



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

█
Docket No. 990-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █ █
XXX XX █ USMC

Ref: (a) 10 U.S.C. § 1552
(b) 10 U.S.C. § 1216a
(c) DoDM 1332.18, Volume 2, Disability Evaluation System (DES) Manual: Quality Assurance Program (QAP), 21 November 2014
(d) 38 C.F.R. Part 4, Schedule for Rating Disabilities
(e) SECNAVINST 1850.4E, Department of the Navy (DON) Disability Evaluation Manual, 30 April 2002

Encl: (1) Order, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. █, filed 6 January 2023
(2) Complaint, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. █ filed 12 April 2022
(3) DD Form 149 (w/enclosures)
(4) Formal Rationale (of the Formal PEB) ICO [Petitioner]
(5) DD Form 214
(6) Report of Medical Board ICO Petitioner
(7) Findings Commentary of the Physical Evaluation Board, Ref. # █ printed 29 March 2017
(8) Department of Veterans Affairs Disability Evaluation System Proposed Rating, 26 January 2017
(9) PEB E-mail, subj: [Petitioner], sent Tuesday, February 7, 2017, @12:55:30
(10) Department of Veterans Affairs Disability Evaluation System Proposed Rating, 16 March 2017
(11) Findings of the Physical Evaluation Board Proceedings, Ref. █, printed 29 March 2017
(12) Petitioner's Counsel Memo, subj: Petition for Relief ICO [Petitioner], 4 October 2017
(13) Findings of the Physical Evaluation Board Proceedings, Ref. █ printed 6 September 2017
(14) Secretary of the Navy Council of Review Boards Memo 1910 CORB: 002, subj: Request for Comments and Recommendations ICO [Petitioner], 22 March 2023
(15) Petitioner's Memo, subj: Appeal of Disability Percentage based on New Medical Evidence and VA Error in the Assignment of Diagnostic Code, 3 November 2017
(16) Department of Veterans Affairs Decision Review Officer Reconsideration,

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27 November 2017

- (17) Findings of the Physical Evaluation Board Proceedings, Ref. # [REDACTED], printed 23 January 2018
- (18) Secretary of the Navy Council of Review Boards Memo 1910 CORB: 001, First Endorsement on Enclosure (14), subj: Request for Comments and Recommendations ICO [Petitioner], 22 March 2023

1. By order dated 6 January 2023, the United States Court of Federal Claims (COFC) remanded the case filed by the Subject, hereinafter referred to as Petitioner, to the Board for Correction of Naval Records, hereinafter referred to as the Board.¹ See enclosure (1). Pursuant to reference (a) and the Order of the COFC, Petitioner filed enclosure (3) with the Board, requesting that his naval record be corrected to reflect that his disability rating for his unfitting condition of hydrocephalus (VASRD Code 8045-9434) is at least 30 percent, and that he be placed on the Permanent Disability Retired List (PDRL) with all attendant back pay and benefits.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED] reviewed Petitioner's allegations of error or injustice in accordance with the above referenced Order of the COFC on 13 April 2023 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's record. Documentary materials considered by the Board included the enclosures, relevant portions of Petitioner's naval records, 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, found as follows:

a. In July 2010, prior to his enlistment in the Marine Corps, Petitioner was involved in a motor vehicle accident which resulted in an episode of post-traumatic amnesia after being ejected from his vehicle. A CT scan conducted at the time was notable for mild ventriculomegaly,² but no intervention for this observation was deemed necessary at the time. See enclosure (4).

b. Petitioner enlisted in the Marine Corps and began a period of active duty service on 23 July 2012. See enclosure (5).

