



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

JRE
Docket No. 10443-07
19 December 2008

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

Subj: [REDACTED] REVIEW
OF NAVAL RECORD

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

Encl: (1) DD Form 149
(2) SECNAV CORB ltr 5220 CORB:002, 30 Sep 08
(3) SECNAV CORB ltr 5220 CORB:002, 28 Oct 08
(4) 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 permanently retired by reason of physical disability, vice transferred to the Fleet Reserve.

2. The Board, consisting of Ms. [REDACTED] and Messrs. [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 4 September 2008 and, pursuant to its regulations, determined that Petitioner's record should be corrected to show that he was unfit for duty by reason of physical disability on 31 May 2007. On 16 December 2008, after reviewing enclosures (2) and (3), and Petitioner's response thereto, the Board recommended 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 12 December 1986. On 26 August 2006 he underwent surgery for evaluation and treatment of metastatic squamous cell carcinoma. His tonsils, some adenoid tissue, and several teeth were removed. On 16 February 2007, the Physical Evaluation Board (PEB) determined that Petitioner was fit for duty in accordance with the presumption of fitness (PFIT) standard, notwithstanding his diagnoses of carcinoma of the tonsil and lymph nodes of the head face and neck, without evidence of recurrence, status/post surgical treatment, chemotherapy and radiotherapy; implantation of a percutaneous endoscopic gastrostomy (PEG) feeding tube; dysphagia; hearing loss; disturbance of skin sensation; disturbance of salivary secretion; and nausea without vomiting. He required the PEG tube because of his inability while recovering from surgery, and difficulty swallowing that continued after the completion of chemotherapy and radiation treatments. He was released from active duty on 31 May 2007 upon his completion of 20 years, 5 months and 19 days of active service and attaining his high year tenure limitation. He was transferred to the Fleet Reserve on 1 June 2007. On 2 August 2007, the Department of Veterans Affairs (VA) awarded him a combined disability rating of 80% as follows: use of PEG device, 50%; dysphagia, 30%; degenerative disc disease, 20%; scar, 10%; and four conditions at 0%. The final rating of 80% is based on the combination of individual ratings, rather than the addition of the simple addition of those ratings.

d. In correspondence attached as enclosure (2), the Director, Secretary of the Navy Counsel of Review Boards (SECNAVCORB) advised the Board, in effect, that Petitioner fell under the PFIT provisions of DOD Instruction 1332.38, which are applicable to service members who are referred to the PEB within 12 months of their attaining retirement eligibility. He stated that PFIT creates a "rebuttable presumption that a service member's medical condition has not caused career termination. This presumption can only be overcome, basically, with the development of acute, grave circumstances, sufficiently serious deterioration that occurs as to preclude further duty if the member were not retiring incident to the medical conditions generating the referral to the PEB; or that the Service member had, basically, been rendered Unfit prior to the PFIT timeframe." When Petitioner was referred to the PEB in January 2007, the adverse residual effects of treatment of his cancer appeared to be improving, and were not of sufficient aggregate severity to render him unfit for continued service. The disability rating of 80% he received from the Department of Veterans Affairs (VA) does not indicate unfitness, as VA ratings

are largely manifestation based, whereas military PEB ratings are tied to actual functional occupational impairment, which must be sufficient to render the service member unfit for continued service in order to warrant disability separation or retirement.

e. In correspondence attached as enclosure (3), the Director, SECNAVCORB advised the Board further that although he believes the PFIT finding is correct, a disability rating of 50% would have been appropriate had he been found unfit for duty rather than PFIT. Transfer to the Temporary Disability Retired List (TDRL) would have been indicate given the likelihood that the rating for his condition might change over the five-year maximum period of eligibility for retention on the TDRL.

CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the comments contained in enclosures (2) and (3), the Board concludes that although Petitioner had substantially recovered from a grave condition that was identified while he was in a PFIT status, his continued need to use a PEG feeding tube to ensure that he received adequate nutrition following his extensive surgery, chemotherapy and radiation treatment is sufficient to rebut the presumption of fitness. The Board concludes that his use of the PEG tube rendered him unfit to reasonably perform the duties of an operational specialist.

The Board concurs with the rating guidance contained in enclosure (3), as well as the recommendation that Petitioner be transferred to the TDRL vice being permanently retired.

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 he was not released from active duty on 31 May 2007 or transferred to the Fleet Reserve on 1 June 2007.

b. That Petitioner's naval record be further corrected to show that on 30 May 2007, the Secretary of the Navy found him unfit to perform the duties of his rate by reason of physical disability by reason of category I, unfitting condition,

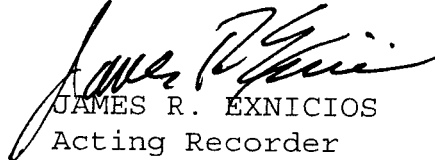
implantation of a percutaneous endoscopic gastrostomy feeding tube due to Category II condition of malignant neoplasm of tonsil (squamous cell carcinoma) and unspecified malignant neoplasm of lymph nodes head, face, neck, without evidence of recurrence, status post surgical treatment, chemotherapy and radiotherapy, 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 50% 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 6819-7299-7203; and that accepted medical principles indicate the disability may be of a permanent nature, accordingly, the Secretary directed that Petitioner be released from active duty on 31 May 2007, and transferred to the Temporary Disability Retired List effective 1 June 2007 pursuant to 10 U.S. Code 1202.

c. That Petitioner be afforded a periodic physical examination as soon as practicable. Current address:
701 W. Spruce Street, Selinsgrove, PA 17870

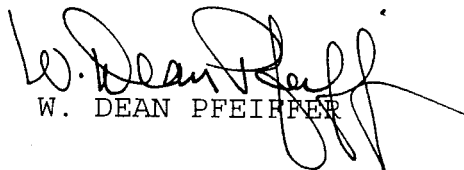
d. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

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

Reviewed and approved: 
12-24-08

Reviewed and disapproved: _____