



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

[REDACTED]
Docket No. 700-24
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF RETIRED [REDACTED]
[REDACTED] USMCR

Ref: (a) Title 10 U.S.C. § 1552
(b) Petitioner's Case File
(c) Petitioner's PEB File

Encl: (1) DD Form 149
(2) Advisory Opinion dtd 16 Oct 24

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 by increasing his Physical Evaluation Board (PEB) disability evaluation rating.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 26 November 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.

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 enlisted in the United States Marine Corps and honorably served on active duty from 12 August 1996 to 13 July 2005. Petitioner subsequently transferred to the United States Marine Corps Reserve (USMCR). Petitioner was re-called to active duty for five mobilizations [26 July 2005-3 January 2006, 14 May 2007-12 May 2008, 25 April 2010-30 July 2010, 14 November 2011-4 December 2012, and 1 August 2016-25 July 2017). Upon completion of each period of mobilization, Petitioner was released from active duty with an Honorable characterization of service and returned to his reserve unit. On 11 February 2022, a physician at the Pain Management Clinic, [REDACTED], documented Petitioner's history of neck pain with bilateral radiculopathy. Petitioner was diagnosed with cervicalgia, cervical degenerative disc disease, and cervical radiculopathy.

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c. The same day, the Program Manager, Reserve Medical Entitlements Determination Section, HQMC, Wounded Warrior Regiment notified Petitioner the Commandant had authorized medical care for his left shoulder, right shoulder, neck and back, and left knee injury. On 24 August 2022, the Command Medical Officer Naval Hospital [REDACTED], referred Petitioner to the Integrated Disability Evaluation System (DES) for 1) Unspecified Rotator Cuff Tear or Rupture of Unspecified Shoulder, not specified as Traumatic; 2) Cervicalgia; 3) Cervical Disc Disorder with Radiculopathy, Unspecified Cervical Region; and 4) Pain in Left Knee.

d. On 5 October 2022, Petitioner underwent the Department of Veterans Affairs (VA) Compensation and Pension (C&P) examination. On 27 October 2022, the VA granted service connection for 1) Left Shoulder Strain with Rotator Cuff Tear and Labral Tear including (SLAP (non-dominant, referred as rupture; also claimed as bilateral biceps) with 20% disability evaluation; 2) Right Shoulder Strain with Petitioner's left knee, rotator cuff tear (dominant, referred as rupture, also claimed as bilateral biceps) with 20% disability evaluation; 3) Cervical Strain with Degenerative Arthritis (referred as cervicalgia, also referred as cervical disc disorder) with 10% disability evaluation; 4) Left and Right Shoulder Surgical Scars with 0% disability evaluation; 5) PTSD (claimed as depression) with 30% disability evaluation; and Left Knee Degenerative Arthritis with 10% disability evaluation. Service connection for radiculopathy was denied. Overall/combined rating was 90%. However, the VA noted that Radiculopathy (8514) was "not service connected, due to "no diagnosis."

e. On 12 December 2022, the Medical Evaluation Board (MEB) Naval Hospital Pensacola referred the following conditions to the PEB for determination of fitness for continued military service: 1) Unspecified Rotator Cuff Tear or Rupture of Unspecified Shoulder, not specified as Traumatic; 2) Cervicalgia; 3) Cervical Disc Disorder with Radiculopathy, Unspecified Cervical Region; and 4) Pain in Left Knee, *Id.* at 2. The MEB noted the clinical history associated with the Cervicalgia and Cervical Disc Disorder with Radiculopathy as:

Patient has a history of chronic cervicalgia dating back to 2013 with acute worsening after his CFT in 2019. MR imaging demonstrates cervical degenerative changes greatest at C6-C7. Patient's pain has progressed with development of bilateral radiculopathy managed with cervical epidural steroid injections. Last pain management note dictates a presumed need for ACDF [Anterior Cervical Discectomy and Fusion] in near future pending medical separation. Due to combination of shoulder, knee, and neck pain/injury member has been on a light/limited duty status since 2019. Functional limitations of anticipated cervical spine fusion unlikely to be conducive with military duty requirements.

f. On 19 January 2023, the PEB found Petitioner Unfit for continued service and recommended transfer to the Permanent Disability Retirement List (PDRL) from active duty at a combined disability rating of 50% for the Unfitting Conditions of 1) Chronic Left Shoulder Pain (Stable), VA Diagnostic Code 5201 at 20% disability evaluation; 2) Chronic Right Shoulder Pain (Stable), VA Diagnostic Code 5201 at 20% disability evaluation; 3) Cervical Disc Disorder (Stable), VA Diagnostic Code 5237 at 10% disability evaluation; 4) Left Knee Degenerative Arthritis (Previously rated as left knee tendonitis) claimed as Pain in Left Knee (Stable), VA Diagnostic Codes 5003-5260 at 10% disability evaluation; and 5) Lateral Instability, Left Knee

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Associated with Left Knee Degenerative Arthritis (Previously rated as Left Knee Tendonitis) claimed as Pain in Left Knee (Stable), VA Diagnostic Codes 5003-5257 at 10% disability evaluation. In the PEB Work Card, the Medical Officer noted "No evidence of radiculopathy on C&P physical exam. Full ROM" and the referred unfitting condition of "Cervical Disc Disorder with Radiculopathy, unspecified cervical region" was changed to "Cervical Disc Disorder." On 6 February 2023, the PEB notified the Commandant of the Marine Corps that Petitioner was Unfit and to transfer Petitioner to the PDRL at a 50% rating.