¹ Petitioner had not previously sought relief from the Board before seeking relief from the COFC. In his Complaint to the COFC, Petitioner challenged the 10 percent disability rating assigned to his unfitting hydrocephalus condition by the Formal Physical Evaluation Board (FPEB), which did not exceed the 30 percent necessary to qualify for a medical retirement. Specifically, he alleged that the Department of the Navy's (DON) disregard for the Department of Veteran's Affairs (VA) Schedule for Rating Disabilities (VASRD) (reference (d)) when rating his symptoms of hydrocephalus violated reference (b); that the DON's refusal to use VASRD Diagnostic Code 9434 when rating Petitioner's symptoms of hydrocephalus violated reference (c); and that the DON misapplied the VASRD when rating Petitioner's symptoms of hydrocephalus in violation of reference (b). He requested that the COFC award him a medical retirement, along with money and other benefits that are formulaic in nature in an amount to be determined by the VA; order that Petitioner's military records be corrected to reflect the disability retirement to which he is entitled; award Petitioner interest, costs, and attorneys' fees; and grant such other relief as the Court deems just and proper. See enclosure (2).

² Ventriculomegaly is a condition in which the ventricles of the brain appear larger than normal.

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c. On 1 November 2014, Petitioner was involved in another motor vehicle accident in when he was rear-ended at a traffic stop. Following this accident, he was driven to the emergency room at [REDACTED] for evaluation of neck and upper back pain. He denied any blow to the head or loss of consciousness, so no imaging was done of his head at the time. See enclosure (4).

d. In March 2015, Petitioner first presented for treatment of headaches, which he reported to have begun after the 1 November 2014 motor vehicle accident. See enclosure (4).

e. On 27 March 2015, Petitioner received an orbital CT for right eye pain, which again noted ventriculomegaly, but again no intervention was deemed necessary. See enclosure (4).

f. In April 2015, Petitioner was involved in a single vehicle motorcycle accident, but reported no injuries other than skin abrasions. See enclosure (4).

g. In May 2015, after complaining of short-term memory loss and headaches, Petitioner underwent magnetic resonance imaging (MRI) of his brain. This MRI demonstrated the previously noted ventriculomegaly, with no evidence of aqueductal stenosis. Neurosurgery felt that Petitioner “has likely had the triventricular hydrocephalus since birth,”³ and felt that his complaints of headaches and cognitive difficulties were more likely due to a concussion. See enclosure (4).

h. A follow-up head CT in December 2015 showed stable ventriculomegaly. After other treatments failed to provide relief for his headaches, and given his reported decline in cognitive functioning after his motor vehicle accident, neurosurgery offered intervention by doing an endoscopic third ventriculostomy.⁴ See enclosure (4).

i. After the intervention described in paragraph 3h above offered no relief to Petitioner’s ongoing headaches and cognitive function decline, neurosurgery offered and inserted a ventriculoperitoneal shunt in August 2016. This resulted in a significant worsening of Petitioner’s headaches, necessitating a revision shunt surgery to add a programmable valve. Despite constant adjustments made based upon Petitioner’s degree of hydrocephalus following this intervention, no improvements to Petitioner’s baseline headaches or cognitive dysfunction complaints were noted. See enclosure (4).

j. In November 2016, a Medical Evaluation Board (MEB) found that, “[g]iven the placement of the ventriculoperitoneal shunt and the inherent restrictions on deployability conferred by the shunt, it is extremely unlikely that [Petitioner] would ever be able to return to worldwide deployability,” Accordingly, the MEB opined that Petitioner’s “surgical condition interferes

³ Hydrocephalus is the buildup of fluid in the ventricles deep within the brain, which puts pressure on the brain. Some common symptoms of this condition in young adults, such as Petitioner at the time, are headaches, sluggishness, loss of coordination or balance, loss of bladder control or a frequent urge to urinate, vision problems, and a decline in memory, concentration and other thinking skills that may affect job performance.

