



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

JRE

Docket No: 1011-00
14 November 2001

[REDACTED]

Dear [REDACTED]:

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 1 November 2001. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by Headquarters, U.S. Marine Corps dated 28 February 2001, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. With regard to the issue of your disability rating, the Board concurred with the rationale of the hearing panel of the Physical Evaluation Board which considered your case on 9 December 1998. A copy of that rationale is enclosed. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official

records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1741
MMSR-6
28 Feb 01

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF [REDACTED]
[REDACTED] USMCR (NOT FIRST SERGEANT)

Ref: (a) MMR Route Sheet of 15Feb01, Docket No. 1011-00
(b) SecNavInst 1820.2b

1. Reference (a) requests an advisory opinion on [REDACTED] petition to correct his record to show that he is retired by reason of physical disability in the E-8 pay grade.
2. [REDACTED] was promoted to the pay grade of E-8 on 1 April 1994. He was placed on the Temporary Disability Retired List (TDRL) in 1994 with a disability rated at 100 percent. While on the TDRL, [REDACTED] disability was determined by the Navy Medical Department to be stabilized at less than 30 percent. He rebutted the findings and requested a Formal Hearing before the Physical Evaluation Board (PEB).
3. The PEB determined that [REDACTED] disability had stabilized at 20 percent, resulting in his discharge from the TDRL. [REDACTED] then requested, and was granted, a transfer to the Individual Ready Reserve (IRR) to receive retired pay and benefits at age 60. At age 60, he can be transferred to the Retired Reserve in the grade of gunnery sergeant (E-7). Per the provisions of reference (b), he cannot be retired as a master sergeant (E-8) because he will not have the required 2 qualifying years in that grade.
4. [REDACTED] can apply for retired pay and benefits at age 60. He will then be retired as a gunnery sergeant. There is no provision of law that allows a waiver of the provisions of reference (b). Unfortunately, we must, therefore recommend that [REDACTED] petition not be granted favorable consideration. Point of contact is G. Williams, MMSR-5, 784-9306.

[REDACTED]
Head, Separation
and Retirement Branch
By direction of the Commandant
of the Marine Corps

RATIONALE:

THE MEMBER IS A 54 YEAR OLD 1STSGT, USMCR(RET) WITH ABOUT 17 AND 1/2 YEARS TOTAL ACTIVE (4 AND 1/2 YEARS) AND RESERVE (13 YEARS) SERVICE AT THE TIME HE WAS PLACED ON THE TDRL ON 1 DECEMBER 1993 WITH A DISABILITY RATING OF 100% UNDER V.A. CODE 6821 FOR THE DIAGNOSIS:

- (1) CHRONIC PULMONARY COCCIDIOIDOMYCOSIS.

ADDITIONAL DIAGNOSES THAT WERE CONSIDERED CATEGORY III CONDITIONS WERE:

- (2) OPEN-ANGLE GLAUCOMA; AND
- (3) BILATERAL UPPER HEMIANOPSIA.

THE MEMBER UNDERWENT TDRL EVALUATION 17 SEPTEMBER 1996 AT WRIGHT-PATTERSON AIR FORCE BASE AND ON 23 JUNE 1998 AT THE NATIONAL NAVAL MEDICAL CENTER. THE PEB RECORD REVIEW PANEL CONSIDERED THE CASE ON 21 AUGUST 1998 AND FOUND THE MEMBER UNFIT FOR DUTY BECAUSE OF PHYSICAL DISABILITY AND RATABLE AT 0% UNDER V.A. CODE 6835. THE MEMBER DISAGREED WITH THIS FINDING AND DEMANDED A FORMAL HEARING.

A FORMAL HEARING WAS CONDUCTED 9 DECEMBER 1998 WITH COLONEL E. G. BEINHART, III, USMC, AS PRESIDING OFFICER AND CAPTAIN R. N. BROOKS, USNR, AND CAPTAIN L. E. MCCrackEN, MC, USN, AS PANEL MEMBERS. THE MEMBER WAS REPRESENTED BY LIEUTENANT (JG) D. M. WINDER, JAGC, USNR.

