



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 5898-00
29 November 2001



Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 16 November 2001. 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, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by the Bureau of Medicine and Surgery dated 26 September and 13 November 2000, and the Director, Naval Council of Personnel Boards (NCPB) dated 14 February 2001. A copy of each opinion is attached. In addition, the Board considered the submission of your attorney dated 6 November 2001.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion provided by the Director, Naval Council of Personnel Boards. It was not persuaded that you were unfit to perform duties commensurate with your grade and specialty prior to your discharge from the Navy on 20 July 2000. The Board was somewhat perplexed by the determination of the Bureau of Medicine and Surgery (BUMED) that you were not physically qualified for service in the Naval Reserve, given your outstanding performance of duty, the finding of fitness that was made prior to your discharge, and, presumably, that you were found physically qualified for commissioning in the Naval Reserve. As noted by the Director, NCPB, it is likely that you would have been found physically qualified for further service in the Naval Reserve had you requested review of your case by a physical evaluation board (PEB), notwithstanding the determination of BUMED officials that you were not physically qualified.

The Board noted that a determination of your fitness for duty and entitlement to disability benefits administered by the Department of the Navy is under the cognizance of the Naval Disability Evaluation System (DES), rather than the Bureau of Medicine and Surgery. The fact that BUMED found you not physically qualified for service in the Naval Reserve does not mandate that you be found unfit for duty by the DES, or that the Board grant your request. In addition, the Board noted that as you did not have a remaining reserve obligation following your discharge, that portion of SECNAVINST 1850.4C, paragraph 3302, pertaining to a period of reserve obligation is not applicable to you. The fact that the Department of Veterans Affairs has awarded you service connection and disability benefits for several conditions is not probative of the existence of material error or injustice in your record, because that agency makes disability benefit determinations without regard to the issue of fitness to perform military duty. The degeneration of your right elbow, right shoulder and cervical spine, history of cancer, hyperlipidemia, osteopenia, and chronic pain, did not preclude you from performing your duties prior to your discharge, and it does not appear that a medical evaluation board was necessary in your case; however, had you been evaluated by a PEB prior to your discharge, in all likelihood you would have been found fit for duty.

The Board regrets that you may have been given erroneous advice concerning your service in the Naval Reserve following your discharge from the Navy, and that you would not have resigned from the Navy had you known that you would not be permitted to continue your career in the Naval Reserve. Unfortunately, those factors do not provide a basis for recommending that your request for correction of your record be granted.

In view of the foregoing, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously 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,

W. DEAN PFEIFFER
Executive Director

Enclosure

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF

- 20 July 2000, Petitioner was discharged.

- 8 August 2000, Petitioner was found not physically qualified for retention in either the Ready Reserve or Standby Reserve. Petitioner was advised by NPC that she had the option of resigning her reserve commission or requesting a PEB determination as to her PQ/NPQ status. The records do not contain any information that petitioner availed herself of this latter option which, based upon our review of the records, would likely have resulted in petitioner being found PQ for continued service in the reserves.

B. The Petitioner's cancer has been in sustained remission since 1996. Other medical conditions appeared to have some chronicity, but none had generated documentation of interference with her ability to perform her duties as a Dental Officer except Petitioner's ability to participate in the PRT. Standing alone, the inability to participate in the PRT is not enough to be found unfit. The role of the Physical Evaluation Board (PEB) is to evaluate a member's fitness to perform his or her duties. If a Petitioner is not fit for further service, the PEB will assign a disability rating. Based on the record provided in this case if the PEB had evaluated this member, she would have been found fit for continued active duty service.

3. In summary, the evidence in the record does not support any changes to the record in this case. At the time of Petitioner's discharge from the Navy, the Petitioner was fit for retention, the standard on which PEB determinations are made. The Petitioner made a voluntarily decision to leave active duty. This case highlights the difference between a physical finding of fit for retention for continued active duty service by the PEB and the accession standards required for affiliation with the Naval Reserve post-discharge. The threshold for affiliation with the Naval Reserve is higher than the standard for retention on active duty. Reference (c) only applies to members of the Ready Reserve who have incurred a statutory obligation upon commissioning or extension as a Navy Reservist. This Petitioner was released from active duty and in order for her to affiliate with a Reserve Unit, she was required to meet the necessary physical standards. If the Petitioner had a statutory obligation that was not included in the case file, then her case can be returned for further review. Notwithstanding the above, had member requested PEB review of her case, it is likely she would have been found PQ for service in the reserves.

4. If there are any questions, my point of contact for this case is Lieutenant Darren S. Wall, JAGC, U.S. Naval Reserve. He is available at (202)685-6399.


