



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

JRE  
Docket No: 8280-95  
8 May 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  
(b) SecNavInst 1900.7G

Encl: (1) DD Form 149 w/attachments  
(2) CMC Memo 1741 MMSR-6, 15 Sep 99  
(3) CMC Memo 6010 Code HS, 17 Dec 99  
(4) NCPB ltr 5420 Ser:00-005, 25 Feb 00  
(5) 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, as amended, that her naval record be corrected to show that she was awarded separation pay in accordance with reference (b), and that she receive pay and allowances for the period she was on leave awaiting separation.

2. The Board, consisting of Mses. Newman, Schnittman and Taylor, reviewed Petitioner's allegations of error and injustice on 27 April 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 entered on active duty for training on 12 June 1983 as an officer candidate. She accepted appointment as a second lieutenant, USMCR on 19 August 1983, and augmented into the Regular Marine Corps on 20 June 1986. She appeared as respondent before a Board of Inquiry on 8 and 22 April 1994. The government presented evidence to the effect that she was entered into the Weight Control/Military Appearance on 8 January

1993. She was 5'6" tall, and her weight was 176 lbs. She was advised that her reasonable weight loss goal was 29 lbs. within 8 months. The proximate cause of her overweight condition was classified as not being due to a pathological condition. Petitioner's weight had decreased to 163 lbs. by 30 April 1993, while she participating in a 43-day Level III over eaters rehabilitation program, and she maintained that loss for a short period of time; however, there was a gradual weight increase to 174.5 lbs. by 25 August 1993. A Navy psychologist, in a "To Whom it May Concern" letter dated 7 January 1994, indicated that Petitioner had been diagnosed with Dysthymia, in remission with medication (Prozac); Psychological Factors Affecting Physical Condition, obese by military standards; and Alcohol Dependence, in remission. The psychologist noted that she had seen Petitioner 27 occasions for outpatient psychotherapy since 30 April 1993. Petitioner's adherence to and compliance with her psychotherapy and Overeaters Anonymous program treatment plans were assessed as good. The psychologist felt that Petitioner had shown consistent progress in her recovery, and that her prognosis was good. A psychiatrist testified that Petitioner had been prescribed Prozac for about three and one-half years for treatment of depressive symptoms. He testified that there "...may be some indication that the medication itself causes weight gain, unrelated necessarily to what they're eating. That has certainly been true of the older antidepressants." He acknowledged that he had limited experience in prescribing Prozac, and indicated that none of his other three patients who were taking that medication complained of weight gain. He stated that Petitioner had an eating disorder, and that he did not know if the use of Prozac was associated with Petitioner's weight gain. Petitioner called a psychiatrist who testified to the effect that he had prescribed Prozac to numerous patients and participated in a study of the effects of Prozac sponsored by its manufacturer. In his experience, the use of Prozac beyond six months by a "substantial minority" of patients was associated with dose-related complaints of gradual weight gain or, more commonly, an inability to lose weight gained during the period of use. When asked if weight loss would be facilitated by substituting another anti-depressant, he indicated that it was problematic, because one had to evaluate the risk/benefit ratio of "taking them off the medicine with the idea of losing weight versus their having a relapse of their depression." The witness was advised that Petitioner had lost 11 lbs. while in the level III treatment program, and gained it back upon her release from the in-patient portion of the program. He stated that it was not uncommon for someone to make heroic attempts and lose weight acutely and then gain it back, despite best efforts to maintain the weight loss. A second psychiatrist called by Petitioner testified, in effect, that he had prescribed Prozac for several hundred patients. Many patients lost weight initially, but began to gain weight after 6 to 12 months of use, and commonly gained 10-15 pounds per year. In his opinion, weight control was very difficult for those patients, and that "...it would take degrees of deprivation that are not...the right way to live and deprivation that tends to cause compensatory break-through binging in order to control it. And even then it may not." It was his theory the use of Prozac caused weight gain, although that effect had not been substantiated by scientific studies. Concerning Petitioner's 11 lbs. weight loss while in the level III program, he noted that only about 8 lbs. of that loss was "real" (as opposed to water loss) during the intensive phase of the program, and the reason for the loss "depends on what the structure was and how did they do it." A pharmacologist was called by the recorder, and testified to the effect that she did not see any correlation between Petitioner's