⁴ This is a surgical procedure offered to individuals with obstructive or non-communicating hydrocephalus, whereby a bypass is created for the cerebrospinal fluid in the head that eliminates the need for a shunt

with the reasonable performance of assigned duties” and referred him to the Physical Evaluation Board (PEB) for determination of fitness and appropriate disposition. See enclosure (6).

k. On 18 January 2017, an informal PEB (IPEB) found Petitioner to be unfit due to hydrocephalus. The medical officer on the board found that this condition, in and of itself, did not prevent Petitioner from performing the duties of his office, grade, rank, or rating, but that the presence of his shunt required close medical follow-up and continuous access to specialized medical care which cannot be guaranteed in all military settings. Accordingly, the medical officer opined that Petitioner’s continued service would post an unreasonable risk to him, as well as a significant burden on the government to safeguard him in the process of ensuring constant access to adequate care. Therefore, he found that Petitioner’s hydrocephalus diagnosis interfered significantly with Petitioner’s ability to carry out the duties of his office, grade, rank, or rating. See enclosure (7).

l. On 26 January 2017, the VA proposed a 50 percent Disability Evaluation System (DES) disability rating for “Major Depressive Disorder [(MDD)] with Traumatic Stress Disorder (claimed as depression, hydrocephalus, and TBI),” which it evaluated under VASRD Code 9434.⁵⁶ See enclosure (8).

m. By e-mail dated 7 February 2017, the PEB requested that the VA relook its proposed disability rating for Petitioner.⁷ Specifically, the PEB noted that the proposed VA rating was for PTSD,⁸ but the IPEB found Petitioner to be unfit for hydrocephalus. Additionally, the PEB noted that its doctors felt that hydrocephalus should be rated separately and not included with the mental health rating, and that a more appropriate VASRD Code would be 8099-8024. See enclosure (9).

n. On 16 March 2017, the VA issued a second proposed disability rating for Petitioner, this time for “[MDD] with [TBI] residual of hydrocephalous secondary to status post AV shunt placement (claimed as depression, hydrocephalus and TBI),” again with a 50 percent disability rating but this time pursuant to the hybrid VASRD Code of 8045-9434.⁹ The VA explained in its rating decision that, per reference (d), symptoms associated with a diagnosed mental disorder may overlap with symptoms of TBI, and that such overlapping symptoms should be evaluated under the criteria which would render the highest possible evaluation. In Petitioner’s case, the symptoms relating to his TBI (hydrocephalus) and MDD were overlapping and it was not possible to differentiate what portion of the occupational and social impairment is attributable to each diagnosis. As such, the VA explained that evaluation of his condition under the criteria for MDD was appropriate because such criteria would render a more favorable evaluation for the

⁵ VASRD Code 9434 corresponds to MDD.

⁶ This determination was made by the VA under the DES Pilot Program, which was a joint initiative between the Department of Defense (DoD) and the VA. It was prepared to assign evaluations to Petitioner’s unfitting conditions for use by the DoD in determining a final disposition for unfit conditions, as well as to determine the member’s potential entitlement to VA disability compensation.

⁷ This request was sent to VA representatives by the PEB’s Post-Quality Assurance and Joint Disability Evaluation Tracking System Management Supervisor.

⁸ While enclosure (PEB E-mail) asserted that the rating was for PTSD, it was actually for MDD.

⁹ VASRD Code 8045 corresponds to “Residuals of TBI,” which is how the VA characterized Petitioner’s hydrocephalus condition. As stated previously VASRD Code 9434 corresponds to MDD.

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Petitioner. However, the VA did state that, for DoD purposes, Petitioner's "[TBI] also diagnosed as hydrocephalous (secondary to status post AV shunt placement) would only warrant a 10 percent evaluation ... based on [the relatively low severity of cognitive impairment and subjective symptoms across the 10 important facets of TBI under the rating schedule]" if rated separately from the overlapping MDD symptoms. See enclosure (10).

o. On 29 March 2017, the IPEB recommended that Petitioner be placed on the Temporary Disability Retired List (TDRL) with a 50 percent disability rating for the unfitting condition of hydrocephalus, under the hybrid VASRD Code of 8045-9434. This recommendation and rating was consistent with the VA's proposed rating. See enclosure (11).

