



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

ELP  
Docket No. 1348-02  
22 May 2002

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C.1552  
(b) 10 U.S.C.12686  
(c) CMC WASH DEC 071232Z AUG 97 (ALMAR 251/97)  
(d) MCO P1001R.1J

Encl: (1) Case Summary  
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former officer in the Marine Corps applied to this Board requesting, in effect, reinstatement to active duty with his Regular Marine Corps commission as of 13 March 1992; backdating of his promotions to major (MAJ; 0-4) and lieutenant colonel (LTCOL; 0-5) and consideration for promotion to colonel (COL; 0-6); a complete and unbiased physical examination along with all necessary medical treatment prior to referral to a medical board, and retention on active duty until all of his medical needs are met; and constructive service necessary to complete a 20-year active duty retirement. He further requests that all Marines who worked for him in Southwest Asia on the Expeditionary Airfield (EAF) Stabilization Project 2000 be reconsidered for achievement awards, and that the Secretary of the Navy and the Commandant of the Marine Corps apologize to his wife and family for the emotional stress they have endured over the past 11 years due to the failure of medical authorities to recognize the seriousness of his medical condition.

2. The Board, consisting of Messrs. Bishop, Morgan and Neuschafer, reviewed Petitioner's allegations of error and injustice on 1 May 2002 and, pursuant to its regulations, determined that the partial 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. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner first enlisted in the Marine Corps Reserve on 5 March 1973 for six years. He reported to active duty for training (ADT) on 15 July 1973 and, four days later, he was found not physically qualified for service. His ADT was terminated on 20 July 1973 and he was discharged from the Marine Corps Reserve on 10 August 1973 due to an internal derangement of the left knee.

d. Petitioner again enlisted in the Marine Corps Reserve on 12 May 1977 for six years and reported to Officer Candidate School on 12 June 1977. The medical record reflects that on 20 July 1977 he hyperventilated after physical training and complained of a severe headache and numbness in both arms. He was seen by medical personnel on 25 July 1977 for an injury he sustained while running, and again on 29 July 1977 for shoulder pain after he slipped and fell on his left shoulder. The medical record reflects Petitioner fell off a rope on 5 August 1977, but was made to climb up the rope despite a painful left shoulder. However, he was commissioned a second lieutenant (2NDLT; O-1) on 19 August 1977.

e. On 26 August 1977 it was determined that Petitioner had fractured his left shoulder and would be unable to continue in The Basic School until October 1977, when a new company would be formed. Petitioner was followed by the orthopedic clinic and was recommended for full duty on 6 October 1977.

f. During the next two years, Petitioner was seen for various medical problems that included blurred vision, headaches, foot pain, dermatitis, and left shoulder pain and numbness. He was admitted to a naval hospital on 20 November 1979 for acute appendicitis and was discharged from treatment on

24 November 1979. Petitioner was promoted to first lieutenant (1STLT; O-2) on 26 April 1980 and was accepted for augmentation in the Regular Marine Corps. He was found physically qualified for transfer on 20 October 1980.

g. The medical record indicates that during the next five years, Petitioner was seen by medical personnel for a variety of injuries and ailments. During this period, he was also promoted to captain (CAPT; O-3).

h. On 15 October 1985, Petitioner had an electro-encephalogram (EEG) for right-sided headaches and vague right body dysesthesia. The EEG was normal, with nothing to support any clinical suspicion of a seizure disorder, or focal or generalized brain disease.

i. Petitioner was awarded the Navy Commendation Medal (NCM) for meritorious service for the period from July 1985 to July 1988. He was awarded the Navy-Marine Corps Achievement Medal (NAM) for his service as officer in charge of a runway rehabilitation detachment for the period 24 April to 28 December 1989.

j. On 30 July 1990, while in Saudia Arabia, Petitioner complained of persistent pain and intermittent numbness in his left shoulder. He was medically transferred back to the United states on or about 22 October 1990 and sent to a naval hospital for vascular surgery and orthopedic consults. The transfer fitness report on file in the record for the period ending 22 October 1990 is mostly illegible, but the first page shows Petitioner was marked outstanding in all categories except for "endurance" and "military presence." The reporting senior's comments, also partially illegible, noted that Petitioner departed Saudi Arabia in October to receive necessary medical treatment, his vacancy was not easily filled, and that he always gave 110% in performance.

