Based upon the newly considered evidence indicating that Petitioner had a surgical procedure scheduled for 12 September 2018, this period would have expired on or about 17 November 2018. It remains impossible for the Board to determine how long Petitioner actually took to recuperate from surgery, as enclosure (2) seemed to direct, as there was no evidence provided to the Board that Petitioner ever had the surgery in question. As discussed above, such treatment may be sought through the VA if it remains necessary. In response to that part of enclosure (2) which directed the Board to determine when Petitioner's medical doctors would have cleared him for separation if he had been retained, the Board notes that Petitioner was already medical cleared for separation in June 2018, and his surgeon took no steps to contradict that determination when he scheduled a surgical procedure for Petitioner in August 2018.

RECOMMENDATION:

In view of the above, the Board recommends that no corrective action be taken on Petitioner's naval record.

3. 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.

¹² This finding is provided solely in compliance with enclosure (2). The Board does not believe that any relief is warranted based upon this finding .

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4. Pursuant to the delegation of authority set forth in SECNAVINST 5420.193, and having assured compliance with its provisions, I hereby approve the findings and recommendation of the Board on behalf of the Secretary of the Navy.

10/19/2022

10/19/2022

X

[REDACTED]
Executive Director

Signed by [REDACTED]