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

JRE
Docket No: 6977-01
19 February 2002

[redacted]

Dear [redacted]

This is in reference to your request for further consideration of 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, reconsidered your application on 25 October 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 5 February 1999, a copy of which is attached.

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. As it did during its initial review of your application, the Board substantially concurred with the comments contained in the advisory opinion. The Board was not persuaded that you are entitled to an increased disability rating for diabetes mellitus, or to disability ratings for any additional conditions.

The Board rejected your contention to the effect that competent medical authority determined that all of the conditions listed your medical evaluation board (MEB) were unfitting, and that the Physical Evaluation Board (PEB) "...unilaterally reversed the findings that were clearly supported by the medical records." The Board noted that it is the function of an MEB, which is composed entirely of physicians, to report on the state of health of the service member who is the subject of the MEB, and to recommend referral of the member to the PEB in appropriate cases. An MEB is prohibited from making fitness determinations, and its recommendations are subject to review by its convening authority. The determination of whether a not the service member is unfit for duty and, if found unfit, entitled to disability

benefits administered by the Department of the Navy, is vested in the Secretary of the Navy acting through the PEB, which is composed of both line and medical officers. In those cases where the PEB determines that a member is unfit for duty, it will indicate which condition or conditions are unfitting, those which contribute to the unfitting condition, those which are not unfitting, and those which are not considered disabilities under the laws administered by the Department of the Navy. Obviously, there is no requirement that all conditions reported on by the MEB be found unfitting. The order in which conditions are listed in the MEB report is of little import to the ultimate disposition of the case.

The Board concluded that the initial findings made by the Record Review Panel (RRP) of the PEB, although erroneous in part, were more accurate than any the subsequent findings made in your case. The RRP determined that you were unfit for duty because of three conditions which existed prior to your entry on active duty , and were not aggravated by your service. It was clear to the Board that you were unfit for duty because of diabetes mellitus, which was neither incurred in nor aggravated by your service, and therefore was not rated. In this regard, it noted that in early 1991, you entered on what was originally scheduled to be a brief period active duty. You had a long history of diabetes, which you apparently made little effort to control. It did not appear to the Board that there was a valid basis for determining that the diabetes mellitus worsened beyond natural progression following your entry on active duty. The Board disagreed with the determination of the RRP that the bronchitis and cardiovascular conditions were unfitting, as there is no indication in the available records, or in anything submitted by you, that your ability to perform the duties of your office, grade, rank or rating was materially impaired by the effects of either condition. The precise diagnosis of your pulmonary condition was not considered significant because regardless of the diagnostic label chosen, the effects of the condition were not unfitting. You should note that it is your burden to demonstrate to the satisfaction of the Board that your pulmonary and cardiovascular conditions were unfitting at the time of your placement on the Temporary Disability Retired List, and that it is not the Board's responsibility to establish that they did not render you unfit for duty.

The Board concluded that the hearing panel of the PEB which considered your case on 11 June 1992 properly deducted a 20% existed prior to entry factor from the rating for diabetes mellitus. The Board rejected your statement that "... the DEM provided for only a 10% reduction", as that percentage reduction was not mandated by the provisions of the Disability Evaluation Manual then in effect. It is clear that the Director, NCPB, gave you substantial benefit of the doubt in substituting a 10% deduction, thereby for the more appropriate 20% deduction recommended by the hearing panel of PEB. The Board also noted that it would have been appropriate for the Director, NCPB, to have made an additional deduction because of your failure to follow medical advice to lose weight.

The Board agreed that the advisory opinion contains erroneous information concerning the number of days you were hospitalized in August 1993. It appears that the Director, NCPB, misread your hospital discharge summary, and considered the period between the date when the discharge summary was dictated and when it was typewritten as the dates of your

hospitalization The Board did not consider that to be a particularly significant error. Although you were hospitalized for five days, rather than two, in all likelihood you were hospitalized for that period because of such factors as of your age, body weight, blood lipid levels, subjective complaints, and extensive medical history, rather than the actual severity of your condition. You were accorded extremely careful and extensive observation and evaluation to rule out a heart attack or other serious cardiac condition, but, as you know, no significant clinical findings were made during that period of hospitalization. The results of an exercise thallium study completed the following month also failed to show significant cardiovascular disease. The Board rejected any suggestion that the Director, NCPB intentionally misstated the number of days you were hospitalized in order to minimize the significance of your condition. The Board noted, notwithstanding your assertion to the contrary, that exercise thallium imaging reports show only a very small ischemic zone, which was described by a cardiologist on 15 September 1993 as of "minimal clinical significance." The subsequent determination that you were in functional class 3 under the "New York American Herat Functional Classification patient"[sic] criteria appears to have been based on your unsubstantiated subjective complaints.

