



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

JRE
Docket No. 10018-02
3 October 2003

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

Subj: FORMER [REDACTED]
315-02-0216; REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) Director, NCPB ltr 5220 Ser: 03-12, 22 Jul 03
(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 his naval record be corrected to show that he was restored to active duty to undergo surgical procedures on his spinal column, or, in the alternative, that his record be corrected to show that he was discharged by reason of physical disability rated at 10%.

2. The Board, consisting of Messrs. [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 25 September 2003 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 Marine Corps on 26 May 1992 for a period of four years. He transferred to the Individual Ready Reserve on 25 May 1996. He accepted career designation in the Active Reserve Program on 24 February 1998, which entailed extended service on active duty as a member of the Marine Corps Reserve. He was evaluated by a medical board on 22 January 2002, and given diagnoses of chronic mechanical low back pain; patellofemoral pain syndrome; nephrolithiasis (kidney stones); and left shoulder impingement. The body of the medical board report indicates that Petitioner had been evaluated by several different practitioners who had diagnosed his back condition as lower back pain with questionable radiculopathy (a pathological condition of the vertebral nerve roots). As he had not benefited from conservative treatment with different medications and exercises, he was referred for neurosurgical evaluation. The results of an MRI evaluation indicate that he had degenerative disc disease (DDD) at the L5-S1 vertebral level, as well as in the lumbar spine. The condition was treated with back bracing and three epidural steroid injections, which did not result in significant relief of symptoms. An Army neurosurgeon concluded that as Petitioner had failed the aforementioned treatment regimen, it was probable that an internal fixation of the spine would also fail, and that he was therefore not a candidate for surgery. The medical board concluded that Petitioner was unfit for duty because of his "chronic musculoskeletal issues", and recommended that he be referred to the Physical Evaluation Board (PEB).

d. On 13 May 2002, the Record Review Panel of the PEB made preliminary findings that Petitioner was fit for duty, notwithstanding his orthopedic conditions. He rejected those findings and demanded a formal hearing. He appeared before a formal PEB on 18 July 2002, and requested that he be found unfit for duty because of low back pain, and that he be assigned a disability rating of 10% under VA code 5295. The formal PEB noted that although an MRI showed some L5-S1 disc degenerative changes, with a disc protrusion and mild neural foraminal encroachment, the protrusion did not produce significant spinal stenosis, and neurosurgery had reported a normal physical examination, with full motor strength and negative straight leg raise testing bilaterally. Thus, the formal PEB felt there was no physiological explanation for Petitioner's complaints of pain. It noted that he had derived no benefit from epidural injections or a back brace, and that "the member simply continued to assert that he had serious back pain." The formal panel was perplexed by the fact that despite the absence of significant objective findings, Petitioner testified to dramatic

pain that was so bad he could not wear a uniform, because wearing a belt exacerbated his back pain. The formal PEB discounted a number of letters from Petitioner's superiors, peers, and wife, which indicate that he had displayed symptoms of back pain severe enough to affect his posture and gait, caused him to miss time from duty, and interfered with his performance of duty and ability to engage in various personal activities. The formal PEB confirmed the finding of fitness, and the case was finalized on 24 September 2002. Petitioner was released from active duty on 23 November 2002 and involuntarily discharged, by reason of "NON-RETENTION ON ACTIVE DUTY", because he had twice failed of selection for promotion to staff sergeant. He was assigned a reentry code of RE-1B, to indicate he was eligible and recommended for reenlistment by his commanding officer, but that he had been denied retention by the Commandant of the Marine Corps.

e. Petitioner contends that he has been unable to find employment since his discharge, which he attributes to the effects of his back condition. He submits the results of testing and examinations he underwent during March 2003, which demonstrate that his back pain is discogenic in nature, and that, in the opinion of a civilian physician, he would benefit from staged surgical procedures at the L4-L5 and L5-S1, consisting of a hemi-laminectomy, discectomy, posterolateral and interbody fusions, and bone grafting. Petitioner contends that he should be restored to active duty to undergo the recommended procedures, which he believes may result in his full recovery, and that he should be retained on active duty for the period of his convalescence from the surgical procedures.