k. The medical record indicated that Petitioner was due to separate on 1 December 1990. However, his multiple medical complaints of chronic left shoulder pain and history of vague neurologic/vascular episodes required medical evaluation and some sort of treatment prior to discharge. The examining doctor stated that he would request Petitioner be extended on active duty pending evaluations and a possible medical board. A computerized tomography (CT) scan of the chest on 13 December 1990 showed a soft tissue density mass, anterior to the aortic

arch in the region of the thymus. The impression was anterior mediastinal soft tissue density mass, the exact etiology of which was unclear.

l. On 14 December 1990 a medical board diagnosed Petitioner with a probable thoracic outlet syndrome of the left arm and probable post-traumatic arthritis of the left shoulder, and recommended a period of limited duty. The Commandant of the Marine Corps (CMC) approved the medical board and restricted the limited duty to a period not to exceed six months. On 5 March 1991 Petitioner was referred for evaluation to rule out a neuro-impingement or abnormality. The electromyography (EMG) and nerve conduction velocity (NCV) testings were within normal limits. On 11 June 1991 CMC advised the command that Petitioner would be discharged unless he was confined to a hospital as an inpatient or had disability proceedings pending before a physical evaluation board (PEB). At the direction of CMC, Petitioner's medical records were forwarded to the PEB.

m. On 11 June 1991 CMC directed Petitioner's discharge on 1 July 1991 due to failure of selection for promotion to MAJ, and advised him that he would have to sign a written agreement to serve in the Ready Reserve for three years in order to receive separation pay. On 12 July 1991 the command advised CMC that Petitioner was pending disability proceedings before a PEB, was undergoing treatment, and requested that the orders be modified until 30 September 1991 to provide adequate time for completion of the PEB.

n. Petitioner sought emergency treatment on 20 July 1991 for severe back and neck pain and again on 13 August 1991 for numbness and pain on his left side, and cold and hot sensations in his head. On 16 August 1991 CMC was advised that Petitioner had undergone a spinal tap and would have to be reevaluated by a vascular surgeon when neurological test results were available. Accordingly, CMC authorized that Petitioner's discharge be held in abeyance.

o. On 26 September 1991 a second medical board found the that Petitioner had been treated in multiple clinics including neurology, physical medicine, orthopedics, vascular surgery, psychiatry, and the pain clinic. He had been evaluated by the neurology clinic multiple times and all neurological examinations and EEGs were normal. During limited duty, he underwent a cranial magnetic resonance imaging (MRI). This showed a single unidentified bright object in the subcortical

white matter. However, the appearance of the MRI was not consistent with demyelinating disease. Numerous other tests were all normal. The medical board further noted that his many symptoms of headache and left-side sensory symptoms could be explained as part of a complicated migraine syndrome. During the period of limited duty, he became increasingly unable to exercise. He was also diagnosed with an adjustment disorder and tentatively diagnosed with myofascial pain syndrome. The medical board opined that Petitioner's problems with continued left shoulder pain and continued headaches prevented him from performing full duty in the Marines, and resolution was not anticipated in the near future. He was referred to a PEB with diagnoses of complicated migraines, probable myofascial pain syndrome, and an adjustment disorder with mixed emotional features. Additional diagnoses were to be rendered by orthopedics and vascular surgery. Petitioner was advised of the medical board's recommendation on 10 October 1991, and he declined to submit a rebuttal to the medical board.

