



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

JRE
Docket No: 6411-01
17 December 2002

[REDACTED]

[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 12 December 2002. 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 opinions furnished by the Director, Bureau of Medicine and Surgery dated 15 July 2002 and the Director, Naval Council of Personnel Boards dated 22 October 2002, and your response thereto. A copy of each opinion is attached.

After careful and conscientious consideration of the entire record, the Board was unable to accept your contention to the effect that a hearing was necessary for the proper resolution of your request for correction of your record. It concluded that the facts and issues present in your case could be fairly reviewed in an executive session of the Board, and it declined to authorize a hearing. The Board determined that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, it Board substantially concurred with the comments contained in the advisory opinion from the Director, Naval Council of Personnel Boards. The Board was not persuaded that you were unfit by reason of physical disability at the time of your release from active duty and transfer to the Fleet Reserve, or that your release was erroneous. It could find no basis for recommending that you be restored to active duty, promoted to commander, or retired by reason of physical disability.

Your contentions to the effect that you would have been retired by reason of physical disability had your completed the Comprehensive Clinical Evaluation Program in a more timely manner, and that while on terminal leave, you were forced to resign from a civilian

position because of your sleep disorder were considered insufficient to warrant any corrective action in your case. As noted above, you have not demonstrated that you were unfit for duty, which is a prerequisite to the disability separation or retirement of a service member. Similarly, the fact that you suffer from conditions which had their onset following your service in the Persian Gulf war, which a physician strongly suspects are due to your exposure to "uncertain agents" in that war, do not demonstrate that you were unfit for duty at the time of your release from active duty. The issue of disability compensation for the deterioration of your condition which occurred following your release from active duty is a matter within the purview of the Department of Veterans Affairs (VA), rather than the Department of the Navy. As you may know, the VA awards disability ratings without regard to the issue of fitness for military duty, whereas the military departments may assign ratings only in those cases where the service member has been found unfit for duty, and has overcome the presumption of fitness, where applicable. .

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

BUREAU OF MEDICINE AND SURGERY
2300 E STREET NW
WASHINGTON DC 20372-5300

IN REPLY REFER TO

6010
Ser M3F1/018
15 July 2002

From: Director, Bureau of Medicine and Surgery M3F1 (Code 25)
To: Chairman, Board for Correction for Naval Records

Subj: COMMENTS AND RECOMMENDATIONS ICO [REDACTED]

Ref: (a) Letter, Chairman Board of Correction for Naval Records Dated 5 July 2002
(b) SECNAVINST 1850.4E

Encl: (1) Medical records of [REDACTED]

1. As requested in reference (a) we have reviewed [REDACTED]' letter to the Board of Corrections regarding his discharge from the United States Navy.
2. [REDACTED]' medical records document multiple medical problems including a history of obstructive sleep apnea requiring the following surgeries: uvulopalatopharyngoplasty, septoplasty and two turbinate resections prior to his retirement. Although these medical problems limited his ability to function in the operational environment, [REDACTED] was found physically qualified for retirement by the Naval Hospital Jacksonville. After he retired, [REDACTED] began to increasingly experience medical problems that effected all areas of his life. These medical problems included: chronic fatigue, recurrent headaches, memory loss, difficulties in concentration, poor anger management, anxiety, dysphonia, anxiety, joint and muscle pain, depression and urinary incontinence. The Veterans Administration and the Gulf War Health Center have extensively worked up these multiple medical problems without definitely defining the cause of his problems.
3. Because [REDACTED] was found "fit" for retirement, his case was not referred to the PEB for determination whether or not he was eligible for medical retirement or disability compensation. Since [REDACTED]' medical conditions did not meet retention criteria listed in ref (b), we recommend that his case be referred to the PEB for review.
4. Enclosure one is returned for appropriate administrative action. Thank you for the opportunity to review this most interesting case.

[REDACTED]

JUL 23 2002



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

5220
Ser: 02-16
22 Oct 02

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

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

Ref: (a) Your ltr JRE:jdh Docket No: 64411-01 of 23 Jul 02
(b) SECNAVINST 1850.4E

1. This letter responds to reference (a) which requested comments and a recommendation regarding Petitioner's request for correction of his naval records. The Petitioner was honorably discharged from the U.S. Navy and states he should have been given the opportunity to go through the Physical Evaluation Board (PEB) process prior to his discharge.

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. Despite having developed Chronic Sleep Apnea, LCDR [REDACTED] was able to maintain sufficient functioning as evidenced by complimentary FITREPs through 31 October 1997. He requested, and was approved by the Assistant Secretary of the Navy (ASN) for a voluntary non-medical retirement prior to registration of significant medical concerns over his physical qualification for retirement. Also, after having been determined "Not Physically Qualified" for retirement in August 1997, LCDR [REDACTED] examining Medical Officer found him to be "Physically Qualified", with lingering concerns, for retirement on 21 July 1998, about 1.5 weeks prior to his retirement.

b. Within two years after retirement, a more significant industrial impairment had developed. According to [REDACTED], he was able to maintain active employment as a High School Instructor until 26 May 2000. His deteriorating clinical situation has been monitored, evaluated, and rated by the Veterans Administration (VA).

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3. The following is concluded:

a. Had [REDACTED] undergone a Medical Evaluation Board resulting in referral to the PEB during the timeframe of his processing for Voluntary Retirement, the PEB would likely have found him to have been "presumed" fit. [REDACTED] records and demonstrated ability to remain in a employed status for an extended period after retirement suggests that his condition would not have been determined by the PEB to have reflected the "acute, grave" deterioration required to overcome the presumption of fitness while he was on active duty, and, indeed, might have resulted in an unqualified finding of Fit.

c. [REDACTED] Gulf War illness claim is a separate issue which, in the absence of a likely PEB finding of Unfit appears to lie outside commentary purview of my office and, thus, best referred for comment to the appropriate Bureau of Medicine (BUMED) and VA offices. However, it is noted that review of the available VA records, fails to reveal any Gulf War related diagnoses or a rating of any un-diagnosed illnesses.

4. In summary, [REDACTED] Chronic Obstructive Sleep Apnea appears to have resulted in a progressive impairment of functioning beginning while on active duty but with significant acceleration after retirement. The level of impairment on active duty appears insufficient to overcome the finding of Presumed Fit, which the PEB would likely have rendered had his case been referred to the PEB prior to his July 1998 retirement. Thus the denial of his BCNR petition is warranted. In the absence of a finding of Unfit, the issue of Gulf War related illnesses remains outside my purview and ought to be referred to BUMED and the VA.

[REDACTED]