



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

JRE
Docket No: 8355-01
30 October 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 27 September 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 21 June 2001, a copy of which is attached, and your rebuttal thereto.

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. The Board reviewed the original rating documents filed with your disability evaluation proceedings, it was clear to the Board that the initial rating assigned by the Physical Evaluation Board, prior to your transfer to the Temporary Disability Retired List, was under VA code 8025-7203, rather than 8025-7003, and that a typographical error was made when the hand written rating was transcribed. A hyphenated rating was assigned because the your condition was rated based on its residual effects, of which esophageal dysfunction was the most prominent. The Board rejected your unsubstantiated contentions to the effect that you did not receive the effective assistance of counsel during your disability evaluation process.

The fact that the VA rated several conditions not rated by the Navy was not considered probative of the existence of error or injustice in your Navy record. In this regard, the Board noted that the VA assigns disability ratings without regard to the issue of fitness for military duty, whereas the military departments rate only those conditions which render a

service member unfit for duty. The VA assigned you ratings for migraine headaches, hypertension, and osteoarthritis of multiple joints as separate entities, and not as conditions caused by or otherwise related to your myasthenia gravis (MG). As those conditions did not render you unfit for duty, they were not ratable by the Department of the Navy.

It is clear that many of the conditions rated by the VA, which you contend are related to the MG, began years before you were diagnosed as suffering from MG. The Board noted that when you underwent a pre-enlistment physical examination on 26 September 1980, you had a body mass index of about 31, which falls in the lower end of the obese range. Your blood pressure was recorded as 146/80 mm Hg, which is borderline high, and that you were required to undergo serial blood pressure readings prior to being found qualified for enlistment. On 4 March 1981, while a student Officer Candidate School, you were classified as obese, and instructed to limit your daily caloric intake. During the rest of your active duty career, you had elevated or borderline high blood pressure readings from time to time, and you remained overweight, with the possible exception of brief periods when you lost weight in order to avoid administrative separation processing for failure to comply with body weight standards. Following your release from active duty and transfer to the TDRL, you were no longer required to maintain your weight within reasonable levels, and it increased substantially. The Board rejected your contention that your use of corticosteroid medications caused you to gain weight, which in-turn aggravated your arthritis. In this regard, it noted that steroid associated weight gain is generally attributable to increased appetite, which is controllable. You were unsuccessful in controlling your weight, and ultimately elected to undergo a gastric by-pass procedure in order to limit your caloric intake. Although your excessive weight contributed to your fatigue, as well as the pain in your weight bearing joints, it cannot be attributed to your use of medication.

With regard to the osteoarthritis, the Board noted you had sustained a lower back injury prior to enlisting in the Navy, which was treated with bed rest. It is notable that you concealed that history when you completed a Standard Form 93, Report of Medical History, on 26 September 1980, in connection with your enlistment. You disclosed the injury and treatment when seeking treatment for a back injury you suffered in an automobile accident on 9 August 1985. Thereafter, you complained of spinal pain which extended from your neck to your lower back, and radiated into your right upper leg, thigh and knee, and caused numbness in your right foot. Degenerative changes were noted several years later in multiple joints, and your condition has continued to worsen and spread to additional joints since that time. The Board concluded that had the PEB had found your arthritis to be unfitting as of 1 October 1994, it is unlikely that you would have received a substantial rating for that condition, because substantial deductions would have been taken from the rating for non-compliance with medical advice to control your weight, which exacerbated your condition.

The Board agreed with your contention that rating guidance for VA code 8025 provides that when a rating in excess of the minimum is assigned, it is exceptionally important that the diagnostic codes utilized as bases of evaluation be cited in addition to code 8025 however, it disagrees with your conclusion that VA rating officials followed that guidance. VA rating officials did not specify any additional codes, and they assigned you a 50% rating for MG

based on the nebulous reason that they "...felt that a 50% evaluation properly" reflected the extent of disability caused by the MG. Allied rating documents you submitted do not provide a clear basis for their choice of that rating.

The Board was not persuaded that your MG condition was unstable when you were permanently retired. It noted that your condition was largely quiescent at that time, and that there has been no significant increase in the severity of the MG since then. The fact that you still require medical therapy, and faced the possibility that your condition might worsen at some time in the future, do not demonstrate that the MG was unstable or that you should have been retained on the TDRL for the maximum permissible period. There is no basis for concluding that you would have received an increased disability rating had your retirement been deferred to 1999.