p. On 18 October 1991 an addendum to the medical board stated that Petitioner had undergone an extensive work-up for possible thoracic outlet syndrome or post-traumatic arthritis in the left shoulder. However, there was no clearcut evidence of thoracic outlet syndrome in the left upper extremity. A second addendum on 24 October 1991 diagnosed post-traumatic left shoulder pain. The medical board opined that there was no evidence of instability, rotator cuff tear or a labral tear that could be treated with surgery, and that it was unlikely Petitioner's left shoulder pain probably would not improve since there had been no change in the past 13 years. On 11 November 1991 Petitioner submitted a rebuttal to the medical board, however, the recommendation of the medical board remained unchanged. On 20 November 1991 the PEB found Petitioner unfit for duty with a 10 percent disability rating for the migraines, the syndrome, and the adjustment disorder.

q. On 3 December 1991 Petitioner was notified of the PEB findings and given 15 days to respond. In a letter to Petitioner on 11 December 1991, the commanding officer (CO) of the naval hospital indicated that Petitioner initially declined to rebut the medical board findings, but had since changed his mind after reviewing the addendum, and that appropriate personnel had failed to advise him that he had five days to rebut the addendums. As a result, the addendums were forwarded without his rebuttal, two days in advance of the submission deadline. The CO stated that the PEB was called to ensure that

Petitioner's rebuttal had been received and considered. Upon advice from the PEB, the dictating doctors reviewed his rebuttal and submitted their surrebuttals, directing no changes in the addendum reports. Petitioner's rebuttal and the doctor's surrebuttals were faxed in time for the PEB's consideration.

r. On 17 December 1991, Petitioner did not accept the preliminary findings and demanded a formal hearing. Counsel for Petitioner then requested that a scheduled hearing on 22 January 1992 be delayed until 24 February 1992, so Petitioner could obtain additional medical evidence. However, on 30 January 1992 Petitioner accepted the PEB findings of unfit with a 10 percent disability rating.

s. On 11 February 1992, the Deputy Naval Inspector General for the Marine Corps (DIGMC) responded to Petitioner's letter to the Secretary of the Navy (SECNAV) concerning complaints of being denied a request mast, institutional bias, and improper medical treatment. The DIGMC stated that applications for request mast with CMC or SECNAV will only be considered if specifically recommended by the last command endorsing the application, and that his request mast with the commanding general, 3rd Marine Aircraft Wing in February 1991 had satisfied the regulatory requirements. His allegations of fraud, waste and abuse were determined to be unfounded. His allegation of institutional bias was based on the Marine Corps' intent to involuntarily separate him for having twice failed selection for MAJ. The DIGMC stated that there was no evidence to support Petitioner's claims that he was denied proper medical treatment, and noted that CMC had assured his wife that the Marine Corps would defer discharge until Petitioner's medical status could be resolved. The CMC also addressed the promotion issue and stated that he did not know why Petitioner was not selected for MAJ since the selection board's findings and deliberations could not be discussed with anyone who was not a member of that board. The DIGMC further stated that Petitioner's command had deferred discharge pending a formal hearing before the PEB, but he later accepted the PEB findings without a hearing.

t. CMC advised SECNAV that Petitioner had been found physically unfit for duty with a 10% disability rating. A "not observed" fitness report for the period 20 December 1991 to 29 February 1992 states that Petitioner had been released from active duty following failure of selection to MAJ. A report of physical examination on 10 March 1992 stated that Petitioner was physically qualified\* for separation, and the PEB had approved

his discharge due to vascular headaches and left shoulder instability. In the report of medical history completed by that Petitioner, he marked "don't know" to the question "have you ever had or have you now heart trouble." On 12 March 1992 Petitioner was honorably discharged by reason of physical disability and was paid \$77,608.80 in disability severance pay. However, it does not appear that he received an Honorable Discharge Certification (DD Form 256).

u. On 28 August 1992 Petitioner accepted an appointment as a CAPT in the Marine Corps Reserve. His application for membership in the Selected Marine Corps Reserve was favorably endorsed on 6 October 1992. At that time, the CO claimed that Petitioner met the physical standards required by regulation. However, the medical problems which led to his earlier discharge continued. Department of Veterans Affairs (DVA) records show that in December 1992 Petitioner had CT scans of his head and chest which revealed no vascular abnormality, but a low density mass in the superior mediastinum. In August 1993, DVA awarded Petitioner a combined 30% disability rating for degenerative joint disease (10%), residuals for fracture of left scapula (10%), and complex migraine (10%).

