



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

JRE
Docket No. 10312-02
17 July 2003

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

Subj: OF NAVAL RECORD REVIEW

Ref: (a) 10 U.S.C. 1552
(b) SECNAVINST 1850.4D

Encl: (1) DD Form 149 w/attachments
(2) Dir, NCPB ltr 5220, Ser: 03-09, 20 May 03
(3) 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 retained on active duty until 31 May 2002, and transferred to the Temporary Disability Retired List the following day, with a combined rating of 40%; that he be reimbursed in the amount of \$4401.00 for rent he paid for Navy housing; and that he reimburse by reason of physical disability.

2. The Board, consisting of _____ and _____ reviewed Petitioner's allegations of error and injustice on 17 July 2003 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 enlisted in the Navy on 7 August 1987, and served on active duty in an enlisted status until 7 July 1986, when he entered the U.S. Naval Academy. He was commissioned on 30 May 1990. He sustained a Lisfranc (midfoot) fracture of the left foot on 8 June 1996, which required multiple surgical procedures between 20 June 1996 and 1 May 2001. He was serving as an instructor at the Naval Academy Preparatory School on the latter date. Shortly thereafter, he was notified of his second failure of selection for promotion to the grade of lieutenant commander, and that he had a statutorily mandated separation date of 1 March 2002. As his foot condition remained symptomatic, and he suffered from several other medical conditions, he was evaluated by a medical evaluation board (MEB) on 31 January 2002. He was given diagnoses of Lisfranc joint fusion of metatarsal cuneiform joints 1,2,and 3; left hallux with decreased range of motion secondary to scar tissue entrapment; unspecified migraine; status/post dorsal exostosis of left foot, first and second metatarsal-cuneiform; status/post tenolysis, left extensor hallicus longus tendon, and eczematous dermatitis. In the opinion of the MEB, Petitioner could not walk or stand for periods of time greater than one hour due to foot pain, and could not perform the duties of his rank; and that there was some impairment of his ability to carry out his duties because of intermittent migraine headaches. Accordingly, the MEB recommended that he be evaluated by the PEB. Addenda to the MEB were prepared on 30 January and 8 February 2002, to document the migraine headaches and dermatitis, respectively. The addenda were attached to the basic MEB report without separate signature pages. The convening authority approved the findings and recommendation of the MEB on 24 February 2002, and the report was forwarded to the PEB via FEDEX on 25 February 2002. On 27 February 2002, a PEB official rejected the MEB because of the absence of signature sheets for the addenda thereto.

d. Petitioner was released from active duty and discharged from the Navy on 28 February 2002, and he accepted a commission in the Naval Reserve. He apparently continued as an instructor at NAPS in a civilian capacity for the remainder of the school year, and occupied government quarters until 31 May 2002. On 17 June 2003, Petitioner was notified by the Department of Veterans Affairs (VA), that pending a final rating determination, he had been granted a 30% rating and entitlement to benefits under the Vocational Rehabilitation and Employment program, based on a review of his service medical records, and the results of VA examinations completed between 29 August and 11 September 2001.

e. In correspondence attached as enclosure (2), the Director, Naval Council of Personnel Boards (NCPB), hereinafter "the Director", advised the Board, in effect, that the surgical procedures Petitioner underwent on 1 May 2001 relieved some pain and released a tendon, but increased the limited range of motion of his big toe only 2 to 5 degrees. Petitioner indicates in his petition that he continued to have left foot pain at the site of the joint fusion, as well as "giving out" of his left foot. As a result, if he were to stand or walk for 2 to 3 consecutive hours, he experienced metatarsal pain. Moreover, if he continued to walk or stand, he would suffer "tremors in his foot", although he motor strength remained within normal limits. Petitioner states that this interferes with his ability to teach several classes a day or stand watch on the quarterdeck; however, the Director noted that Petitioner's medical evaluation board states "if he walks or stands intermittently for 1 hour at a time with rest in between, he does not experience pain or weakness." The Director noted that an addendum to the MEB report detailed a history of chronic intermittent migraine and tension headaches with only the latter having responded significantly to therapy. The migraines were reported to occur at least twice monthly, with variable intensity. The Director noted that despite the frustrations and limitations associated with his foot and headache conditions, Petitioner's record of fitness reports continued through 31 January 2002. He noted that available health records do not indicate "that the need for medical attention, especially for ... his migraine headaches, significantly interrupted his workday. In addition, Petitioner indicates he was gainfully employed post-discharge in the educational field. The Director opined that neither the left foot condition nor the migraine headaches appears to have rendered Petitioner unfit while he served on active duty. Hence, there is insufficient evidence to warrant a recommendation that Petitioner's application be granted, "...even though Petitioner's MEB had been rejected by the PEB on a technicality during preliminary screening."