The Board carefully considered the statements of Drs. Freeman and Leshner, and concluded that they do not support the conclusion that you were severely impaired by your MG condition. Dr. Freeman classified your MG as "severe", but noted that was well controlled by medical therapy. His opinion appears to have been based in large part on the potential consequences of your disease, rather than objectively demonstrated and verified symptoms. Although the possibility that you might experience life threatening crises in the future is one of the primary reasons you were found permanently unfit for duty, the mere possibility of a future crisis is of little or no rating significance. Dr. Freeman described what can be characterized as trivial to mild symptoms of MG, such as "some difficulty swallowing" on days when you were off prednisone, "somewhat slurred" speech, and eyelid droop which had been noted with repetitive eye movement. His claims that the MG significantly affected you arms and legs was vitiated by his observation that such effects were "often not easily discernible in a point-in-time examination". He addressed the issue of fatigue, but did not discuss the contribution of your obesity to that fatigue. Dr. Leshner felt that you deserved more than the minimum rating for MG because you remained on high doses of medication, but admitted that he did not fully understand the military disability evaluation system. He also noted that when he examined you in February 1997, your MG was well controlled, but that you had "residual fatiguable weakness" at that time. The report of the February 1997 examination by Dr. Leshner indicates that you were close to clinical remission at that time, and that he was loath to make any changes in a treatment regimen which had been "so successful" in controlling your disease. He noted that should "minor exacerbations ensue", he would consider minor adjustments in your medication. He demonstrated his ignorance of the rating principles applicable to the military disability evaluation system when he indicated that he would support a continuation of a 50% rating for MG until "he enjoys 'true myasthenic remission', i.e., elimination of virtually all symptoms while on no immuno-suppressive medications."

The statements from your co-workers indicate that you are impaired in your work environment by a variety of symptoms; however, it appears that most, if not all, of your symptoms can be attributed to the effects of your excessive body weight and osteoarthritis, which were not unfitting, and do not appear to be causally related to the MG.

In view of the foregoing, 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
720 KENNON STREET SE STE 309
WASHINGTON NAVY YARD DC 20374-5023

5240
Ser: 01-21
21 Jun 01

IN REPLY REFER TO

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

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

Ref: (a) Your ltr JRE:jdh Docket No: 8355-00 of 15 Mar 01
(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 contends his condition warranted a disability rating of 80% vice the 30% disability rating he received.

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

a. The Petitioner was discharged from the U.S. Navy and placed on the TDRL on 1 October 1994 with a 50% disability rating under V.A. Code 8025-7003 for Myasthenia Gravis generalized and severe Bulbar weakness and Dysphagia secondary to the Myasthenia Gravis.

b. The Petitioner in his BCNR application raises a number of issues regarding the representation he received from his assigned PEB Counsel. His Counsel was provided by the Naval Legal Service Office North Central. Issues regarding representation should be addressed by that command. The only issue of substance presented by the Petitioner that is addressable by this office is whether the specific data documented in his record supports the 2 September 1997 PEB determination.

c. The PEB originally placed the member on the TDRL based on VASRD Code 8025-7003 and granted him a disability rating of 50%. On 29 July 1997, a Hearing Panel was convened to hear the Petitioner's case. The Hearing Panel determined that the Record Review Panel in April of 1994,

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which granted the Petitioner a disability rating of 50% under V.A. Code 8025-7003, had made an error since a disability rating of 50% is not available under that code. In addition, V.A. Code 8025-7003 is for Pericardial Adhesions and restrictions that were not present in the Petitioner's case.

d. The Record Review Panel's use of 8025-7003 was likely the result of a transcription error. The correct V.A. Code for the Petitioner's condition is 8025-7203 for Esophageal Dysfunction. The Hearing Panel made the proper decision in correcting and reducing the Petitioner's disability rating to 30%. The Petitioner's record does not identify ratable residuals of sufficient magnitude as to combine in a rating greater than the 30% awarded. The record indicates the Petitioner was able to function reasonably well despite the frustrations normally associated with Myasthenia Gravis.

3. In summary, the Hearing Panel made the proper determination in reducing the Petitioner's disability rating. The Petitioner's record does not contain sufficient evidence to support any increase in his disability rating. At this time, no change is recommended for Petitioner's record.

[REDACTED]
Director