v. Petitioner was promoted to MAJ in December 1993. Despite his medical problems, he accumulated numerous periods of active duty for annual training (AT) and active duty for special work (ADSW). His fitness reports consistently rated him as an outstanding officer. He was awarded a second NAM for superior performance of duty during a fleet exercise from 28 May to 16 July 1994. In the fitness report covering this period, the reporting senior stated Petitioner was an extremely competent, astute professional, and one of the finest officers with whom he had ever worked. The NAM certificate noted that he had worked numerous days without pay or drill credit. In August 1996 he underwent implantation of a pacemaker due to a diagnosis of neuro-cardiogenic syncope. On 14 July 1998 he was awarded his third NAM for superior performance of duty from 1 March to 10 July 1996 as a special projects officer for Marine Aircraft Group Detachment 46.

w. Orders dated 28 July 1998 assigned Petitioner to ADSW from 20 July 1998 through 20 April 1999. A copy of the orders provided by Petitioner shows he did not endorse them until 21 October 1998. The orders directed Petitioner to report to the nearest medical facility for a physical examination. He accepted the conditions of the orders, and purported to waive

the provisions of law providing sanctuary to reservists with over 18 years of active service, provided by subsection (a) of reference (b). Petitioner provides no evidence that he reported to a medical facility for a physical examination. He was promoted to LTCOL; O-6, effective 1 October 1998. The mediastinal mass which had been enlarging for several months had an aggregate size of 6X6X5 centimeters and was benign when it was removed on 15 December 1998.

x. On 21 April 1999 orders were issued extending Petitioner's current ADSW until 2 July 1999. Petitioner endorsed the orders on 22 April 1999, certified that he had no injury or illness that prohibited execution of the orders, and waived the sanctuary protection afforded under reference (b). On 21 May 1999 CMC notified Petitioner that he was eligible to receive Reserve Retired Pay at age 60. On 22 July 1999 he was awarded a second NCM for superior performance of duty from April 1998 to July 1999. The certificate stated that his superior performance had saved the Marine Corps in excess of one million dollars. On 27 July 1999 he was honorably released from active duty upon completion of the period of ADSW, as extended. The Certificate of Release or Discharge from Active Duty (DD Form 214) issued at that time shows his total period of active service was 17 years, 10 months, and 20 days.

y. A DVA rating decision dated 8 August 2000 shows Petitioner's combined rating for multiple disabilities had increased to 70%.

z. In support of his application, Petitioner provides copies of his medical records and a medical history, excerpts from the Cecil Textbook of Medicine, medal certificates, copies of AT and ADSW orders, documentation relating to the EAF 2000 project, and an IG report. He contends that he only accepted the findings of the PEB because he was told that he could only submit medical evidence from Navy doctors, and if he appeared before a formal PEB he would be found fully qualified and discharged due to failure of selection. He also says that the circumstances surrounding his rebuttals to the PEB indicate noncompliance with medical board procedures, there was undue command influence on the medical board, the senior medical officer was unwilling to sign the medical board because of unanswered questions, and that he was never issued a discharge certificate in March 1992. Petitioner also asserts that numerous doctors failed to recognize that he had suffered a number of minor strokes resulting in brain damage, as confirmed



by a Navy MRI, by DVA, and by civilian MRIs and a CT scan. He points out that DVA records show that he had a heart block within months of being released from active duty, and a complete block while undergoing tests with a civilian doctor which required an implant of a pacemaker. He further asserts that Navy doctors either ignored or failed to recognize the seriousness of the chest mass, which impinged on the heart and caused dizziness, blackouts, restricted blood flow to the heart, and damage to the heart. He contends that his concerns regarding his heart were never addressed, and states that he is alive today only because the law required three years service in the reserves in order to receive severance pay.