p. Petitioner subsequently requested a formal hearing to appeal the IPEB's decision to place him on the TDRL. Accordingly, his case was referred to a Formal PEB in accordance with reference (e). See enclosure (12).

q. On 25 August 2017, the FPEB recommended that Petitioner be medically separated from the Marine Corps for hydrocephalus under VASRD diagnostic code 8045 with a 10 percent disability rating. The FPEB subsequently explained that it found Petitioner unfit for continued service due to TBI (hydrocephalus), but not for depression, and that the VA proposed only a 10 percent disability rating for TBI. See enclosures (4) and (13).

r. By memorandum dated 4 October 2017, Petitioner's counsel submitted a Petition for Relief (PFR) to the Director, Secretary of the Navy Council of Review Boards (CORB), asserting that the PEB erred in its application of the VASRD and misrepresented the facts of his case in enclosure (4). Specifically, he asserted that the medical evidence in Petitioner's case file provides convincing evidence to find Petitioner unfit due to hydrocephalus at no less than a 50 percent disability rating under diagnostic code 8045-9434. He also asserted that the FPEB reasoning misapplied the laws and instructions governing their evaluation of medical diagnoses and the appropriate VA rating to be applied. Specifically, Petitioner's counsel asserted that the VA rated Petitioner's hydrocephalus at a 50 percent disability rating under diagnostic code 8045-9434 specifically because the symptoms of his MDD and TBI were intertwined and could not be separated, as the FPEB purported to do, and that the FPEB misrepresented the facts pertaining to its need to provide a rationalization of its decision. See enclosure (13).

s. On 12 October 2017, the CORB denied the above referenced PFR, sustaining the FPEB's 10 percent rating. See enclosure (14).

t. By memorandum dated 3 November 2017, Petitioner appealed his assigned disability rating based upon new medical evidence and VA error in the assignment of his diagnostic code. Specifically, he stated that, while the Director, CORB, stated that the VA assigned him a disability rating of 10 percent under diagnostic code 8045 for his hydrocephalus, it was his belief that the VA never intended to portray the significant effects of the TBI he suffered in 2014 to have resulted in only a mild impact to his life. Specifically, Petitioner asserted that the VA's conclusion that it would have assigned only a 10 percent disability rating if Petitioner had been rated solely for TBI to be a "categorically wrongful conclusion in the most absolute sense." Specifically, he asserted that the VA, in describing the relatively mild effect of Petitioner's TBI

across the 10 impairment evaluative facets, failed to explain how Petitioner's psychiatric symptoms contributed to any of these facets. Additionally, Petitioner asserted that the VA's use of the analogous rating "8045-9434" complicated matters and led to a false conclusion that his level of impairment attributable to his TBI amounted to "mild" changes, and thus a minimal level of severity. Accordingly, he requested that the VA raise its proposed disability rating under diagnostic code 8045 for hydrocephalus to no less than 70 percent. See enclosure (15).

u. On 27 November 2017, the VA reviewed its rating proposal for only those conditions referred by the PEB as unfitting. Based upon this reconsideration, the VA proposed a 50 percent disability rating for "Hydrocephalus, status post [motor vehicle accident] with [TBI] status post AV shunt placement with [MDD]," under the same previously assigned VASRD diagnostic code of 8045-9434. In proposing this disability rating, the decision review officer reiterated that Petitioner's "symptoms related to [Petitioner's] TBI and [his] diagnosed [MDD] are overlapping and it is not possible to differentiate what portion of the occupational and social impairment is attributable to each diagnosis. As such, [his] TBI and [MDD] are evaluated together to avoid pyramiding." The VA also proposed a 30 percent disability rating for "post-traumatic headache (s/p [motor vehicle accident] hydrocephalus & AV shunt placement)," under diagnostic code 8100,¹⁰ and a 10 percent disability rating for "peripheral vestibular disorder with slight ataxia, s/p [motor vehicle accident] with hydrocephalus," under VASRD diagnostic code 6204.¹¹ See enclosure (16).

