



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

JRE  
Docket No. 07633-08  
27 October 2009

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

Subj: FORMER [REDACTED]  
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149  
(2) 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, as amended, that his naval record be corrected to show that he was retired by pursuant to the Temporary Early Retirement Authority vice discharged by reason of physical disability.

2. The Board, consisting of Messrs. [REDACTED], [REDACTED], and [REDACTED] reviewed Petitioner's allegations of error and injustice on 16 October 2009 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. Although the application was not timely filed, the Board finds it to be in the interest of justice to waive the statute of limitations and consider the application on the merits.

c. On 4 January 1995, the Physical Evaluation Board found Petitioner unfit for duty due to coronary artery disease rated at 30% disabling under Department of Veterans Affairs (VA) code

7005. He was advised by the President, PEB, on 6 January 1995, in effect, that he was being placed on the Temporary Disability Retired List (TDRL) with a rating below 30%, he might be entitled to elect either retirement under TERA or separation with entitlement to disability severance pay. He was released from active duty on 30 May 1995 and transferred to the TDRL having completed 17 years, 5 months and 29 days of active service. The VA rating criteria for cardiovascular disease was substantially modified during Petitioner's tenure on the TDRL schedule was modified; consequently, the PEB reduced his final rating below 20% on 13 June 2000. He was discharged by reason of physical disability with entitlement to severance pay on 29 September 2000 in accordance with the approved findings of the PEB.

d. The Temporary Early Retirement Authority (TERA) was authorized by the 1993 National Defense Authorization Act, and remained in effect until 1 September 2002. Although not an entitlement, TERA provided for the early qualification for retired pay of selected military personnel who had completed between 15 and 20 years of service whose applications for TERA retirement were approved based on the needs of the service. In addition, DoD Instruction 1332.38 provided, in part, that service members with between 15 and 20 years of active service who were pending discharge by reason of physical disability were to be notified of their eligibility to apply for retirement pursuant to TERA.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that there were two major factors which contributed to Petitioner's decision to accept transfer to the TDRL in lieu of requesting transfer to the Fleet Reserve under TERA: he had no reason to believe that the rating criteria for his disability would be changed while he was on the TDRL and that his disability rating would fall below 30% as a result of those changes, and that the advice he received from the President, PEB, on 6 January 1995 suggested that he would have the opportunity to apply for TERA in the event his rating fell below 30%. Unfortunately, the rating criteria did change, and he was not given the opportunity to apply for TERA in 2000. Accordingly, and in view of Petitioner's lengthy period of naval service, the Board finds the existence of an injustice which warrants the following corrective action.


RECOMMENDATION

a. That Petitioner's naval record be corrected to show that he was not discharged from the Navy on 29 September 2000, and that it be further corrected to show that he transferred to the Fleet Reserve effective 1 June 2000, the day following his completion of five years on the Temporary Disability Retired List, pursuant to the Temporary Early Retirement Authority then in effect.

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

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER  
Executive Director