f. Paragraph 3710 of reference (b), then in effect, provided that if a member is pending mandatory separation or retirement, such retirement or separation may only be deferred if the member is hospitalized or a medical board report has been accepted by the President, PEB for disability evaluation processing. 10 U.S.C. 640.

g. Petitioner contends, in effect, that his MEB was unfairly rejected by the PEB based on a minor technicality that was not

substantive in nature. He submits the statement of his disability counselor, which is to the effect that the MEB was rejected because of a mistake on her part. She noted, however, that she subsequently learned from a PEB official that "medboard packages with addenda included within the package are accepted at the PEB." Petitioner states that an MEB was going to be initiated in the Spring of 2001, but action was deferred pending surgery. At the same time, he was sent to a neurologist, who did not complete his work-up until December 2001. The MEB was not written until the end of January 2002, or signed until 25 February 2002. Given time constraints associated with his impending discharge, he did not submit a rebuttal to the MEB. Had he submitted a rebuttal he would have stated that although his pain was initially alleviated by the surgery on 1 May 2001, it recurred about 5 months later and continued to worsen since then. If he stands without breaks for more than an hour, or with breaks for more than three, he gets tremors in the left foot. He explained that when teaching 50-minute periods with an hour off between periods, he usually did not have pain on those days. On days when he taught all day without any periods off, he would have to sit and teach from a chair by the last period of the day, and would occasionally ask leave work early so he could go home to rest. He assigned himself duty on Mondays because he had no classes on Tuesdays, and could sit at his desk and stay off his feet. During his last months of duty, he asked to be allowed to wear tennis shoes while standing watch, and be allowed to sit down from time to time rather than patrolling constantly.

h. With regard to his migraine headaches, he contends that when he had migraines during a workday, he would either go home or rest at his desk. As 90% of the headaches occurred in the afternoon, he could finish most of the day before leaving, and occasionally medication would help enough for him to stay until 1515 hours, when the students went to sports. He states that he had migraines on 17 December 2001 and 17 and 26 January 2002. He noted that his current teaching job pays only half as much as he made in the Navy, and that it was the only position he was offered during the five months he was looking for work. He reports that he missed about 6 days of work during the previous school year because of migraines and foot pain. Both conditions have continued to worsen and affect his work. The headaches occur at the same frequency, but their intensity and duration has increased. His foot has gotten weaker and the time he can stand and walk without trouble and pain has decreased. He believes that had he been given the opportunity to present his case he would have been able to present more information to show

how his conditions affected his work and daily performance. Granting his request to be placed on the TDRL would give him the opportunity to be heard, but that action would not require the Navy to permanently retire him by reason of physical disability.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the comments contained in enclosure (2), the Board concludes that relief is warranted in this case. It notes that Petitioner's MEB was rejected by the PEB on a mere technicality, rather than for substantive reasons. The fact that the MEB was prepared indicates that the members of the MEB had concluded that his fitness for further service in the Navy was at least questionable. While the Board is not convinced that he would have been found unfit for duty and assigned a disability rating of 30% or more had he been evaluated by the PEB in 2002, it concludes that he should have been given the opportunity to present his case to the PEB.

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

The Board notes that although a petitioner may be entitled to monetary compensation as a result of record correction, such as back pay and allowances, it has no authority to direct gratuitous payments, such as for the reimbursement of health insurance premiums.

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 released from active duty on 28 February 2002 or discharged from the Navy.

b. That Petitioner's naval record be further corrected to show that on 30 May 2002, while he was entitled to receive basic pay, the Secretary of the Navy found him unfit to perform the duties of grade by reason of physical disability due to migraine headaches, and status/post Lisfranc fracture, left foot, which were incurred while Petitioner was entitled to receive basic pay; that the disabilities were not due to intentional misconduct or willful neglect, and not incurred during a period

of unauthorized absence; that the disabilities are considered to be ratable at 40% in accordance with the Standard Schedule for Rating Disabilities in use by the Department of Veterans Affairs at the time the Secretary found Petitioner unfit, Code Numbers 8100, (migraine headaches, 30%) and 5003, (status/post Lisfranc fracture, 10%); and that as accepted medical principles indicate the disabilities may be of a permanent nature, the Secretary directed that Petitioner be released from active duty on 31 May 2002, and transferred to the Temporary Disability Retired List on 1 June 2002, pursuant to 10 U.S. Code 1202.

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

d. That so much of Petitioner's 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. 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.

Recorder

~~Recorder~~ Acting Recorder

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

Executive Director 

Approved.

7-25-03

~~Assistant General Counsel~~
(Manpower and Reserve Affairs)