v. On 23 January 2018, the FPEB reconsidered its findings, but again found Petitioner to be unfit for continued service in the Marine Corps due to hydrocephalus with only a 10 percent disability rating under VASRD diagnostic code 8045. Accordingly, the FPEB recommended that Petitioner be medically separated from the Marine Corps with severance pay. See enclosure (17).

w. Petitioner asserts that relief should be granted for the following reasons:

(1) The DON failed to follow reference (d) when rating Petitioner's unfitting hydrocephalus, in violation of reference (b).¹² As such, its determination to rate his

¹⁰ VASRD Code 8100 corresponds to Migraine (Headaches).

¹¹ VASRD Code 6204 corresponds to Peripheral vestibular disorders.

¹² Paragraph (a) of reference (b) provides as follows:

(1) In making a determination of disability of a member of the armed forces for purposes of this chapter, the Secretary concerned—

(A) shall, to the extent feasible, utilize the schedule for rating disabilities in use by the Department of Veterans Affairs, including any applicable interpretation of the schedule by the United States Court of Appeals for Veterans Claims; and

(B) except as provided in paragraph (2), may not deviate from the schedule or any such interpretation of the schedule.

(2) In making a determination described in paragraph (1), the Secretary concerned may utilize in lieu of the schedule described in that paragraph such criteria as the Secretary of Defense and the Secretary of Veterans Affairs may jointly prescribe for purposes of this subsection if the utilization of such criteria will result in a

hydrocephalus using diagnostic code 8045 (residuals of TBI) at 10 percent was unlawful. Reference (d) establishes three main areas of dysfunction associated with residuals of TBI: cognitive, emotional/behavioral, and physical. When there is a diagnosed mental disorder that causes symptoms that overlap with the symptoms of TBI, those symptoms must be evaluated under the rating table titled "Evaluation of Cognitive Impairment and Subjective Symptoms." The VA concluded that the symptoms of Petitioner's TBI and MDD were "overlapping and it [was] not possible to differentiate what portion of the occupational and social impairment is attributable to each diagnosis," and therefore proposed a rating of 50 percent for his hydrocephalus because "symptoms which overlap between TBI and a mental health disorder would be evaluated under the criteria which would render the highest possible evaluation." The DON's adoption of a 10 percent evaluation for Petitioner's hydrocephalus violated three separate provisions of reference (d), each of which would have compelled at least a 50 percent rating.¹³

(2) The DON's rating of Petitioner's hydrocephalus was contrary to reference (c). Specifically, reference (c) requires the Navy to apply the VASRD diagnostic codes as provided by the VA to the service member's unfitting conditions. As such, the Navy's failure to apply the hybrid diagnostic code of 8045-9434 to Petitioner's hydrocephalus, as provided by the VA, with its attendant 50 percent disability rating violated reference (c).

(3) Even if it was proper to use diagnostic code 8045, the DON violated reference (b) by failing to adopt the full rating provided by the VA for Petitioner's unfitting hydrocephalus. When the VA issued its 27 November 2017 decision in response to Petitioner's request for reconsideration, it clearly indicated that both the 10 percent rating under diagnostic code 8045 and the 30 percent rating for post-traumatic headache (under diagnostic code 8100) should be included in rating Petitioner's unfitting hydrocephalus condition.

See enclosure (3).

x. By memorandum dated 22 March 2023, the CORB Medical/Psychiatric Advisor provided an advisory opinion (AO) for the Board's consideration, finding that the DON did not follow its own procedures and regulations, and recommending that Petitioner's request for relief be approved. He specifically cited to reference (b) and the provision cited in footnote 12. Under diagnostic code 8045, reference (d) provides that "[t]here may be an overlap of manifestations of conditions evaluated under the table titled "Evaluation Of Cognitive Impairment And Other Residuals Of TBI Not Otherwise Classified" with manifestations of a comorbid mental or neurologic or other physical disorder that can be separately evaluated under another diagnostic code. In such cases, do not assign more than one evaluation based on the same manifestations. If the manifestations of two or more conditions cannot be clearly separated, assign a single

determination of a greater percentage of disability than would be otherwise determined through the utilization of the schedule.

