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

JRE
Docket No. 07721-09
27 July 2009

[redacted]

Dear [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, reconsidered your application on 23 July 2009 as directed by the United States Court of Federal Claims. 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, the administrative record compiled by government counsel, your naval record, an unsigned memorandum dated 1 October 2001 prepared by Lieutenant Commander Barbara A. Smith, Medical Corps, US Navy Reserve (USNR), and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by the Director, Secretary of the Navy (SECNAV) Council of Review Boards (CORB) dated 16 April and 1 May 2009, and the Rules Counsel, Office of the Judge Advocate General (OJAG), dated 3 June 2009, and your counsel's submission of 22 July 2009. A copy of each of the advisory opinions is attached.

As a preliminary matter, the Board found that your file contains several documents prepared by your attorney, government counsel,

and officials of the Department of Veterans Affairs (VA), which indicate that you served on active duty in the Navy from 27 January 1976 to 25 June 1979, and from 22 January 1986 to 31 January 2002. Documents in your official military personnel file (OMPF) show that you reenlisted in the Navy Reserve on 20 December 1988, and in the Regular Navy on 19 June 1989, and that you entered on extended active duty on the latter date. You had no military status during the period from 26 June 1979 to 19 December 1988.

The Board considered your application and all pertinent records in accordance with the provisions of SECNAV Instruction 5420.193, enclosure (1), Procedures of the Board for Correction of Naval Records (codified at 32 CFR 723), paragraph 3e. After careful and conscientious consideration of the entire record, the Board confirmed its findings of 23 September 2004 that you failed to submit sufficient evidence to establish the existence of probable material error or injustice in your naval record. In addition, the Board substantially concurred with the comments contained in the advisory opinions.

The Board was not persuaded that you suffered from any unfitting conditions at the time of your discharge other than major depression, or that you should have received any disability rating other than the 10% rating you accepted on 4 October 2001. The Board disagreed with the recommendation of the Director, CORB, that it amend your disability findings by classifying the anxiety and posttraumatic stress disorders as category II conditions, as it appears that the record can be amended administratively by the President, PEB. In addition, such an amendment would not accord you effective relief because your final disability rating would remain at 10%.

The Board was not persuaded that the legal advice you received from then Lieutenant Pintar was materially erroneous, or that you would have received a disability rating of 30% or higher had your case been considered by a hearing panel of the Physical Evaluation Board (PEB). The Board agreed with Lieutenant Pindar's conclusion that a hearing panel of the PEB might have found you fit for duty, in which case you would have been faced with the possibility of administrative separation. In the Board's experience, the initiation of separation action for the convenience of the government is very common in cases where a service member has been found fit for duty and is subsequently found unsuitable for sea duty, deployment or overseas service because of the existence or effects of a medical condition that was not considered unfitting by the PEB. Given the number and

subjective effects of your medical conditions, being found suitable for sea duty, overseas service and/or deployment would have been problematic had you fully disclosed your medical history to the medical examiner. In addition, the Board noted that you were described as "obese" in the 14 March 2001 addendum to your medical board report and reportedly weighed 233 pounds, approximately 50 pounds above your ideal weight as subsequently determined by VA health care providers. This suggests that you might have been processed for separation for failing to conform to Navy weight and body composition standards had the PEB found you fit for duty. If you had been administratively discharged for either of those reasons, you would have been entitled to involuntary separation pay in accordance with the provisions of DoD Instruction 1332.29, albeit in a substantially lower amount than your disability severance pay entitlement. The Board did not have sufficient information before it to determine what actions would have ensured the best opportunity for you to earn a retirement from the Navy Reserve.

The Board was troubled by your lack of candor and credibility with regard to your medical history and state of health. It was particularly troubled because you received numerous medical board diagnoses and ultimately substantial disability compensation from the VA based on your unverified, subjective representations concerning the nature and severity of your claimed disabilities, which Navy physicians and VA rating officials apparently accepted as true. Those physicians and rating officials might have reached different conclusions had they been aware of the factors which demonstrate your lack of candor and credibility.