f. In correspondence attached as enclosure (2), the Board was advised by the Director, Naval Council of Personnel Boards, in effect, that Petitioner's discharge documents suggest that he had the option to remain on active duty, where continued medical and surgical evaluation, monitoring and treatment would have been available. The Director noted that despite obvious frustrating aspects, Petitioner's back condition did not render him unfit for duty, as evidenced by the "adequate, even somewhat complimentary FITREP covering the year ending 5 months after the Petitioner's MEB which referred Petitioner to the PEB", as well as the relative absence of neurologic, physical or radiographic findings that led to a recommendation against surgery, as noted in a 1 August 2000 neurosurgery consultation report. The Director advised the Board that post-discharge evaluations suggest that Petitioner's condition may have progressed to the point that at least one civilian evaluator felt that a

recommendation for surgical intervention was warranted. In the Director's opinion, the evidence of record "appears insufficient to warrant a retrospective change" in the findings of the PEB.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the comments contained in enclosure (2), the Board concludes that Petitioner's discharge without entitlement to disability benefits administered by the Department of the Navy was unjust.

The Board notes that although Petitioner was recommended for reenlistment by his commanding officer, his discharge was involuntary because the Commandant of the Marine Corps denied his request for reenlistment. It does not appear that Petitioner could have remained on active duty and availed himself of further medical care, as the Director, Naval Council of Personnel Boards, suggests he could have done. The Board also notes that the specific testing that established that Petitioner's symptoms were discogenic in nature was not performed prior to his release from active duty. Although the findings made several months after he was discharged may indicate that his condition had worsened in the interim, it is also possible that the true cause of his back pain was not recognized as such prior to his release from active duty. In addition, it believes that irrespective of the cause of his back pain, the pain was real, and had an adverse effect on Petitioner's performance of duty. The Board concludes, after resolving reasonable doubt in his favor, that Petitioner was unfit for duty at the time of his discharge, and that he should have been separated from the Marine Corps by reason of physical disability. The Board was not persuaded, however, that he was a surgical candidate at that time, or that he was prematurely released from active duty while in need of emergent medical care that would have mandated his retention on active duty.

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 on 22 November 2002, while Petitioner was entitled to receive basic pay, the Secretary of the Navy found him unfit to perform the duties of his rank by reason of physical disability due to low back pain, which was incurred while Petitioner was entitled

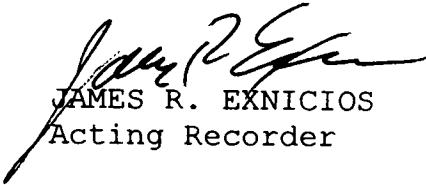
to receive basic pay; that the disability is not due to intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; that the disability is considered to be ratable at 10% in accordance with the Standard Schedule for Rating Disabilities in use by the Department of Veterans Affairs at the time the Secretary found Petitioner unfit, Code Number 5295; that the condition is not combat related; and that accepted medical principles indicate the disability may be of a permanent nature, accordingly, the Secretary directed that Petitioner be discharged by reason of physical disability effective 23 November 2002, with entitlement to disability severance pay, pursuant to 10 U.S. Code 1203.

c. That so much of Petitioner's request for correction of his naval record as exceeds the foregoing be denied.

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

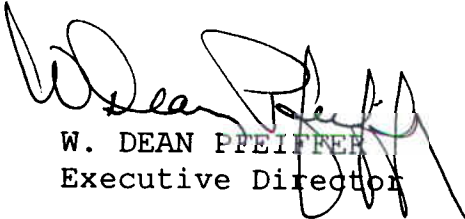
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



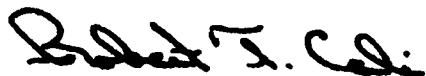
JAMES R. EXNICIOS
Acting Recorder

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



W. DEAN PFEIFFER
Executive Director

Approved:



10/10/03

Assistant General Counsel
(Manpower & Reserve Affairs)