



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

JRE
Docket No: 6756-99
28 August 2000

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
(2) 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 he was permanently retired by reason of physical disability.
2. The Board, consisting of Ms. Moidel and Schnittman and Mr. Bartlett, reviewed Petitioner's allegations of error and injustice on 17 August 2000 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 8 July 1994, and transferred to the Temporary Disability Retired List (TDRL), with a 30% rating for major depression and dysthymia. He completed 10 years, 8 months and 19 days active service. He underwent a periodic physical examination on 4 March 1996. In the opinion of the psychiatrists who examined him on that date, his condition had improved "somewhat", but he remained unable to perform military duty, and his condition was assessed as productive of moderate to severe interference with social and industrial adaptability. The psychiatrists noted that "[t]he patient may benefit from pharmacologic intervention; however, at present, he has declined to do so." On 30 May 1996, the Record Review Panel (RRP) of the Physical Evaluation Board (PEB) made recommended findings that Petitioner's condition was ratable at 30%, less a

20% non-compliance factor, based on his failure to take medication for the condition. On 11 July 1996, Petitioner rejected those findings and demanded a formal hearing. He advised the RRP that he had stopped taking medication because it had had no effect on his depression; however, he was "currently looking to start therapy again and maybe start taking Zoloft again." On 9 September 1996, after consultation with Judge Advocate General Corps counsel, he accepted the findings of the RRP, and withdrew his request for a hearing. On 18 September 1996, the President, PEB, requested that the Commandant of the Marine Corps discharge Petitioner with entitlement to disability severance pay. The date of discharge is not shown in available records.

d. SECNAVINST 1850.4C, paragraph 2117, provided, in effect, that a compensable disability rating may be reduced to compensate for aggravation or increase in severity of the rated condition attributed to unreasonable failure or refusal to submit to medical or surgical treatment or therapy, when the existence and degree of aggravation or increase in severity are ascertainable by application of accepted medical principles, and where it is clearly demonstrated that the member was advised clearly and understandably of the medically proper course of treatment, therapy, medication or restriction; and the member's failure or refusal was willful or negligent, and not the result of mental disease or of physical inability to comply.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board was not persuaded that Petitioner's failure to take psychoactive medication clearly aggravated his mental disorder, or caused it to increase in severity. In this regard, it noted that the psychiatrists who performed his final periodic physical examination indicated that medication "may" have improved his condition. They did not express certainty that medication would have a beneficial effect, and there is no indication in the available records that validates the conclusion of the PEB that his condition would have improved with medication by a rating factor of 20%. In addition, the Board believes that Petitioner's decision to stop taking medication may have been related to the effects of his depression, and possibly the result of mental disease. In addition, given all of the circumstances of this case, it finds the deduction of a non-compliance factor premature and unnecessarily draconian, especially given Petitioner's statement of 11 July 1996 to the effect that he would consider undergoing psychiatric and medical therapy.

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

RECOMMENDATION:

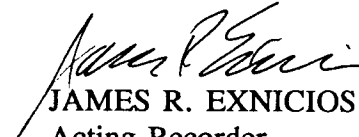
a. That Petitioner's naval record be corrected to show that he was not discharged by reason of physical disability.

b. That Petitioner's naval record be further corrected to show that he was permanently retired by reason of physical disability on the date of the discharge set aside subparagraph a., above, pursuant to 10 U.S.C. 1201, with a 30% rating under VA code 9209.

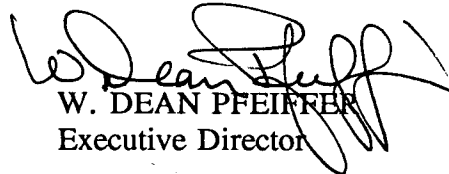
c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

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


W. DEAN PFEIFFER
Executive Director