g. For this request, Petitioner contends that when he was originally evaluated by the VA for his (C&P) examination as part of the Integrated Disability Evaluation System (IDES), the VA physician did not evaluate his claimed bilateral upper extremity radiculopathy condition. Consequently, his bilateral upper extremity radiculopathy conditions were erroneously not properly evaluated as contributing to his unfitness for duty. Petitioner states this oversight was not discovered until his 14 February 2023 out-brief with his VA Representative in Tampa. Subsequently, on 30 August 2023, Petitioner filed a supplemental VA claim for his condition of bilateral upper extremity radiculopathies. On 17 January 2024, the VA granted service-connection for his Right Upper Extremity Radiculopathy at a 40% rating and Left Upper Extremity Radiculopathy at a 30% rating, which increased his VA combined disability rating to 100%.

h. The Board sought an advisory opinion (AO) from a licensed physician regarding Petitioner's allegations, enclosure (2). The Physician Advisor found in pertinent part:

The case at hand does show an error by VA examiners and raters in not identifying bilateral upper extremity radiculopathy conditions at the initial rating, which qualified the Petitioner for a 40% disability rating for his right upper extremity radiculopathy and 30% for his left upper extremity radiculopathy conditions. Ultimately, this is a case where relief is recommended to correct an injustice. The C&P evaluation error is obvious and was quickly corrected through an alternate remedy within in the VA system. In summary, the evidence does support the request. Although the Physical Evaluation Board adjudicated this case in a procedurally valid manner, relief is appropriate based on a clear rating error by the VA Disability Evaluation System, subsequently corrected via a filing of a Supplemental Claim with the VA.

The AO recommended a correction of the record to show Petitioner as Unfit for the following conditions with placement on the Permanent Disability Retired List (PDRL):

1. Cervical Disc Disorder with Right Upper Extremity Radiculopathy (Stable); VA Code 8510, rated at 40%, permanent and stable, not combat related (NCR), non-combat zone (NCZ);
2. Cervical Disc Disorder with Left Upper Extremity Radiculopathy (Stable); VA Code 8510, rated at 30%, permanent and stable, not combat related (NCR), non-combat zone (NCZ);
3. Chronic Left Shoulder Pain (Stable), VA Diagnostic Code 5201, rated at 20%, permanent and stable, not combat related (NCR), non-combat zone (NCZ);

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4. Chronic Right Shoulder Pain (Stable), VA Diagnostic Code 5201, rated at 20% permanent and stable, not combat related (NCR), non-combat zone (NCZ);

5. Left Knee Degenerative Arthritis (Previously rated as left knee tendonitis) claimed as Pain in Left Knee (Stable), VA Diagnostic Codes 5003-5260, rated at 10%, permanent and stable, not combat related (NCR), non-combat zone (NCZ); and

6. Lateral Instability, Left Knee Associated with Left Knee Degenerative Arthritis (Previously rated as Left Knee Tendonitis) claimed as Pain in Left Knee (Stable), VA Diagnostic Codes 5003-5257, rated at 10%, permanent and stable, not combat related (NCR), non-combat zone (NCZ).

This results in a combined rating of 80%.

CONCLUSION

Upon review and consideration of the evidence of record, the Board concluded that there was an injustice in Petitioner's naval record that warrants relief. Specifically, the Board concurred with the findings of the AO, which it found set forth a logical framework of analysis based on an objective review of substantial evidence. In terms of the disability retirement rating, the Board determined that the findings described by the AO were rational and based on substantial medical evidence and that 80% was appropriate. Accordingly, the Board made the following recommendation.

RECOMMENDATION

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

The Petitioner's assigned disability rating record be changed to reflect the below assigned ratings, effective the date of his transfer to the Permanent Disability Retired List, at a combined rating of 80%:

1. Cervical Disc Disorder with Right Upper Extremity Radiculopathy (Stable); VA Code 8510, rated at 40%, permanent and stable, not combat related (NCR), non-combat zone (NCZ)

2. Cervical Disc Disorder with Left Upper Extremity Radiculopathy (Stable); VA Code 8510, rated at 30%, permanent and stable, not combat related (NCR), non-combat zone (NCZ)

3. Chronic Left Shoulder Pain (Stable), VA Diagnostic Code 5201, rated at 20%, permanent and stable, not combat related (NCR), non-combat zone (NCZ)

4. Chronic Right Shoulder Pain (Stable), VA Diagnostic Code 5201, rated at 20% permanent and stable, not combat related (NCR), non-combat zone (NCZ)

5. Left Knee Degenerative Arthritis (Previously rated as left knee tendonitis) claimed as Pain in Left Knee (Stable), VA Diagnostic Codes 5003-5260, rated at 10%, permanent and stable, not combat related (NCR), non-combat zone (NCZ)

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6. Lateral Instability, Left Knee Associated with Left Knee Degenerative Arthritis (Previously rated as Left Knee Tendonitis) claimed as Pain in Left Knee (Stable), VA Diagnostic Codes 5003-5257, rated at 10%, permanent and stable, not combat related (NCR), non-combat zone (NCZ)

Note: Headquarters Marine Corps will correct any other entries affected by the Board's recommendation.

DFAS shall audit the Petitioner's pay account for payment of back pay to the date of Petitioner's retirement and any lawful monies owed.

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 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 the reference, has been approved by the Board on behalf of the Secretary of the Navy.

1/16/2025

[REDACTED]