



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

JRE
Docket No: 7711-99
20 July 2001

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

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was permanently retired by reason of physical disability, vice discharged with entitlement to disability severance pay, and that the requirement that he repay the severance pay he received be waived.

2. The Board, consisting of Mses. Davies and Schnittman and Dr. Schultz, reviewed Petitioner's allegations of error and injustice on 21 June 2001 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, naval records, and applicable statutes, regulations and policies.

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.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner was evaluated by a medical board on 31 December 1996, and given diagnoses of 1) L5-S1 spondylolisthesis, status post fusions with pedicle screws and in situ graft, and 2) marked pain behavior. On 28 March 1997, the Physical Evaluation Board (PEB) made preliminary findings that he was unfit for duty because of diagnosis 1, which it rated at 10% less a 0% existed prior to entry factor, and that the marked pain behavior was related to the first diagnosis, but not separately ratable. On 22 April 1997, Petitioner rejected those findings, and demanded a formal hearing before a hearing panel of the PEB. In a 15 May 1997 addendum to the medical board, CDR H..., a Navy psychiatrist, gave him

an Axis I diagnosis of pain disorder associated with psychological factors and low back injury, chronic. The psychiatrist stated :

"After three months of diagnostic evaluation, treatment, and observation, it is clear that the service member suffers from a chronic mental health condition that occurred as a complication of disabling back injury, associated surgical procedures, and chronic pain that is only partially amenable to treatment, and resulted in moderate to severe occupational and social decline, both civilian and military due to depressed mood, feelings of loss of control, loss of self-esteem, decreased energy, loss of motivation, disturbed sleep, weight loss, and continued exacerbation of chronic pain due to social and occupational stressors." In his opinion, Petitioner was unfit for continued naval service due both to the back injury and associated psychological factors, and that he should be separated with continued medical and psychiatric outpatient care, and maintenance on Sertraline, an antidepressant medication, and methadone for pain control. He also noted that there was no evidence of prescription pain medicine abuse or addiction, and that Petitioner had been compliant in his medical and psychiatric treatment.

d. Petitioner appeared before a hearing panel of the PEB on 24 June 1997, requesting to be found unfit for duty, and that he be awarded a disability rating of 40% under VA code 5293. The hearing panel noted that the neurosurgeon who performed Petitioner's spinal operations, Dr. M..., had written a medical board surrebuttal, dated 29 January 1997, in which he indicated that Petitioner had continued to take narcotics after his treating physicians advised him to discontinue this. In the physician's opinion, Petitioner's subjective complaints were not borne out by objective findings. He stated that Petitioner "...was very interested in disability ratings and his being incapacitated". The hearing panel also made reference to a psychiatric evaluation dated 14 April 1997, prepared by CDR H... in which Petitioner's dependency on narcotics and tendency toward somatization were noted. Petitioner was described by CDR H... as "...melodramatic and highly critical of past medical care with some question of drug seeking." There was also some question of a personality disorder and narcotic dependency. The report concluded with a sarcastic comment about the prospects for Petitioner's recovery. It did not make any reference to the contents of the medical board addendum described in paragraph 3c, above, which were also written by CDR H... , and are not critical of Petitioner's behavior. The hearing panel concluded that Petitioner's had undergone two back surgeries, which were objectively successful, but he continued to complain of pain out of proportion to objective findings. The hearing panel found him unfit for continued naval service, and recommended that he be separated with a 10% rating under VA code 5295. On 12 August 1997, Petitioner submitted a petition for relief from the final action of the PEB, in which he requested that his disability be classified as combat related. He did not contest the finding of unfitness or the disability rating. The petition was denied by the Director, Naval Council of Personnel Boards on 27 October 1997. He was discharged with entitlement to disability severance pay on 4 December 1997.

e. On 23 September 1998, the Department of Veterans Affairs (VA) awarded Petitioner a rating of 40% under code 5293 for spondylolisthesis, status post surgery; 10% under code 5301 for right shoulder and biceps tendinitis with hand numbness; 30% under code 9422 for pain disorder with depression, fatigue and sleep difficulties; and 0% under

code 6514 for sinusitis, for a combined rating of 60%. The ratings were effective from 5 December 1997.

f. Petitioner contends, in effect, that erroneous or misleading statements of Dr. M... concerning his use of pain medication, the nature of his pain, and his concern over his potential disability rating, among other things, significantly biased the PEB. He maintains that he still requires significant amounts of pain medication in order to function, and even then he still has limitations. He invites the Board's attention to the aforementioned VA ratings, and notes that a request for an increase is pending before the VA.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that in addition to his lower back condition, Petitioner was unfit for duty because of a pain disorder, with depression, fatigue and sleep disturbance, which should have been separately rated at 20%. It concludes that the PEB hearing panel gave too much weight to the statement of Dr. M... and the 17 April 1997 statement of CDR H... , which reflects substantially different findings than that contained in the medical board addendum written by CDR H... on 15 May 1997; consequently, it denied Petitioner a rating for his mental disorder.

In view of the foregoing, the Board finds the existence of an injustice warranting corrective action; however, as Petitioner's condition was subject to improvement at the time of his separation from the Navy, permanent retirement effective 4 December 1997 would not be appropriate. In addition, the Board was not persuaded that it would be in the interest of justice for it to take any action which would excuse him from repaying or offsetting the amount of severance pay he received against the amount found due as a result of the Board's corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged by reason of physical disability on 4 December 1997.

b. That Petitioner's naval record be further corrected to show that on 3 December 1997, while he was entitled to receive basic pay, the Secretary of the Navy found him unfit to perform the duties of rank by reason of physical disability due to L5-S1 spondylolisthesis, status post fusions with pedicle screws and in situ graft, rated at 10% under VA code 5295; and pain disorder, rated at 20% under VA code 9422, for a combined rating of 30%; that the conditions were incurred or aggravated while Petitioner was entitled to receive basic pay; that the disability is not due to intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; that Petitioner has completed over eight years of active service; and that accepted medical principles indicate the disability may be of a permanent nature, accordingly, the Secretary directed that he be released from active duty on 4 December 1997, and transferred to the Temporary Disability Retired List effective 5 December 1997, pursuant to 10 U.S. Code 1202.

c. That Petitioner be afforded a periodic physical examination as soon as practicable.
Current address: [REDACTED]

d. That so much of his request for correction of his naval record as exceeds the foregoing be denied.

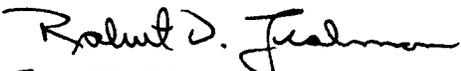
e. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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.

ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. 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 Regulations, 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.


For W. DEAN PFEIFFER
Executive Director