THE MEMBER APPEARED AT THE HEARING REQUESTING TO BE FOUND UNFIT FOR DUTY WITH A DISABILITY RATING OF 30% UNDER V.A. CODE 6835 AND PLACEMENT ON THE PDRL. THE MEMBER ALLEGED THAT HE DEVELOPED MARKED FATIGUE WITH HIS COCCIDIOIDOMYCOSIS SUCH THAT IT FELT LIKE HE RAN INTO A BRICK WALL IN 1992; THAT HIS FATIGUE HAS PERSISTED AND IS AT TIMES SEVERE SUCH THAT HE HAD TO RETIRE FROM HIS CIVILIAN JOB WITH THE MICHIGAN HEALTH DEPARTMENT IN 1997 BECAUSE HE WAS ONLY ABLE TO WORK 4 HOURS A DAY WHERE HE HAD PREVIOUSLY WORKED 8 TO 14 HOURS PER DAY; THAT HE IS ENROLLED IN A MASTERS OF DIVINITY PROGRAM AT PRINCETON THEOLOGICAL SEMINARY AND HAD TO DROP SEVERAL COURSES LAST YEAR BECAUSE OF HIS FATIGUE; THAT HE CANNOT RUN AND CANNOT STAY AS ALERT FOR LONG PERIODS OF TIME; THAT AFTER 20 TO 30 MINUTES OF READING HE HAS TO STOP AND REST; THAT HIS GRADES ARE ONLY AVERAGE TO A LITTLE BELOW AVERAGE; THAT HE CANNOT PARTICIPATE IN THE SAME KINDS OF ACTIVITIES WITH HIS WIFE AS HE DID PREVIOUSLY; AND THAT HE HAS DIFFICULTY CLIMBING STAIRS AND GETS WINDED AFTER JUST 2 FLIGHTS OF STAIRS. TO SUPPORT HIS REQUEST THE MEMBER PRESENTED TWO LETTERS FROM HIS TREATING PHYSICIAN, DR. CAROL A KAUFFMAN, CHIEF OF INFECTIOUS DISEASE AT THE UNIVERSITY OF MICHIGAN MEDICAL SCHOOL AND THE ANN ARBOR V.A. MEDICAL CENTER, AND NON-MEDICAL EVIDENCE LETTERS FROM THE DIRECTOR OF PROFESSIONAL STUDIES AT PRINCETON THEOLOGICAL

SEMINARY, TWO FORMER CO-WORKERS IN THE MICHIGAN DEPARTMENT OF PUBLIC HEALTH, AND A FRIEND.

AFTER CAREFUL REVIEW OF ALL THE AVAILABLE EVIDENCE AND BASED ON UNANIMOUS OPINION, THE HEARING PANEL FINDS THE MEMBER REMAINS UNFIT FOR FULL DUTY IN THE U.S. MARINE CORPS BECAUSE OF PHYSICAL DISABILITY. THE RECORD DOCUMENTS THAT THE MEMBER DEVELOPED CHRONIC PULMONARY COCCIDIOIDOMYCOSIS IN 1992 THAT REQUIRED PROLONGED DRUG THERAPY, AND THAT ALTHOUGH THE DISEASE IS CURRENTLY IN REMISSION, THE MEMBER CONTINUES TO HAVE SIGNIFICANT FATIGUE THAT LIMITS HIS ACTIVITIES AND WOULD INTERFERE WITH THE ADEQUATE PERFORMANCE OF REQUIRED MILITARY DUTIES.

ALTHOUGH THE MEMBER HAS SOME SCARRING IN THE RIGHT UPPER LOBE OF THE LUNG ON CHEST X-RAY, SPIROMETRY AND DLCO WAS NORMAL WITH PULSE OXIMETRY SHOWING AN OXYGEN SATURATION OF 97% AND EXERCISE TESTING SHOWING A NORMAL PEAK OXYGEN CONSUMPTION OF 2.2 LITERS AT 89% OF PREDICTED AND CONSUMPTION PER KG BEING 27.9. LUMBAR PUNCTURE SHOWED NO EVIDENCE OF DISSEMINATED DISEASE. CBC AND SED RATE WERE NORMAL. THYROID EVALUATION WAS NORMAL, AND A PSYCHIATRIC EVALUATION SHOWED NO DEPRESSION AS A BASIS FOR THE FATIGUE. THE EVALUATION AT THE CHRONIC FATIGUE CLINIC AT THE UNIVERSITY OF MICHIGAN INDICATED THAT THE MEMBER'S CHRONIC FATIGUE APPEARED TO BE CLINICALLY RELATED TO THE EPISODE OF PERSISTENT PULMONARY COCCIDIOIDOMYCOSIS BUT DID NOT MEET THE CRITERIA FOR A CHRONIC FATIGUE SYNDROME.

SINCE THERE IS NO EVIDENCE OF RECURRENT OR ACTIVE MYCOTIC DISEASE AT THIS TIME AND NO DRUG THERAPY HAS BEEN REQUIRED SINCE 1995, THE 30% RATING UNDER V.A. CODE 6835 IS NOT ASSIGNABLE. HOWEVER, BECAUSE THE MEMBER DOES SEEM TO HAVE SOME SIGNIFICANT ACTIVITY LIMITING FATIGUE, A RATING GREATER THAN 0% IS CONSIDERED WARRANTED. THE MEMBER'S TESTIMONY INDICATED HE IS PURSUING A DIVINITY DEGREE CURRENTLY WITH AVERAGE GRADES, IS ABLE TO WALK ABOUT A MILE, CAN OCCASIONALLY PLAY A SET OF TENNIS, AND CAN CLIMB 2 FLIGHTS OF STAIRS BEFORE HAVING TO STOP DUE TO SHORTNESS OF BREATH. THIS IS CONSIDERED TO WARRANT A RATING BY ANALOGY TO CHRONIC FATIGUE SYNDROME EVEN THOUGH HE DOES NOT MEET THE CRITERIA FOR THIS DIAGNOSIS. THE DEGREE OF IMPAIRMENT IS CONSIDERED TO BE BETWEEN THE CRITERIA FOR THE 10% AND 20% RATINGS UNDER V.A. CODE 6835-6399-6354, AND WITH BENEFIT OF DOUBT TO THE MEMBER THE 20% RATING IS ASSIGNED.