



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

█
Docket No. 8899-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █
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Ref: (a) Title 10 U.S.C. § 1552
(b) Title 10 U.S.C. § 1216a
(c) 38 C.F.R. PART 4 Veterans Administration Schedule for Rating Disabilities (VASRD)
(d) DoDM 1332.18, Volume 2

Encl: (1) DD Form 149
(2) President, PEB ltr 1850 10R:111 PEB Index No. █, 20 Mar 98
(3) VA Proposed Rating

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected to reflect, for Department of Defense (DoD) purposes, a disability rating of 30% for the condition of asthma, under Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) code 6602, reference (c), and placement on the Permanent Disability Retired List (PDRL).

2. The Board, consisting of █ reviewed Petitioner's allegations of error and injustice on 8 February 2024, 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, relevant portions of the naval records, and applicable statutes, regulations, and policies as well as enclosures.

3. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Petitioner enlisted in the United States Marine Corps on 6 July 1993 and participated in Operation Southern Watch in the Persian Gulf from 7 August until 6 September 1996. Petitioner underwent a medical board on 7 January 1998, which stated Petitioner started having problems with asthma in 1995. Petitioner continued to have problems with recurrent episodes of wheezing and chest congestion and significant exercise induced bronchospasm. It was noted that Petitioner was unable to complete his three-mile run physical fitness requirement as a result.

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b. On 20 March 1998, President, Physical Evaluation Board (PEB) sent notification to the Commandant of the Marine Corps that Petitioner was found Unfit to perform the duties of his office, grade, and rank due to a physical disability, enclosure (2). In addition, the notification listed “a percentage of disability assigned in accordance with the Veterans Administration Schedule for Rating Disabilities (VASRD).” Petitioner was assigned a rating of 10% under VASRD code 6602, and was subsequently discharged on 30 April 1998 with an Honorable characterization of service; narrative reason for separation states “Disability – severance pay.”

c. On 26 October 2020, the Department of Veterans Affairs (VA) issued a decision, enclosure (3) that clear and unmistakable errors were found in its prior evaluation for Petitioner’s bronchial asthma and established a rating of 30% effective 1 May 1998. The decision specifically stated:

“Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was a clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been. (38 CFR 3.105a).

Rating determinations of May of 1998 and December of 2017 in assigning and confirming a 10 percent evaluation for the veteran's service-connected asthma are clearly and unmistakably erroneous as the medical evidence to include the Physical Evaluation Board proceedings shows that the veteran met the 30 percent evaluation criteria given that his asthma required the daily use of inhalational therapy. The veteran's asthma has required daily inhalational therapy since 1995, when he was first evaluated and treated for asthmatic attacks during his active military service. Therefore, the 30 percent evaluation is established from May 01 1998, revising prior erroneous decisions.”

d. Petitioner contends that he was correctly found unfit for continued naval service due to asthma, but the disability rating was erroneous as he should have been rated at 30%, warranting a medical retirement.

e. Reference (b) states that each armed service must utilize the complete VASRD and any interpretation of the VASRD by the Court of Appeals for Veterans Claims when evaluating a disability, unless the VA and Department of Defense have jointly prescribed a rating criteria that will result in a higher disability percentage than what would be determined by using the VASRD. Per reference (d), the Secretaries of the Military Departments “accept the disability rating(s) awarded to each of the compensable unfitting condition(s), as determined by the Military Department, rendered by the VA pursuant to reference (c).

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[REDACTED]

CONCLUSION

Upon review and consideration of all the evidence of record, the Board found the existence of error and injustice warranting relief. Specifically, the Board determined that the PEB's 10% rating decision was in error due to an erroneous VA finding. The VA has acknowledged its rating determinations were "clearly and unmistakably erroneous" and that Petitioner met the 30% evaluation criteria. Thus, in line with reference (b), the correct rating is 30% warranting medical retirement.

RECOMMENDATION

In view of the above, the Board directs the following corrective action:

That Petitioner be found Unfit and placed on the PDRL effective the date of separation from active duty, for the following condition:

1. Asthma, VA Code 6602, rated at 30%, not combat related (NCR), not incurred in a combat zone (NCZ).

The Defense Finance and Accounting Service will complete an audit of Petitioner's pay records to determine Petitioner's pay entitlements.

Petitioner's narrative reason for separation shall be changed to: Disability, Permanent; separation program designator: as appropriate; reentry code: RE-3P.

Note: Headquarters, U.S. Marine Corps will issue a DD Form 215 or a new DD Form 214 whichever one they deem appropriate.

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.

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 Regulation, 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.

3/28/2024