The Board found that you underwent evaluation and treatment for numerous medical conditions during your first enlistment and ten-year break in active service. Among those conditions are back, hip and knee pain; tachycardia or heart palpitations; blurred vision; sinusitis, prolonged headaches; hay fever; respiratory allergies; urethritis; shortness of breath; possible rheumatoid arthritis; rapid breathing; a feeling that your body and head were expanding; hypertension; possible hypothyroidism; sharp chest pains; feeling lightheaded over an extended period of time; disturbing feelings of euphoria; nervousness; feeling hyper-tense and constantly nauseated because of nervousness, for which Valium was prescribed; and out of control shaking. Two medical record entries dated 2 February 1976 indicate that you were thought to be in need of neuropsychiatric (NP) evaluation or treatment, and that you were advised to report to the NP clinic the following day.

During the 1979-1989 period, you received treatment from VA health care providers for multiple conditions such as hip, back and knee pain, chronic recurrent foot pain, allergies, and possible ankylosing spondylitis, and you were prescribed several anti-inflammatory and pain medications for foot and post-surgical wrist pain. On 13 September 1985 you complained that your foot pain had been worse during cold weather, and you expressed concern about the pain medications you had been taking. Your condition was assessed by a physician as chronic recurrent plantar fasciitis. On 17 October 1985 your feet were examined and found to be "extremely sensitive" and paradoxically to have decreased sensation. Your foot and hip complaints were assessed as painful bilateral soles and possible trochanteric bursitis, respectively. The treatment plan was to inject the scars on your feet with steroids and prescribe a pain medication. You complained of hip, knee, and foot pain on 13 March 1986. Your back condition was assessed as "rule-out" ankylosing spondylitis, although it was thought your pain was more likely attributable to "soft tissue rheumatism". Your VA file contains a civilian medical record dated 27 July 1965, which predates your first enlistment by more than ten years, and indicates that hypothyroidism should be ruled-out because of your complaints of tachycardia and shortness of breath. You were hospitalized from 19 to 22 June 1986 for surgical removal of a ganglion cyst on your wrist, and you advised VA physicians that you had been diagnosed with "MVP". The Board presumed that MVP is an abbreviation for mitral valve prolapse, which may be disqualifying for entry in the military service if symptomatic. As your private medical records were not available for review by the Board, it was unable to determine if you received any diagnoses or treatment from non-VA health care providers during your break in service.

On 5 March 1988, at age thirty years and six months, you completed a Standard Form (SF) 93, Report of Medical History, in connection with your application for enlistment in the Navy Reserve. You reported a history of "Tumor, growth, cyst, cancer" which apparently pertained to the fibrous tissue that had been removed from your feet, and "Foot trouble". You specifically denied all other significant medical history, to include most of the conditions noted above. You did not disclose the period of hospitalization and surgery you underwent in 1986 or any of the medical care you received from the VA after 1981, and you answered "No" to the question posed in item 20 of the SF 93, "Have you ever had any illness or injury other than those already noted". You apparently told the Navy flight surgeon who

reviewed the SF 93 that you had not had any significant medical or surgical history since 1981, and you submitted a statement from [redacted]., dated 25 February 1988, which is as follows: "Thomas Stine has [sic] no problem with his feet since his last surgery in 1981". The flight surgeon examined you at a Navy/Marine Corps Reserve Center on 5 March 1988 and found you qualified for enlistment notwithstanding your previous discharge by reason of physical disability, bilateral foot condition, and elevated blood pressure. You completed an SF 93 on 24 February 1989 in connection with your application for enlistment in the Regular Navy and entry on active duty, and disclosed a medical history which is substantially the same as that you disclosed on 5 March 1988. You were examined at a Military Entrance Processing Station (MEPS) on that date and found not physically qualified for enlistment because of your foot condition. Your blood pressure was found to elevated, but the physician who examined you apparently did not consider it disqualifying. On 17 April 1989, you stated that you continued to receive disability compensation from the VA in the amount of $138.00 per month, which troubled the Board because of your representations and statement from Dr. Fiel to the effect that your foot condition had been asymptomatic since 1981. The Commander, Navy Recruiting Command granted you a waiver of physical standards for an asymptomatic bilateral foot condition on 31 May 1989, and you reenlisted on 19 June 1989. Shortly thereafter, you began to seek medical care on a rather frequent basis and received evaluation and treatment of many of the conditions you had failed to disclose when applying for enlistment in 1988 and 1989.

