



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

JRE
Docket No: 4039-01
9 July 2002

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 1850.4D

Encl: (1) DD Form 149 w/attachments
(2) Director, NCPB ltr 5220 Ser:02-04, 25 Mar 02
(3) 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 her naval record be corrected to show that she was released from active duty and transferred to the Temporary Disability Retired List (TDRL) with a 30% rating under Department of Veterans Affairs (VA) code 5284, for "Other injuries, severe, foot".

2. The Board, consisting of Messrs. Kim, Novello and Pfeiffer, reviewed Petitioner's allegations of error and injustice on 23 May 2002 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 initially enlisted in the Navy on 10 September 1990. She was the subject of medical boards convened on 24 November 1998 and 15 July 1999, and was given diagnoses of traumatic hematoma, with plantar fibrosis of the left foot arch, and surgical debridement, left arch. The medical boards recommended that she be placed on limited duty. She underwent a pre-separation physical examination on 15 March 2000 and was found not

physically qualified for separation, apparently due to diagnoses of "rule/out" fibromyalgia, and reflex sympathetic dystrophy, left foot. A third medical board convened on 19 April 2000, and gave her diagnoses of hemangioma, plantar aspect left foot, status post excision times two, and complex regional pain syndrome with continuing pain and dyesthesias. On 24 August 2000, the Physical Evaluation Board (PEB) made preliminary findings that she was unfit for duty because of the regional pain syndrome, which it rated at 20% under VA code 8799-8720, by analogy to neuralgia of the sciatic nerve. She rejected those findings, and demanded a formal hearing, which was conducted on 26 October 2000. She requested that her condition be rated under VA code 5284, as a foot injury. The hearing panel determined that she received the maximum permissible rating of 20%, because her condition, also known as reflex sympathetic dystrophy (RSD), was routinely rated as neuralgia under code 8720 when the sciatic nerve was the primary nerve involved. It noted that the VA Schedule for Rating Disabilities (VASRD) provides, in effect, that ratings for neuralgia will not exceed the rating for moderate incomplete paralysis of the involved nerve. As the rating for moderate, incomplete paralysis of the sciatic nerve is 20%, her condition was properly rated at that level. Petitioner submitted a Petition for Relief from Final Action (PFR) to the Director, Naval Council of Personnel Boards (NCPB), in which she detailed the severity of her condition, and renewed her request for a 30% rating. The Director, NCPB, denied the PFR on 17 January 2001, and Petitioner was discharged by reason of physical disability on 5 March 2001, having completed 10 years, 5 months and 26 days of service.

e. In correspondence attached as enclosure (2), the Director, NCPB, advised the Board, in effect, that Petitioner received a rating for RSD of her left foot based on the inability to use her lower left extremity. The code table contained in reference (b) is unambiguous in establishing code 8799-8720 for rating RSD, and establishing a maximum rating equivalent to moderate incomplete paralysis, or 20%, in the case of the sciatic nerve. In addition, he opined that the function oriented code of 8799-8720 is more appropriate than is code 5284, which is an anatomically based code for a foot injury. He noted that Department of the Navy regulations take precedence over VA rating conventions, and recommended that Petitioner's request for correction of her record be denied.

f. Petitioner contends, in effect, that code 5284 is more appropriate because reference (b), pages 9-37 and 9-38, provide that "Cases that are rated based on residuals should be adjudicated based on the basis of impairment of function rather than on anatomical diagnosis." She alleges that she sustained a severe foot injury as a result of surgical errors, and that the injury caused her severe pain, for which she has been treated with numerous medications since 1998. She maintains that all of the medications have side-effects which have added to the limitations caused by her injury. According to the physician who performed the second surgical procedure on her foot, she has loss of use of the foot, and dystrophic and disuse changes of the entire left lower extremity, which resulted from "failure of the missed diagnosis of her initial surgery with the resultant surgery that resulted in her reflex sympathetic dystrophy." He classified her impairment as "extremely severe" as of 2 November 2000, and noted that she had a neuropathic lower extremity, with inability to use the entire foot and inability to bear weight. He recommended that her condition be rated under code 5284.

g. On 8 September 2001, the VA awarded Petitioner a combined rating of 50%, as follows: left foot injury, with severe, incapacitating symptoms, 30%; myofascial pain syndrome, thoracic spine, 10%; painful scar of left foot, 10%; and myofascial dysfunction, left shoulder, 10%.

h. Attachment (a) to enclosure (9) of reference (b), entitled Analogous Codes, provides that RSD of the leg will be rated by analogy to sciatic nerve paralysis under VA code 8720. Analogous codes are used in those cases where the specific condition does not have a separate VA code, and those codes will be eliminated as the VASRD is updated to include code numbers for specific diagnoses that were previously rated by analogy. Paragraph 3804f, of reference (b) provides, in part, that the requirement to use the VASRD does not prevent the Secretary of the Military Department concerned from assigning ratings in unusual cases not covered by the VASRD. In such cases, extra-schedular ratings commensurate with the average earning capacity impairment due exclusively to service connected disability may be assigned.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner has a severe disability of her left lower extremity which is productive of significantly greater impairment of average earning capacity than indicated by the 20% rating assigned by the PEB and confirmed by the Director, NCPB. It further concludes that she should have been assigned an extra-schedular rating of 30%, as permitted by paragraph 3804f of reference (b), and transferred to the TDRL, vice discharged by reason of physical disability with entitlement to severance pay.

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 not discharged from the Navy on 5 March 2001.


b. That Petitioner's naval record be further corrected to show that she was released from active duty on 5 March 2001, and transferred to the TDRL the following day, pursuant to 10 U.S. Code 1202, with a disability rating of 30% under VA code 8799-8720.

c. That Petitioner be afforded a periodic physical examination as soon as practicable.
Current address: 3811 Marquette Place, Number 3K, San Diego, CA 92106

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

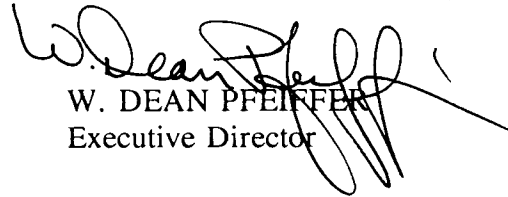
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



JAMES R. EXNICIOS
Acting Recorder

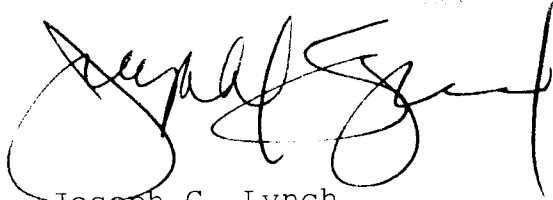
5. The foregoing report of the Board is submitted for your review and action.



W. DEAN PFEIFFER
Executive Director

Reviewed and approved:

AUG 16 2007



Joseph G. Lynch
Assistant General Counsel
(Manpower and Reserve Affairs)