The recommendation that you be retained on the TDRL, which was made by the physician who conducted your final periodic medical evaluation, was advisory in nature, and not binding on the PEB. The Board found it significant that the physician reported that your diabetes was under excellent control, and that you had arteriosclerotic heart with insignificant single vessel disease of the circumflex and stable angina pectoris. The Board also noted that there was no requirement that the PEB provide "supporting rationale" for a decision to permanently retire a service member, rather than continuing him on the TDRL. As your cardiovascular condition was not considered unfitting, however, your cardiac status would have had no bearing on the decision of the PEB to recommend that you be permanently retired rather than retained on the TDRL.

The fact that the VA assigned you a disability rating for cardiovascular disease is not probative of error or injustice in your naval record, because 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. As the PEB did not find your cardiovascular condition unfitting, there is no validity to your statement that the evidence "...indicates clearly and unequivocally that it was the Navy that failed to following the rating guidelines" in evaluating it.

Your contention that the diabetes mellitus was unstable and progressively worsening is not substantiated by the available records. As noted above, the report of your final periodic examination report indicates that the diabetes was in excellent control at that time. Although there are many conditions and symptoms which can be associated with diabetes, you have not demonstrated that all of the symptoms and conditions which you attribute to your diabetes are actually related to that condition. Furthermore, there is no evidence that your condition was getting progressively worse prior to your permanent retirement. Your objection to being classified as obese was considered by the Board; however, it is clear that you were obese,

and that your inability to control your weight was a major contributing factor in the development of many of your medical conditions.

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
BUILDING 36 WASHINGTON NAVY YARD
901 M STREET SE
WASHINGTON, DC 20374-5023

IN REPLY REFER TO
5420
Ser: 99-010
5 Feb 99

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

Subj: COMMENTS AND RECOMMENDATIONS IN THE CASE OF [redacted]

Ref: (a) BCNR ltr JRE DN: 5724-97 of 10 Mar 98
(b) SECNAVINST 1850.4C

1. This responds to reference (a) for information to show whether or not Petitioner should be retired by reason of physical disability with an increased combined rating, to reflect his coronary artery disease and bronchitis, as well as to reconsider the findings of the Physical Evaluation Board rating for his diabetes mellitus. **In our final analysis, we find the Petitioner's request warrants no increase to the Physical Evaluation Board (PEB) ratings.** The Petitioner's case history and medical records have been thoroughly reviewed in accordance with reference (b) and are returned.

2. The facts in Petitioner's case are noted as follows:

a. Petitioner's request errs in that it appears to approach PEB decisions as if the presumption were that all of his referring history were 'unfitting' whereas the opposite is mandated by regulation, viz., the member is presumed to be 'fit.' Petitioner appears to respond to Category 3 placement of his Bronchitis and Single Vessel Coronary Artery Disease as if such represented an adverse finding, when, in fact, it is equivalent to a finding of 'fit' relative to these conditions and, hence, not adverse. However, it is apparent, in retrospect that the original RRP, also, erred in bracketing all of Petitioner's diagnostic conditions together under Category 1.

b. In reference to the question of why Petitioner's cardiac and pulmonary conditions found not unfitting at the time of his initial PEB adjudication and placement on the TDRL, reference (a), Petitioner's original 14 February 1992 Medical Evaluation Board (MEB), which referred his case to the PEB indicated the following:

(1) Clearly indicated that Petitioner's Coronary Artery Disease was "CLINICALLY INSIGNIFICANT" with a history of "some

vague substernal chest pressure when he did attempt to exercise... [TREADMILL RESULTS recorded in his Health Record] stopped at 107% of the maximum predicted heart rate due to fatigue and some mild dizziness...no specific chest discomfort...reading of the treadmill showed equivocal evidence for inferolateral ischemia...full cardiac catheterization on 11 December 1991...showed a single vessel, insignificant 40% coronary lesion in the circumflex. Impression of the Cardiologist was...clinically insignificant."