weight gain and her use of Prozac. In response to a question from Petitioner's counsel to the effect of whether Petitioner would be successful in losing weight if she discontinued the use of Prozac, a pharmacologist testified to the effect that Petitioner's dosage was being reduced gradually, and that she had displayed a "positive trend". Petitioner's counsel requested that the board of inquiry retain her on active duty in the weight control program, and that her medications be adjusted.

d. On 22 April 1994, a two-member majority of a Board of Inquiry determined that Petitioner failed to conform to prescribed standards of weight, and recommended that she be separated from the Marine Corps with an honorable discharge by reason of substandard performance of duty on that basis. A minority of the Board of Inquiry found that although Petitioner was not within prescribed Marine Corps weight standards, there may have been medical reasons for her failure to meet the standards, and he recommended that the case be referred to the Physical Evaluation Board. In the minority's opinion, the question of "whether or not there are any medical causes for her condition has not, in my opinion, been adequately addressed." On 14 June 1994, in the first endorsement to the findings and recommendation of the Board of Inquiry, the general court-martial convening authority advised the Secretary of the Navy, via the Commandant of the Marine Corps, that in his opinion, there was no compelling evidence that Prozac caused Petitioner's weight gain. Further, he noted that her chronic depression had been controlled by Prozac for four years; she was physically fit and had no problem passing the PFT; a review of her OMPF revealed her fitness reports were competitive and she had no problems functioning in any billet she had held; she had completed an unaccompanied tour to Okinawa; and that after a period of over two years on Prozac, she entered in a level III treatment program, and despite continuing to take Prozac, was able to lose 11 pounds in a six week controlled environment. Petitioner entered into a terminal leave status on 28 September 1994, and was honorably discharged by reason of substandard performance on 20 October 1995. She completed 12 years, 4 months and 8 days of active duty service.

e. In correspondence attached as enclosure (2), the Board was advised by the Head, Separation and Retirement Branch, Headquarters, U.S. Marine Corps (HQMC), in effect, that Petitioner was discharged for substandard performance, which "in accordance with reference (b) does not qualify her for separation pay." He also indicated that prior to her discharge, Petitioner was placed on terminal leave to remain in a pay status until the expiration of her unused leave. Her request for pay for the period prior to her discharge should be addressed by the Defense Finance and Accounting Service as a matter under that agency's cognizance. He recommended denial of her petition, but recommended medical and legal review of her contentions concerning the effects of Prozac.

f. In correspondence attached as enclosure (3), the Board was advised by the Medical Advisor to the Commandant of the Marine Corps, in effect, that there is conflicting evidence for weight gain as a consistent side effect of the use of Prozac; however, he did not believe resolving that question was central to the medical disposition of the case. In his opinion, Petitioner was suffering from a psychological condition with psychological factors affective

physical condition, obese by military standards, and that a more appropriate disposition would have been referral to the PEB, vice a board of inquiry. He recommended that the case be referred to the PEB to determine Petitioner's eligibility for disability separation.

g. In correspondence attached as enclosure (4), the Board was advised by the Director, Naval Council of Personnel Boards, in effect, that Petitioner's records do not support a medical disability separation. He noted that the use of Prozac has been associated with weight gain in a relatively small number of patients. While Petitioner may have been in the minority, there is insufficient evidence to support the opinion that "this adverse influence was so mitigating as to render her helpless to cooperate with her Over Eaters Treatment Program." Her weight gain does not appear to have impaired her active duty performance to a separately unfitting degree. Her records and other documentation support the conclusion that she was properly discharged for weight control failure and therefore he recommends her petition be denied.

