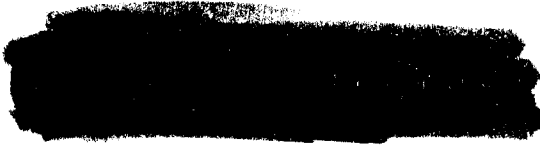





DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 7969-00
19 June 2001



Dear 

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 7 June 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 the Director, Naval Council of Personnel Boards, dated 27 March 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. 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
NAVAL COUNCIL OF PERSONNEL BOARDS
WASHINGTON NAVY YARD
720 KENNON STREET SE RM 309
WASHINGTON, DC 20374-5023

5420 IN REPLY REFER TO
Ser: 01-12
27 Mar 01

From: Director, Naval Council of Personnel Boards
To: Executive Director, Board of Correction for Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE OF
FORMER [REDACTED]

Ref: (a) Your ltr JRE:jdh Docket No: 7969-00 of 15 Dec 00
(b) SECNAVINST 1850.4D

1. This letter responds to reference (a) which requested comments and a recommendation regarding Petitioner's request for correction of his records. The Petitioner was placed on the TDRL at 60% for HIV infection in December 1997. On 21 January 2000, after reevaluation, the Physical Evaluation Board (PEB) determined that the condition was ratable at 30%. The Petitioner requests the reduction be reviewed and a higher disability rating be granted.

2. The Petitioner's case history, contained in reference (a), was thoroughly reviewed in accordance with reference (b) and is returned.

a. The following comments and recommendations are provided:

- 9 September 1997, Petitioner was medically evaluated. He had been HIV positive since July of 1993. Other than a falling CD4 count, no progressive immunologic deterioration was found. No opportunistic infections, fevers, weight loss, diarrhea or other constitutional symptoms were noted.

- On 21 October 1997, the PEB found the member to be unfit for duty and recommended a disability rating of 60%.


- 3 September 1999, the member had his TDRL evaluation. The Petitioner reported feeling well, tolerating medications and had no signs or symptoms of progressive immune deficiency. He was well developed and well nourished.

- 27 January 2000, the PEB reevaluated the Petitioner's case and reduced his disability rating to 30%.

b. There are basically two BCNR questions:


(1) First, was the initial rating of 60% correct? No, it is estimated that 95% of individuals with HIV infection show a positive serology for Cytomegalovirus (CMV) infection. This is probably the result of a CMV infection occurring early in life that has entered a latent phase. It only becomes active again as an opportunistic infection for rating purposes in patients with severely weakened immune systems (generally a CD4 level of less than 200). Fortunately, this does not appear to have occurred with the Petitioner.

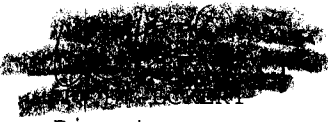
(2) Second, does the 60% disability rating require an opportunistic infection exist at the time the rating is assigned, or

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE OF


merely a history of such infection? The VA has recently clarified its guidance such as to suggest its intent was that individuals would remain ratable at the 60% or higher level under VASRD Code 6351 even if their opportunistic infection has responded to treatment. A history of an opportunistic infection would suffice for rating requirements.

3. In summary, the evidence in the record shows the Petitioner was improperly given a 60% disability rating. He does not appear to have had an opportunistic infection or history thereof related to his HIV immune deficiency. The disability rating of 30% is appropriate. Accordingly, modification to the Petitioner's record is not recommended.

4. If there are any questions, my point of contact for this case is Lieutenant , JAGC, U.S. Naval Reserve. He is available at (202)685-6399.


Director