¹³ Petitioner cites to the following sections of reference (d): 4.7 (When presented with two potential ratings (i.e., residuals of TBI or MDD, the higher rating must be used if the rating criteria for that rating best approximates the veteran's disability picture); 4.126 (When a single disability has been diagnosed both as a physical condition and as a mental disorder, the rating agency shall evaluate it using a diagnostic code which represents the more disabling aspect of the condition); and 4.3 (Reasonable doubt regarding the degree of disability is to be resolved in favor of the veteran).

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evaluation under whichever set of diagnostic criteria allows the better assessment of overall impaired functioning due to both conditions.” By seeking out a separate rating for condition which the VA specifically stated could not be separately evaluated, the PEB violated this provision. Further, per reference (c), the Secretaries of the Military Departments “accept the disability rating(s) awarded to each of the compensable unfitting condition(s), as determined by the Military Department, rendered by the Disability Rating Activity Site [(D-RAS)] pursuant to [reference (d)] in determining separation and other administrative matters.” The PEB had no statutory or regulatory authority to modify the rating provided by the VA in Integrated DES cases except under limited circumstances not applicable in this case. In this case, the PEB “needlessly meddled in VA ratings outcomes and affirmatively sought a minimal rating that reflect not the D-RAS’s assessment of ‘the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present,’ but the minimal remainder manifestations of the condition after the maximum rating was applied to the combined 8045-9434 in accordance with [the VASRD]. This effectively zeroed out the core symptoms of overlapping psychiatric and neurological symptoms described in the [MEB Report] (i.e., concentration problems, mood swings, memory lapses). This represent[s] a failure to abide by [references (b) – (d)].” Accordingly, the CORB Medical/Psychiatric Advisor recommended that Petitioner’s record be corrected to reflect Petitioner’s placement on the PDRL for unfitness due to for the unfitting conditions of MDD with TBI residual of hydrocephalous secondary to status post AV shunt placement, under VASRD diagnostic code 8045-9434, rated at 50 percent, not combat-related (NCR) and not incurred in a combat zone (NCZ); and for Migraines also diagnosed as tension headaches, under VASRD diagnostic code 8100, rated at 30 percent, NCR and NCZ, for a combined rating of 70 percent.¹⁴ See enclosure (14).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board concurred with the AO, finding the existence of an error or injustice warranting relief.

After being requested by the PEB to provide a separate disability rating for condition actually determined by the IPEB to be unfitting (i.e., hydrocephalus), the VA assigned a hybrid diagnostic code to this condition of 8045-9434, reflecting its diagnosis of MDD with TBI residual of hydrocephalus secondary to status post AV shunt placement, with a 50 percent disability rating. In doing so, the VA’s mental health examiner specifically noted that the symptoms related to Petitioner’s TBI and MDD were overlapping, and that it was not possible to differentiate what portion of the occupational and social impairment was attributable to each diagnosis. Reference (d) specifically provides under such circumstances that the two conditions are not to be evaluated separately, but rather they are to be evaluated together under whichever set of diagnostic criteria allows the better assessment of overall impaired functioning due to both conditions. This is what the VA did when they assessed Petitioner’s unfitting hydrocephalus condition under the hybrid diagnostic code of 8045-9434, and proposed a 50 percent disability

¹⁴ By memorandum dated 22 March 2023, the Director, CORB, endorsed this AO, noting that enclosures (4) and his response to enclosure (12) failed to address the adherence to reference (c) and acceptance of a valid rating proposed by the D-RAS in accordance with reference (d) as it pertains to overlapping symptoms of neurological and mental health conditions. See enclosure (18).