h. SECNAVINST 1900.7G, paragraph 8(a)(8), provides, in effect, that officers not fully qualified for retention who meet basic eligibility criteria for non-disability separation pay, i.e., honorable characterization of service, at least five years of active duty, and agreement to complete a three year reserve obligation, or constructive credit therefor if not eligible for reserve appointment, are limited to one-half separation pay if separated by reason of substandard performance of duty by reason of failure to conform to prescribed standards of weight. Paragraph 8b provides, in effect, that the Secretary of the Navy may award full separation pay to members separated under the conditions in paragraph 8a, in extraordinary instances when the specific circumstances of the separation and overall quality of the member's service have been such that denial of such pay would be clearly unjust. As an example, a member with a congenital or hereditary disease who is involuntarily separated for the convenience of the government might be considered for full separation pay as an exception. Paragraph 9n provides, in effect, that officers involuntarily separated for cause by reason of substandard performance of duty, misconduct, or moral or professional dereliction, or who have been notified in writing to show cause for retention and subsequently request separation for such reasons, are not eligible for separation pay, except when half pay is allowed under paragraph 8.

#### CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the comments contained in enclosures (2) and (4), the Board concludes that relief is warranted in this case.

The Board believes that the weight gain and difficulty losing weight which Petitioner experienced during the latter part of her career in the Marine Corps were related to her depressive disorder and treatment with an antidepressant drug. Although the depressive disorder was in remission and did not render her unfit to perform her duties, she continued

to require antidepressant medication, which, together with residual depressive symptoms, adversely affected her ability to conform to Marine Corps weight standards. The fact that Petitioner was able to lose weight while enrolled in a level III treatment program was not considered evidence that her weight problem was caused solely by her consuming more calories than she expended. As indicated by a witness at her Board of Inquiry, individuals who want to lose weight may make heroic efforts to do so for short periods of time, and then relapse in response to the deprivation experienced during the period of extreme weight loss effort. The Board believes that this is what occurred in Petitioner's case. The Board does not excuse Petitioner's failure to conform to weight standards, or conclude that her discharge was erroneous, but it finds that the failure was significantly mitigated by her depression and required treatment for that condition. The Board finds Petitioner's situation analogous to that of a service member who has a physical condition or limitation which makes it difficult to or prevents the member from passing a portion of the physical fitness test, yet does not render the member unfit by reason of physical disability. In cases such as that, the member may be discharged by reason of a condition, not a disability, interfering with the performance of duty. The Board believes that such would have been a more appropriate basis for discharge in this case than was substandard performance of duty.

With regard to the issue of entitlement to separation pay, the Board disagrees with the comments of the Head, Separation and Retirement Branch, HQMC, that Petitioner is not entitled to separation pay because she was discharged by reason of substandard performance. It concludes that she was entitled to one-half separation pay under the provisions of paragraph 8b of reference (b). The Board further concludes that given Petitioner's outstanding performance of duty apart from her failure to conform to weight standards, and the mitigating factors noted above, it would be in the interest of justice for the Secretary to award her full separation pay.

The Board notes that Petitioner did not make any contentions of error or injustice in connection with her terminal leave and entitlement to pay and allowances during that period. There is no indication in the available records that Petitioner was placed in a leave status involuntarily, or that she did not know that her pay and allowances would stop as soon as she had expended her earned leave. The Board was not persuaded that the extended delay in effecting her discharge amounted to material error or injustice. Accordingly, the Board was unable to recommend any corrective action with regard to her pay and allowances entitlement.

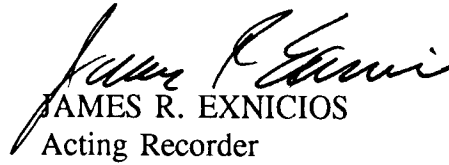
In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

#### RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that she was honorably discharged on 1 November 1995 by reason of condition, not a disability, interfering with the performance of duty, with entitlement to full separation pay in accordance with


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

Reviewed and approved:

JUN 14 2000



CHARLES L. TOMPKINS  
Deputy Assistant Secretary of the Navy  
(Personnel Programs)