(2) A 25 March 1992 "SURREBUTTAL" by Commander Donald L. Calebaugh, MC, USNR, indicated, "CDR Fisher was brought on active duty with Diabetes on an oral hypoglycemic agent...first referred...Internal Medicine Clinic in March 1991 where his glucose was 270 mg%...He was obese and told to diet and exercise...September 1991; he stated he was unable to exercise due to chest pain. This complaint was taken seriously...catheterization...clinically insignificant...Since that time I have encouraged...exercise progressively and lose weight...has not been successful...had discussed the initiation of insulin therapy several times earlier...but this was rejected until he learned it would potentially increase his disability rating...A Holter monitor...had no correlation to the diary he simultaneously kept and...considered clinically insignificant...the potential for secondary gain is so great that his symptoms need to be considered circumspect...."

c. Though listed, erroneously, as the lead history on aforementioned MEB, the body of the MEB largely limited its clinical significance to an honorable mention under the Review of Systems paragraph. Moreover, it is clear that his bronchitis did not prevent a robust performance on his treadmill test, as noted above.

3. Reportedly, Petitioner was placed on the TDRL on 13 December 1992. Petitioner's BCNR request includes subsequent health record entries relevant to the conditions in contention. They indicate symptoms of either less than separately unfitting severity or not sufficiently close to the time of TDRL placement as to result in the retrospective determination that they, indeed, rendered him unfit at the time of placement. The following details are provided:

a. Regarding pulmonary issues, the need for clinical attention did not occur until over 1 year later, and, even, then, no significant/unfitting degree of impaired functioning is noted.

b. Regarding cardiac issues:

(1) Petitioner was admitted for 1 day to the Veterans Affairs Medical Center, Salem, VA, on 24 August 1993 with an admitting diagnosis of "Unstable Angina" and an uneventful work up. On 13 September 1993, a follow-up Thalium-201 exercise test result was "CONSISTENT WITH A VERY SMALL APICAL ISCHEMIC ZONE, PROBABLY OF MINIMAL CLINICAL SIGNIFICANCE." Despite Petitioner's subjective history, a similar test on 2 November 1995, while noting "A SMALL (10% OF TOTAL LEFT VENTRICULAR AREA) PARTIAL ISCHEMIC AREA IN THE DITAL [sic] ANTEROLATERAL WALL}, described exercise tolerance as "Good". Nonetheless, the Department of Veterans Affairs (DVA) medical evaluation has concluded that Petitioner's cardiac-based disability is considerable.

(2) Petitioner's DVA Rating Decision on 24 July 1996, indicated continued obesity and goes on to state, "Current symptoms of the veteran's coronary artery disease are limited exertional angina. The veteran has undergone significant cardiovascular examination and the coronary artery disease has been described as mild with only mild ischemia indicated."

(3) A subsequent DVA decision, on 20 October 1997, to raise Petitioner's rating for his coronary artery disease appears to have been based on a more liberal interpretation of his subjective history, so that repeat objective exercise testing was not done.

(4) Petitioner's coronary artery disease/angina might well be viewed as having been the product of his unfitting, nominally service aggravated Diabetes Mellitus. **Even so, this condition was not separately unfitting at the time of his placement on the TDRL, and at the time of his finalization by the PEB, it appeared to be stable with symptoms largely subjective in nature.** The lack of objective/testing evidence of increasing cardiac disease appears to have continued since then. The one objective parameter that did seem to increase over time is his weight which was recorded at 248lbs, {on a 5'11" frame), at his TDRL evaluation on 25 July 1994 and subsequently on 30 November 1994. This would appear that his weight never fell below 240lbs up to that time. Since 18 September 1991, {when he was 30-35lbs over his ideal body weight (IBW) for his 'large frame', repeatedly counseled to lose weight, his weight had increased to 50+ pounds over his IBW. **Unfortunately, Petitioner's inability to deal**

effectively with this {Category 4} condition, likely, has had more to do with any cardiac symptom increase, or refractoriness of his Diabetes than any active duty service contribution to these Existed Prior to Entry (EPTE) conditions.

4. The Petitioner's records and documentation support the conclusion that he was properly awarded a medical retirement for his "UNFITTING" conditions. I find no evidence of prejudice, unfairness, or impropriety in the adjudication of Petitioner's case, and therefore recommend that his petition be denied.

[redacted]