



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

[REDACTED]  
Docket No: 10657-16  
MAY 22 2017

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

Subj: REVIEW OF NAVAL RECORD ICO  
[REDACTED] USN RET, XXX-XX-[REDACTED]

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

Encl: (1) DD Form 149 w/attachments  
(2) Director, Secretary of the Navy Council of Review Boards ltr 5220 CORB: 002 of 22  
Feb 17  
(3) [REDACTED] ltr of 6 April 2017

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to increase her combined Physical Evaluation Board (PEB) disability rating to 80% with the addition of bi-lateral upper extremity radiculopathy and depression as unfitting conditions. Alternatively, Petitioner requests to have her PEB disability rating increased to 100% due to unemployability.

2. The Board, consisting of [REDACTED] reviewed Petitioner's allegations of error and injustice on 27 April 2017 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. In addition, the Board considered the advisory opinion contained in enclosure (2) and the Petitioner's rebuttal comments contained in enclosure (3).

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. Petitioner was placed on the Temporary Disability Retirement List (TDRL) with a combined 60% disability rating for left thoracic pain and neck pain with a loss of range of motion on 15 May 2008. She is rated for additional service connected disability conditions, including depression, by the Department of Veterans Affairs effective the day of her placement on the TDRL.

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c. On 19 October 2008, Petitioner was deemed unemployable effective 1 June 2006 by the Social Security Administration based on a multitude of physical disability conditions. Her physician described the physical difficulties caused by her unfitting back and neck conditions along with other physical disability conditions that were not service incurred or aggravated based on a review of her military records.

d. On 7 July 2010, the Department of Veterans Affairs also determined Petitioner was unemployable due to her physical disabilities. Their decision was based on medical evidence provided by the Petitioner and the decision of the Social Security Administration to grant her a similar finding.

e. On 10 August 2010, the PEB continued their finding of unfitness for left thoracic pain and neck pain with a loss of range of motion and determined placement on the Permanent Disability Retirement List (PDRL) was appropriate. Petitioner accepted the findings of the PEB and was placed on the PDRL.

f. Director, Secretary of the Navy Council of Review Board provided an advisory opinion recommending denial of Petitioner's request. It was his opinion that insufficient evidence exists to support relief in Petitioner's case. Specifically, he relies upon the decisions of Petitioner's medical providers not to refer her to a medical board for any additional conditions and lack of evidence Petitioner was unfit for any conditions other than those determined to be unfitting by the PEB. He also notes the lack of objective evidence to show Petitioner attempted and failed to secure employment following her placement on the TDRL.

## CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting the following partial corrective action.

The Board substantially concurred with the opinions contained in enclosure (2) and concluded that the PEB correctly determined Petitioner's unfitting conditions. Despite the arguments raised in enclosure (3), regarding the conclusory nature of Director, Secretary of the Navy Council of Review Boards' opinions, the Board determined that his opinions were based on a review of Petitioner's medical records prior to her referral to the PEB and reasonable. The opinion cites medical evidence that "neither atrophy nor muscle weakness was demonstrated" and discusses a 7 August 2007 medical board report that Petitioner had no limb weakness despite occasional "pain and tingling" into her left arm, thumb, and index finger. Additionally, Petitioner's 3 August 2007 non-medical assessment did not indicate any issues with her mental health or raise any occupational impairments created by either a mental health condition or radiculopathy. As a result, the Board concluded sufficient evidence exists to support the Navy's decision not to refer Petitioner to the PEB for any mental health conditions or bi-lateral upper extremity radiculopathy. Based on this finding, the Board concluded that no relief was warranted regarding Petitioner's request to add those two conditions as unfitting conditions to her PEB record.

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Notwithstanding the Board's substantial concurrence with the advisory opinion regarding the adding of additional unfitting conditions, the Board concluded an injustice exists with Petitioner's record that requires partial relief. The Board determined that Petitioner has provided sufficient evidence to support a finding that she was unemployable, at the time of her placement on the PDRL, due to her left thoracic pain and neck pain despite the existence of other disability conditions that do not qualify for military disability benefits. The Board based their decision on the findings of the Social Security Administration and Department of Veterans Affairs regarding Petitioner's unemployability. Further the Board relied on the medical opinion provided by Dr. Childers that Petitioner was physically unable to continue as a dentist or in other full-time occupations. In the Board's opinion, Petitioner's pain that led to a PEB finding of unfitness for continued naval service was enough, by itself, to physically prevent her from working and the additional disability conditions served as contributing conditions. Contrary to the advisory opinion, the Board concluded that Petitioner had provided objective evidence of unemployability.

The Board disagreed with the Petitioner's arguments regarding the existence of a conflict of interest with Director, Secretary of the Navy Council of Review Boards providing an advisory opinion to the Board. As provided in the regulations, advisory opinions are not binding on the Board and serve to assist the Board in reaching an informed decision. So, even if Director, Secretary of the Navy Council of Review Boards had acted in Petitioner's case, it would have been appropriate for the Board to hear his opinion on the case. As the Secretary of the Navy's designated executive agent responsible for the management, integrity, and efficiency of the PEB, the Board concluded it was reasonable to solicit and consider his opinion on whether the PEB may have committed an error as alleged in Petitioner's application. Further, regulations allow for Petitioners to comment on unfavorable advisory opinions and provide the necessary due process to allow Petitioners to alert the Board in cases where they feel a conflict of interest, or some other error, may exist in the provided opinion. Based on these findings, the Board considered the advisory opinion provided.

#### RECOMMENDATION

That Petitioner's naval record be corrected, where appropriate, to show that:

Petitioner was found to be totally disabled (100%) due to unemployability effective the date of her placement on the Permanent Disability Retirement List. No other relief is warranted.

A copy of this Report of Proceedings will 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 quorum was

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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.

[REDACTED]  
Recorder

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

[REDACTED]  
Executive Director

Reviewed and Approved / ~~Disapproved~~

[REDACTED]

27 June 2017