



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

JRE
Docket No: 5732-01
9 August 2002

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

Subj: FORMER
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 w/attachments
(2) Dir, NCPB, ltr 5420, Ser: 01-15, 16 Apr 01
(3) CMC ltr 1760 MMSR-6J, 26 Nov 01
(4) 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 not discharged by reason of physical disability, and that he has remained on active duty since that date.

2. The Board, consisting of _____ reviewed the application on 1 August 2002, 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. On 7 December 1999, a medical board gave Petitioner diagnoses of unspecified internal derangement of the knee, and chondromalacia patella, and recommended that he be referred to the Physical Evaluation Board (PEB). At that time, he was serving on active duty as a member of the Marine enlisted commissioning program at the University of Oklahoma. On 12 April 2000, the PEB made preliminary findings that he was unfit for duty because of chondromalacia patella, right knee, which it rated at 10% disabling. Petitioner accepted those findings on 21 April 2000, and apparently was advised that he would be discharged by reason

of physical disability with thirty days. He apparently received authority from officials at an Air Force hospital to be evaluated by a civilian orthopedic surgeon, and was seen by the surgeon on 27 April 2000 with a complaint of bilateral knee pain, right greater than left. The examination disclosed that he had full range of motion in each knee, from 0 to 135 degrees, and minimal objective signs of knee pathology. He indicated that both knees were painful, but that he had obtained satisfactory rehabilitation of the right knee. The left knee symptoms had gotten progressively worse, especially since he had started to favor the right leg. The physician advised him that if he was unable to tolerate the condition of his right knee, he might benefit from arthroscopic surgical procedure. While improvement in his condition was not a certainty, the procedure should provide some relief in the short run. The physician thought that the left knee might have some patellar tendinitis. He advised Petitioner that he did not like to perform bilateral arthroscopy due to the difficult convalescence, but Petitioner opted for the bilateral surgery because he was scheduled to be discharged in about four weeks. He underwent elective bilateral knee arthroscopy with mediofemoral condyle OATS procedure on 3 May 2000. It is unclear what military official authorized this surgery. When examined on 18 May 2000, he had 0 to 60 degrees of flexion in the right knee, and 0 to 100 degrees in the left knee. He was to continue physical therapy and avoid high impact activities for at least three months. He was confined to a wheelchair on that date, and was scheduled to progress to weight bearing on the left knee in three weeks. There are no records available to the Board which describe the status of his knees following his convalescence from the surgical procedures performed on 3 May 2000.

d. In correspondence attached as enclosure (2), the Director, Naval Council of Personnel Boards (NCPB), advised the Board, in effect, that at the time of Petitioner's discharge, it appears that the conditions of each of his knees rendered him unfit for duty, and that each was ratable at 10%. The Director recommended that Petitioner's record be corrected by adding a 10% rating for his left knee, for a combined rating of 20%. On 7 June 2001, the Board denied his request for correction of his record to show that he was retired by reason of physical disability, because it was not persuaded that he was entitled to a combined disability rating of 30% or higher at the time of his discharge. It did not effect the corrective action recommended by the Director, NCPB, because it would not have accorded Petitioner any effective relief, because it would not have qualified him for disability retirement.

e. After being advised of the denial of his initial application, Petitioner submitted his present application, in which he contended that his release from active duty was erroneous, and that his record should be corrected to show that he has remained on active duty since 26 May 2000. In his opinion, upon his return to active duty and receipt of appropriate medical care and rehabilitative services, he will be fit for duty and for commissioning as a Marine officer. He submitted several letters of character reference which attest to his excellent abilities and qualification for commissioning.

f. In correspondence attached as enclosure (3), the Board was advised by the Head, Separation and Retirement Branch, Headquarters, U.S. Marine Corps, by direction of the Commandant of the Marine Corps, that Petitioner cannot be restored to active duty, as he requests. He recommended that the case be referred to the PEB for review and further opinion.

CONCLUSION:

Upon review and consideration of all the evidence of record , the Board was unable to conclude that Petitioner's discharge was erroneous. In this regard, it noted that he was discharged pursuant to the approved findings of the Physical Evaluation Board. The fact that he underwent elective knee surgery while awaiting discharge, and that his condition apparently worsened, at least in the short run, was insufficient to warrant the cancellation of the final action of the PEB, and mandate the reopening of disability proceedings. Notwithstanding the foregoing, the Board concludes that as the surgery was apparently authorized by proper authority, and as Petitioner's condition may have been ratable at or above 30% disabling at that time due to the effects of the surgery, it would be in the interest of justice to correct his record, as an exception to policy, to show that he was transferred to the Temporary Disability Retired List. If such disposition is effected, it will permit the reevaluation and final assessment of his condition.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show that he was not discharged on 26 May 2000.
 - b. That Petitioner's naval record be further corrected to show that he was released from active duty on 26 May 2000, and transferred to the Temporary Disability Retired List the following day, pursuant to 10 U.S. Code 1202, with a combined disability rating of 30%, as follows: 5299-5003, 20% right knee, and 5299-5003, 10%, left knee.
 - c. That Petitioner be afforded a periodic physical examination as soon as practicable.
Current address: PO Box 18183, Colorado Springs, CO 80935
 - d. That a copy of this Report of Proceedings be filed in 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 entitled matter.

ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

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


W. DEAN PFEIFFER
Executive Director

Reviewed and approved: SEP 10 2002



Joseph G. Lynch
Assistant General Counsel
(Manpower and Reserve Affairs)