aa. With regard to the EAF project, Petitioner appears to imply that it was a contributing factor in his failure to be selected to MAJ. He claims that a number of senior officers believed that the Marine Corps was "heading the wrong way" with the EAF concept, wanted it to fail, and were determined to find an officer that could be discredited. He asserts that he unknowingly became that officer, and when he refused to cooperate, he was referred for a psychological evaluation, which determined that all of his medical problems were psychosomatic. He provides documents showing he sought assistance from the DIGMC, who found his allegations regarding the EAF project were unsubstantiated. As a result, he claims the service award he was to receive for his work in Southwest Asia and at 29 Palms, and those awards recommended for the Marines who worked for him, were denied because of poor performance, even though the CO agreed that awards were warranted.

bb. Petitioner further contends that it was normal practice in his assigned reserve unit to be issued vocal orders followed by written orders, often after the active duty period had ended. He states that he was often at the mercy of the group executive officer, who decided if he would be issued orders and paid. He claims that his ADSW orders of 28 July 1998 were not received until October 1998, and by this time he already had over 18 plus years of active service. He believes that one cannot sign away his sanctuary rights after already earning the right to sanctuary. He asserts he is entitled to active duty retirement under reference (b).

cc. Attached to enclosure (1) are two advisory opinions from Headquarters, Marine Corps (HQMC). On 17 May 2001, HQMC's Separation and Retirement Branch (MMSR) provided an advisory opinion and a "Statement of Service" which shows that on 27 July

1999, Petitioner had completed 18 years, 5 months, and 21 days of active service. MMSR states Petitioner participated in at least 26 periods of AT and ADSW from 5 June 1993 to 27 July 1999 and his own records indicate a fitness for duty statement in the endorsement portion of each of the orders he provided. MMSR also asserts that there was no requirement for Petitioner to perform any further service after the discharge on 12 March 1992. MMSR notes that the HQMC Staff Judge Advocate (SJA) has recently ruled that a Marine who allowed himself to be released from a period of active duty in which he attained sanctuary, waived the right to sanctuary. Accordingly, MMSR contends that Petitioner waived his right to sanctuary when he allowed himself to be voluntarily released from active duty on 27 July 1999. Since he was released from active duty, he is not eligible for review by a PEB. MMSR recommends that Petitioner not be granted sanctuary rights.

dd. On 28 January 2002, the SJA to CMC provided an advisory opinion stating that Petitioner was entitled to claim sanctuary when he passed 18 years active duty while on ADSW orders during 1999. The SJA analyzes the issues as follows:

.... (1) On or about 20 May 1999, Petitioner accumulated 18 years of active duty service. Therefore, on 27 July 1999, he had over 18 years active duty service and was entitled to sanctuary protection per section 12686 of reference (b)....

(2) Congress amended section 12686 of reference (b) in 1996, and permitted SECNAV to require, as a condition for orders to active duty (other than training) for 179 days or less, a waiver of the right to claim sanctuary. Prior to the amendment's effective date (23 September 1996), SECNAV could authorize waiver of the sanctuary protection. As of 27 July 1999, SECNAV authorized neither the Marine Corps nor the Navy to waive sanctuary protection.

(3) References (c) and (d) permit sanctuary waiver and generally require insertion of the waiver in ADSW orders of Marines who have over 17 years active duty. However, as noted, waiver authority was not delegated to the Marine Corps, and implementation of waiver as provided in references (c) and (d) may be legally unenforceable.

(4) Further, although Petitioner signed a sanctuary waiver in the ADSW orders of 21 October 1998, this waiver

was invalid per section 12686 of reference (b), since the orders were for a period in excess of 179 days. When Petitioner was released on 27 July 1999 he had accumulated more than 18 years of active service.

(5) Petitioner's DD Form 214 incorrectly reflected his total active duty service as 17 years, 10 months, and 12 days. Had the Marine Corps accurately kept Petitioner's records, they would have shown he entered the sanctuary zone. Under these circumstances, it would be unjust to force Petitioner to return to active duty for approximately two years to earn an active duty 20-year retirement, since that amount of time has already expired....