W. F. ECKERT
Director



DEPARTMENT OF THE NAVY

BUREAU OF MEDICINE AND SURGERY
2300 E STREET NW
WASHINGTON DC 20372-5300

IN REPLY REFER TO

6010
25/25
13 November 2000

From: Director, Bureau of Medicine and Surgery Code (25)
To: Chairman, Board for Correction for Naval Records

Subj: COMMENTS AND RECOMMENDATIONS ICO [REDACTED]

Ref: (a) Letter, Chairman Board of Correction for Naval Records Dated 6 Oct 2000
(b) Phone con of 16 October 2000 with [REDACTED]
(c) MANMED Chapter 15-28
(d) Commander, Navy Personnel Command letter SER PERS-911 dated 8 Aug 00

Encl: (1) Medical records of [REDACTED]

1. In references (a) and (b) you expressed concerns that we did not accept the findings of the separation physical examination so that [REDACTED] could affiliate with the Navy Reserves despite reference (c) stating "in order for a member to affiliate with a reserve unit the member must be found physically qualified for affiliation, and that "a separation physical completed within the previous 24 months will suffice." In our review of her medical records we discovered that [REDACTED] had multiple medical conditions that should have prevented her from being separation from active duty. The extensive list of medical problems included: breast cancer treated by surgery, radiation and chemotherapy; multiple falls resulting in many orthopedic problems; non-union of fractured 6 and 7th ribs with occasional pain; bony neck spur with neck spasms at the second cervical disk; tendon entrapment right elbow; irregular menses; right ovarian cyst and pelvic dysplasia; osteoporosis; hypercholesterolemia; chronic hoarseness; nose bleeds, chest pain, constipation and diarrhea; back, multiple joint and muscle pain; and hearing loss. In view of these problems that markedly limit her ability to function in the operational environment we determined that [REDACTED] was not physically qualified for affiliation or retention in the Navy Reserves.

2. As discussed in our previous letter, the Navy Personnel Command informed [REDACTED] that she had the option to request that her medical record be referred to the Physical Evaluation Board (PEB) for a final determination of her physical qualification to remain in the naval service. This review would be a "fit/unfit" determination and the PEB will not assign disability ratings if she is found to be unfit. If the PEB finds [REDACTED] "fit" then she may be allowed to affiliate with the Navy Reserves. If the PEB finds her unfit, then she would be separated from the Reserves without disability benefits. It is important to remember that because many of her conditions manifested while she was on active duty, there is a very good possibility that she would be eligible for disability compensation and medical treatment from the Veterans Administration.

4. In conclusion, because she has already been separated from active duty and we have found her not physically qualified for affiliation with the reserve component, we recommend that [REDACTED] request that her case be fully reviewed by the Physical Evaluation Board for fitness for continued service. It is also our opinion that [REDACTED] should not have been separated from active duty until her case was reviewed by the Physical Evaluation Board (PEB) to determine her fitness for continued service.

5. Enclosure one is returned for appropriate administrative action. I hope this clarifies our position on this case.

[REDACTED]

By direction



DEPARTMENT OF THE NAVY
BUREAU OF MEDICINE AND SURGERY
2300 E STREET NW
WASHINGTON DC 20372-5300

IN REPLY REFER TO

6010
25/25
26 September 2000

From: Director, Bureau of Medicine and Surgery Code (25)
To: Chairman, Board for Correction for Naval Records

Subj: COMMENTS AND RECOMMENDATIONS ICO [REDACTED]
[REDACTED]

Ref: (a) Letter, Chairman Board of Correction for Naval Records Dated 14 September 2000
(b) MANMED Chapter 15-28
(c) Commander, Navy Personnel Command letter SER PERS-911 dated 8 Aug 00

Encl: (1) Medical records of [REDACTED]

1. As requested in reference (a) we have reviewed [REDACTED] letter to the Board of Corrections regarding the apparent disparity of her being found fit for release from active duty but then being found not physically qualified for retention in the Naval Reserves.
2. As required by the Manual of the Medical Department (MANMED), Chapter 15-28, reference (b), BUMED reviews the medical records of anyone seeking to affiliate with or remain in the Navy Reserves. When we reviewed [REDACTED]'s medical records we noted her multiple medical problems included a history of breast cancer; multiple falls resulting in many orthopedic problems; non-unit of fractured ribs; tendon entrapment of her right elbow as well as multiple endocrine and medical disorders. In view of these problems that markedly limit her ability to function in the operational environment we determined that LCDR Ballassari-Cruz was not physically qualified for retention in the Navy Reserves.
3. In reference (a) you requested that we explain the disparity between our determination that [REDACTED] was not qualified for retention in the Navy Reserves, and the previous determination that she was fit for release from active duty on 20 July 2000. You also requested our opinion whether or not her release from active duty without benefit of medical or physical evaluation boards was erroneous, and finally asked what would be an appropriate disposition of this case. We have already addressed the rationale and reference for our finding of her not being physically qualified. We are unable to address whether or not the decision to release her from active duty was appropriate because [REDACTED] has not completed the review process to determine whether or not she is fit for retention in the Navy Reserves. In reference (C) Navy Personnel Command informed [REDACTED] that she had the option to request that her medical record be referred to the Physical Evaluation Board (PEB) for a final determination of physical qualification to remain in the naval service. If the PEB finds [REDACTED] "fit" then she may be allowed to remain in the Navy Reserves. If the PEB finds her unfit, then this will support her claim that she should have been evaluated by the PEB prior to her separation from active duty.

5. In conclusion, we recommend that [REDACTED] case be fully reviewed by the Physical Evaluation Board for fitness for continued service.

6. Enclosure one is returned for appropriate administrative action. Thank you for the opportunity to review this most interesting case.

[REDACTED]

By direction