



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

JRE
Docket No: 5542-00
2 April 2001

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 8 March 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 24 October 2000, a copy of which is attached, and the information you submitted in response 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. It noted that your separation was in accordance with the provisions of 10 U.S. Code 631, based on your failure of selection for promotion. Although the Secretary of the Navy could have deferred your separation under the terms of 10 U.S. Code 640, had he decided that additional time was needed for the evaluation of your physical condition and determination of your entitlement to retirement or separation for physical disability, you did not have the right to be retained on active duty. The Board was not persuaded that there was inordinate delay in the processing of your case by naval medical authorities, or that the failure of the Secretary to defer your mandatory separation was erroneous or unjust. 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

IN REPLY REFER TO
5420
Ser: 00-19
24 Oct 2000

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

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

Ref: (a) Chairman, BCNR JRE DN: 1531-99 ltr of 2 Oct 00
(b) SECNAVINST 1850.4D

1. This responds to reference (a) which requested comments and a recommendation regarding petitioner's request for correction of his records to show that he was unfit for duty at the time of his discharge from the naval service in March 1999. We have determined that the evidence in this case does not support a finding that petitioner was unfit for duty on 1 March 1999.

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

a. It appears from the record that petitioner's decision to pursue a surgical remedy in February 1999 was primarily due to a persistent history of low back pain that remained refractory to non-surgical intervention during a six-year period of relatively exemplary service as a Combat Systems/Training Officer. Because the record did not contain an Officer's Fitness Report for petitioner's last eight to nine months on active duty, it can only be presumed that he was able to perform duties appropriate to his rank and designator during this time.

b. Despite the above, evidence that member was technically fit for duty on 1 March 1999 includes:

1. Petitioner's acceptance of a reserve commission; a process (as we are advised by NPC) that required him to attest to his fitness and submit any evidence to the contrary to COMNAVRESFOR.
2. Petitioner's medical records at the time of his separation did not convey any sense of clinical urgency, though it is clear that corrective surgery had been recommended and was apparently anticipated to occur within a six-month period.
3. Petitioner's own opinion of his fitness is demonstrated by his solicitation of civilian employment prior to his discharge (as evidenced by his 28 Jul 2000 letter to BCNR). Petitioner apparently turned down offers of employment since he was told that he would be held on active duty until "fixed".

c. Petitioner's major medical difficulties appear to have occurred in the context of his prolonged convalescence from his one-month post discharge (April 1999) posterior lumbar fusion. A second and more elaborate "360" anterior/posterior fusion was apparently required in February 2000.

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF


d. The evidence in this case leads to the conclusion (relative to petitioner's spinal condition) that, for PEB purposes, he was technically Fit (except for shipboard deployability), at the time of his mandatory separation in March 1999. Had petitioner been retained on active duty, he would have been placed in a Limited Duty status in conjunction with his 12 April 1999 surgery and likely not have been found Unfit by the PEB for his spinal condition until the failure of said surgery had become apparent much later.

e. If petitioner elects a PEB hearing on the issue of physical eligibility for continued service in the Naval Reserves, the PEB's determination will be limited as to whether he is Physically Qualified (PQ) or Not Physically Qualified (NPQ) for service. Application of SECNAVINST 1850.4D, paragraph 1003d, is limited to those cases involving a reservist on extended active duty greater than 30 days who is released from active duty, acquires an inactive duty drilling status, and requests referral to the PEB for a condition incurred or aggravated while on active duty. Petitioner was not a reservist on extended active duty for 30 days or more; accordingly, only a PQ or NPQ determination would be made in his case.

3. In summary, the record in this case does not support a correction of the petitioner's records to reflect that he was unfit for duty at the time of his separation from naval service in 1999. Accordingly, recommend denial of the petitioner's request.