(6) It is unclear how Petitioner obtained a Reserve commission...after being discharged from active duty by reason of physical disability. It is equally unclear how Petitioner repeatedly received active duty orders between 5 June 1993 and 27 July 1999, despite myriad complaints of serious medical conditions and disabilities. On each occasion covered by orders, Petitioner was required to sign and certify that he was physically fit for duty. His final set of ADSW orders required a medical officer's examination and finding that he was in fact physically fit for duty. There is no documentation indicating that this was done.

(7).... Petitioner's service and medical records are incomplete.... It is impossible to accurately assess his physical condition at the times he was ordered to active duty, and to determine what, if anything, was done by Petitioner's command to verify his assertions he was physically fit for duty.... Lack of these records weigh against an attempt to support his request for readjusted promotions and a special colonel's board.... If Petitioner was not physically qualified for active duty, and intentionally misrepresented his physical condition to obtain active duty order, Petitioner could be subjected to administrative or disciplinary action. However, without an investigation, and since more than adequate time to perform one has passed, these questions or issues should not further delay Petitioner's claim for sanctuary....

Accordingly, the SJA recommends that Petitioner be granted active duty credit for retirement purposes from 27 July 1999 until the date he would be eligible for an active duty 20-year retirement. The opinion notes that as a result of his active

duty retirement, he will be eligible for the medical treatment he needs under Tricare. The advisory opinion also recommends denial of his requests for a regular commission, backdated promotions, a special selection board, achievement awards for the Marines he served with in Southwest Asia, and personal apologies.

ee. On 18 March 2002 Petitioner responded to the foregoing advisory opinions, essentially reiterating his previous contentions and providing additional documentation. Petitioner states that he was not medically qualified to receive a commission in the first place and during a physical examination in April 1993, he told the medical officer of his complicated migraines and of a pending disability claim, but was found medically qualified. He asserts that it is common practice for physically unqualified members at the Marine Corps Reserve, to sign orders stating that they are qualified. He asserts that many of his orders were never signed, and others were issued after the start or completion of active duty. He states that he was never given a physical examination as directed by his last set of orders, even though the DD Form 214 states that he received a separation physical. He states that none of his orders ever asked him if he believed he was medically qualified, only if he had any medical limitations which would restrict his performance on active duty.

ff. Reference (b) provides that under regulations to be prescribed by the Secretary concerned, a member of a reserve component who is on active duty (other than for training) and is within two years of becoming eligible for military retired pay may not be involuntarily released from that duty before he becomes eligible for that pay, unless the release is approved by the Secretary.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial favorable action. The Board first considered Petitioner's numerous contentions that the PEB was not signed because the senior medical officer had unanswered questions, medical board procedures were not properly followed, the command unduly influenced the medical boards, he was told that he would have been discharged for failure of selection if he appeared before a formal PEB, Navy doctors failed to recognize the seriousness of the mediastinal mass in his chest, and that concerns regarding

his heart were never addressed. However, despite voluminous medical records and other documentation available in this case, his contentions and assertions are neither supported by the evidence of record nor by any documentation submitted in support of his application. The President of the PEB signed the PEB report, and it remained unchanged since Petitioner accepted the preliminary findings. Furthermore, the Marine Corps would not have been advised of the PEB results had a majority not concurred with its findings and recommendations. A physical examination subsequent to the PEB found him qualified for separation, based on the PEB's approval of the discharge. The Board has no way of determining whether or not a heart condition was considered a relevant factor during the disability proceedings. However, the report of medical history Petitioner completed at the time of separation shows Petitioner answered "don't know" to the question "Have you ever had or have you now heart trouble". DVA's medical records indicate that in 1993 the mass in his chest remained relatively unchanged and medical analysis did not document any functional impairment at that time. Civilian medical records indicate that it was more than six years later that the mass had to be removed. Furthermore, medical records indicate that this appeared to be more of a pulmonary problem than a heart problem. Absent persuasive evidence that the PEB abused its discretion when it recommended discharge by reason of physical disability, the Board finds no valid basis for restoring Petitioner to active duty with his regular commission, backdating his promotions, or affording remedial consideration for promotion to COL. The Board also concurs with that part of the SJA's opinion which states that Petitioner's request for awards more appropriately falls within purview of the commanding officer and not this Board.

