



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

JRE
Docket No: 124-97
15 August 2001

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

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 w/attachments
(2) Dir, NCPB ltr 5420 Ser: 01-11, 23 Mar 01
(3) Hearing Panel rationale, 7 Apr 00
(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 when transferred to the Temporary Disability Retired List on 1 May 1995, he received a 50% rating for his back and related conditions, to be combined with the 40% rating he actually received for rheumatoid arthritis and fibromyalgia. In addition, he requests certain administrative corrections of his DD Form 214.
2. The Board, consisting of Ms. Davies and Messrs. Hogue and Pfeiffer, reviewed Petitioner's allegations of error and injustice on 26 July 2001 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 was released from active duty on 1 May 1995, and transferred to the TDRL with a 40% disability rating under Department of Veterans Affairs (VA) Schedule for Rating Disabilities code 5002 for rheumatoid arthritis and fibromyalgia. He also suffered from carpal tunnel syndrome, which contributed to the unfitting conditions, but was not separately ratable, and L5-S1 intervertebral radicular pain syndrome, which was not

separately unfitting and did not contribute to the unfitting conditions. Petitioner underwent multiple evaluations while on the TDRL, and ultimately, a hearing panel of the Physical Evaluation Board determined on 12 January 2000, that his disabilities were rated at a combined (not added) final rating of 70%, as follows: fibromyalgia and rheumatoid arthritis, 40%, VA code 5099-5025; degenerative disk and joint disease of the lumbar spine L4-5 and L3-4, with transitional sacralized L5, status post multiple surgical procedures, 20%, VA code 5292; sensory neurogenic bladder, 20%, VA code 7542; L5-S1 radicular pain syndrome, 10%, VA code 8520 left, and 0% right; and mood disorder due to medical condition with mixed features, bipolar type, 10%, VA code 9435. As Petitioner had been unable to work since his release from active duty because of his disability, the rating was increased to 100% in accordance with the provisions of SECNAVINST 1850.4D, paragraph 3804(f), by reason of his unemployability. The findings of the hearing panel were approved, and he was permanently retired with a disability rating of 100%. The rationale of the hearing panel, which is attached as enclosure (3), indicates, in pertinent part, that at the time of Petitioner's transfer to the TDRL, his back condition should have been considered at least a category II condition, which contributed to the unfitting conditions. He subsequently underwent lumbar cage fusion surgery, L3 to S1, in April 1998, and developed a neurogenic bladder, as well as unfitting depressive symptoms.

d. In correspondence attached as enclosure (2), the Director, Naval Council of Personnel Boards advised the Board, in effect, that Petitioner's lower back pain and left extremity radiculopathy, symptoms of which significantly interrelated to the fibromyalgia, should have been placed in category II rather than category III at the time of his placement on the TDRL. In the Director's opinion, the disability rating of 40% was appropriate in 1995; however, the lower back pain progressed significantly while Petitioner was on the TDRL, to the point where he required a third surgical intervention, which had the unfortunate residual of a neurogenic bladder. This resulted in an appropriate disability rating of 100% and his permanent retirement. He recommended that Petitioner's record be corrected accordingly.

f. In correspondence submitted in response to enclosure (2), Petitioner's counsel contends, in effect, that Petitioner's permanent retirement with a rating of 100% necessarily required the PEB to find that his back condition should have been initially placed in category I, and assigned a disability rating. He maintains that Petitioner should have received a 50% rating when initially considered by a formal PEB; therefore, and based on all of the submissions provided to the Board, he asks that Petitioner's disabilities be rated appropriately.

CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the comments contained in enclosure (2), the Board concludes that Petitioner suffered from a significant back condition prior to his placement on the TDRL, which was separately

unfitting and ratable, rather than merely contributing to his unfitting rheumatoid arthritis and fibromyalgia conditions. In this regard, it notes from enclosure (3) that the members of the hearing panel who evaluated Petitioner's condition in 2000 and recommended his permanent retirement with a 100% disability rating, felt that the back condition was "at least" a category II condition in 1995, which implies they believe it may have actually been an unfitting category I condition. They were not required to resolve that issue, however, because they lacked the authority to make retroactive changes in the ratings assigned in 1995. It is also notable that the Director, NCPB, indicated in paragraph 2d of enclosure (2) that "Petitioner's lower back condition appears to have at least contributed" to his unfitting conditions in 1995.

The Board concludes that doubt should be resolved Petitioner's favor, and his record corrected to show that he suffered from an unfitting intervertebral disk condition which was ratable at 20% when placed on the TDRL. The Board was not persuaded that he was entitled to separate ratings under a neurological code for the nerve root impingement and resulting leg pain, or for the neurogenic bladder, which developed following surgery he underwent while on the TDRL.

The requested corrections of Petitioner's DD Form 214 are administrative in nature, and do not require action by the Board. That portion of his request will be referred to the Commander, Navy Personnel Command, for action.

In view of the foregoing, the Board recommends the following corrective action.

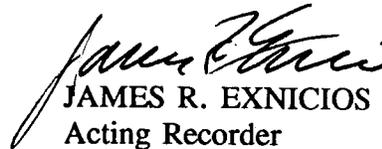
RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that when transferred to the Temporary Disability Retired List on 2 May 1995, he was assigned a disability rating of 20% under VA code 5293, for intervertebral disk syndrome, L4-S1, in addition to the 40% rating he previously received under VA code 5002 for rheumatoid arthritis and fibromyalgia.

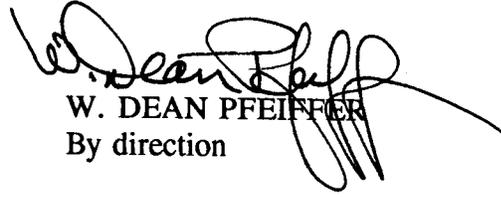
d. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

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
By direction

Reviewed and approved:



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JOSEPH G. LYNCH
Assistant General Counsel
(Manpower And Reserve Affairs)