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rating. Separate evaluations are authorized only if the manifestations are clearly separable, which they were not in this case. Reference (b) directs the DON to utilize reference (d) to the extent feasible, and reference (c) directs it to accept the disability rating awarded to each of the compensable unfitting conditions, rendered by the D-RAS pursuant to reference (d) in determining separation and other administrative matters. The IPEB adopted this proposed rating on 29 March 2017, but the FPEB inexplicably reverted back to a comment in the VA's proposed rating document, which did not constitute the VA's recommendation and was not adopted by the IPEB, regarding the rating that Petitioner's hydrocephalus condition would warrant if it were separable from his MDD condition. Since it was clear that these conditions were not separable, the FPEB committed a clear error in assigning only a 10 percent disability rating to Petitioner's unfitting hydrocephalus condition. In doing so, the FPEB clearly understated the overall level of impairment caused by Petitioner's unfitting condition.

Even if there were no error in the manner by which the FPEB assigned Petitioner's disability rating, the Board would have found an injustice in the manner in which it reviewed Petitioner's appeal. The IPEB had already determined Petitioner to be unfit for hydrocephalus with a 50 percent disability rating, and recommended that he be placed on the TDRL. These findings were presumably acceptable to the PEB leadership and staff, as the PEB President did not direct the IPEB to reconsider its decision in accordance with paragraph 4212(b) of reference (e). Rather, Petitioner's case was assigned to the FPEB in accordance with paragraph 4212(c)(1) of reference (e) because the Petitioner requested a hearing to appeal the TDRL recommendation. As the Petitioner appealed this decision based solely upon the TDRL recommendation, the only question presented to the FPEB on appeal related to the stability of Petitioner's condition at the time. Ironically, the FPEB found Petitioner's condition to be stable, but took it upon itself to reassess the disability rating which was not in dispute and which was already decided upon by the IPEB. The Board does not suggest that this was necessarily beyond the authority of the FPEB. Rather, it finds this action to have been unnecessary and certainly unfair to Petitioner. A Petitioner should not be deterred from exercising his right to a formal hearing to challenge a decision by the IPEB for fear that the FPEB may produce a less favorable result. Accordingly, the Board would have found an injustice warranting relief in this case even in the absence of any error.

RECOMMENDATION:

In view of the above, the Board recommends that the following corrective action be taken on Petitioner's naval record, consistent with that recommended by the CORB AO:

That Petitioner's naval record corrected to reflect he was found unfit for continued service in the Marine Corps, and that he was placed on the PDRL at a combined rating of 70% for the following unfitting conditions:

MDD with TBI Residual of Hydrocephalous Secondary to Status Post AV Shunt Placement (Claimed as Depression, Hydrocephalus and TBI), VA Code 8045-9434, rated at 50%, NCR, NCZ.

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Migraines also diagnosed as Tension Headaches (Claimed as Headaches), VA Code 8100, rated at 30%, NCR, NCZ.

That Petitioner's DD Form 214 be corrected to reflect that he was transferred to the PDRL, with corresponding separation authorities and codes, effective 30 March 2018.¹⁵

That this decision document be forwarded to the Defense Finance and Accounting Service (DFAS), and that DFAS conduct an audit Petitioner's finance records to determine what, if any, back pay and allowances may be due Petitioner as a result of this correction to his naval record.

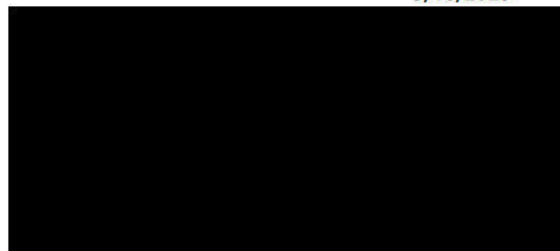
That a copy of this record of proceedings be filed in Petitioner's naval record.

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.

5. Pursuant to the delegation of authority set forth in SECNAVINST 5420.193 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.

5/18/2023



¹⁵ Petitioner shall be issued either a new DD Form 214, or a DD Form 215, reflecting this correction, as determined by Headquarters, U.S. Marine Corps.