Petitioner's orders during his last period of ADSW directed that he report to the nearest medical facility for a physical examination. The fact that he apparently did not receive these written orders until some three months later did not excuse him from this requirement. Navy medical treatment was always available to him while he was in an active duty status. The Board notes that during his last period of active duty he had the mass in his chest surgically removed by a civilian doctor. The Board believes that his failure to utilize such treatment demonstrates he was fearful that his active duty would be terminated. The Board also believes that a presumption of fitness exists because following the surgery he continued to serve on active duty, his active duty was extended for three months, and he was awarded his second NCM. Whether this ailment

would have resulted in another medical board and PEB, as he now requests, cannot be determined.

The Board finds it extremely difficult to understand how or why Petitioner was given a Reserve commission shortly after his discharge for physical disability. Since he was discharged for physical disability with severance pay, there was no requirement for him to serve in the Ready Reserve in order to receive disability separation pay.

Despite his numerous medical problems, Petitioner's outstanding service in the Marine Corps Reserve earned him promotions to MAJ and LTCOL, two Navy Achievement Medals and a Navy Commendation Medal, and he was screened for command. The Board believes the Marine Corps should have known, when it issued the last ADSW orders, that Petitioner was on the threshold of entering the 18-year sanctuary zone. Since it appears that Petitioner entered the 18-year zone on or about March 1999, he should not have been released from active duty at the end of his ADSW. His waiver of the sanctuary provisions was of no effect, since SECNAV has not authorized the Marine Corps to waive sanctuary protection. However, the Board also believes that returning Petitioner to active duty would be unjust given his medical condition. Therefore, the Board adopts the analysis and recommendation made in the SJA's advisory opinion, and concludes that Petitioner's record should be corrected to show that he was not released from active duty on 27 July 1999 but continued to serve until the date he first became eligible for a 20 year active duty retirement. Based on the statement of service provided by MMSR, this date is estimated to be 7 March 2001, but the actual date will be computed by HQMC.

The Board further concludes that the erroneous fitness report for the period 20 December 1991 to 29 February 1992 which erroneously states Petitioner was discharged for failure of selection to MAJ, should be amended to read "is being released from active duty due to physical disability." Further, Petitioner may request an honorable discharge certificate by writing to Commandant of the Marine Corps (MMSB-10), 2008 Elliott Road, Quantico, VA 22134-5030.

**RECOMMENDATION:**

a. That Petitioner's naval record be corrected to show that he was not released from active duty on 27 July 1999 but

continued to serve on active duty until the earliest date he qualified for a 20-year active duty retirement. The actual date of retirement will be computed by HQMC.

b. That the second sentence of the "not observed" fitness report for the period 20 December 1991 to 29 February 1992 be amended to read "(Petitioner) is being released from active duty due to physical disability" vice "has been released from active duty following failure of selection for MAJ" as now shown.


c. That no further relief be granted.

d. That this Report of Proceedings be filed in Petitioner's naval record.

e. That, upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 14 June 2002.

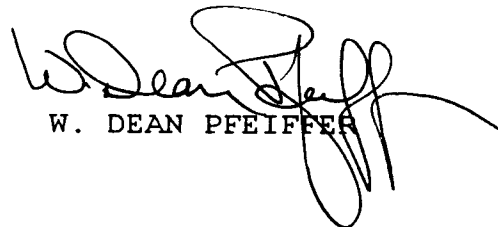
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder

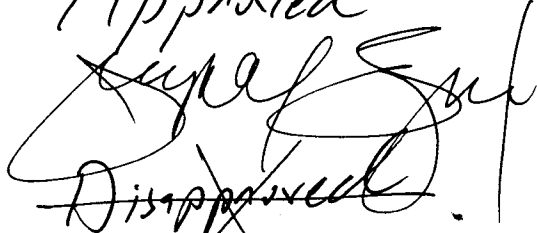


ALAN E. GOLDSMITH  
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Approved SEP 6 2002  
  
~~Disapproved~~  
JOSEPH G. LYNCH  
Assistant General Counsel  
(Manpower and Reserve Affairs)