You completed several SFs 93 after you reenlisted in which the extent of your disclosure of your medical history varied significantly. You made fairly extensive disclosures in the SFs 93 you completed in connection with required pentennial examinations. You completed an SF 93 on 14 May 1996 as part of an assessment of your suitability and physical qualification for overseas service, and failed to disclose significant aspects of your medical history. You might not have been found suitable for overseas service had you disclosed your entire medical history, which could have led to administrative separation processing. On 17 April 2001, you completed an SF 93 for "MED Board Sep. Exam Pkg.". It was to your advantage at that time to fully disclose your medical history, and you disclosed a history of thirty-seven conditions, to include several that existed prior to your initial enlistment in 1976 or pre-dated your reenlistment in the Navy Reserve in 1988, such as shortness of

breath, heart palpitations or tachycardia, hypertension and a possible thyroid disorder.

The Board carefully considered your attorney's submission of 23 July 2009, and concluded that nothing contained therein demonstrates the existence of material error or injustice in your naval record or warrants granting your request for correction of your record to show that you were retired by reason of physical disability. The Board rejected the contention that it and the Director, CORB, failed to adequately weigh the "factual findings" of your mental condition. The medical board gave you four diagnoses of mental disorders: posttraumatic stress disorder, severe; major depression, moderate; anxiety disorder not otherwise specified; and complicated bereavement. While it is the responsibility of the medical board to formulate diagnoses, a medical board is not permitted to make findings of unfitness for military duty or assign disability ratings, as those functions are within the purview of the Secretary of the Navy acting through the PEB. The fact that a disorder is classified as severe by a medical board does not require the PEB to find the disorder unfitting. Similarly, in cases where the PEB finds a mental disorder unfitting, the medical board classification of the disorder as minimal, mild, moderate or severe does not require the PEB to assign a particular percentage rating to the disorder. As the PEB did not find the posttraumatic stress disorder to be unfitting, and you have not persuaded the Board that the PEB erred, there is no basis for granting your request for a disability rating for that disorder. The contents of the non-medical assessment provided by your former commanding officer, which was requested by the PEB, did not require the PEB to find any of the twenty-seven conditions described in the medical board report unfitting and ratable.

As many of the findings of the medical board were based on your subjective complaints rather than objectively verifiable evidence, and given your lack of credibility as a medical historian and submission of false information to facilitate your reenlistments in 1988 and 1989, the Board questioned the veracity of your complaints, as well as the validity of the diagnoses of mental disorders referred to the PEB. You were given a diagnosis of posttraumatic stress disorder because you had been exposed to verified stressors, and you claimed to have most of the hallmark symptoms of posttraumatic stress disorder. It was unclear to the Board if you actually experienced those symptoms, or if your claim was false. The author of the medical board report noted that your [reported] inability to function

was out of proportion to your physical symptoms, which he attributed to the exacerbation of your physical conditions by your mental health condition. While his assessment might be correct, Board believes that the disparity might be attributable to your desire to maximize your disability entitlements. As noted by the Director, CORB, VA officials opined in a report dated 2 October 2002, that the results of neuropsychiatric testing you underwent after you were discharged were inconsistent with the results of your general mental status examination, and that as "unconsciously or consciously poor performance" [by you during the testing] had not been ruled out, they were precluded them from assigning an Axis I diagnosis under the diagnostic criteria contained in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition.*

The Board rejected your contention that you "never received notice" of your rights before the medical board and PEB. The medical board report indicates that there had been no past finding of mental incompetency or incapacity, and that you were considered fully competent to be discharged to your own custody. In addition, the medical board determined in accordance with the provisions the Manual of the Judge Advocate General, chapter 14, paragraph 1404, that you were mentally capable of handling your own financial affairs. The unsigned memorandum from Dr. Smith dated 1 October 2001 does not establish that you were unable to understand and participate in the disability evaluation process, or provide a reasonable basis for further medical board or PEB action in your case. There is no indication in your initial VA rating decision that you were mentally incompetent or incapable of managing your affairs. The Board noted that despite the severity of your posttraumatic stress disorder as assessed by Dr. Smith, you were not undergoing psychotherapy when the statement was prepared because of the lack of "trauma therapists", and that you and Dr. Smith agreed that you would not undergo therapy while you remained in San Diego "due to the length of time and intensity of involvement required for this type of therapy", even though Dr. Smith believed you required "intensive, constant psychotherapy".

The Board considered your attorney's argument concerning the issue of "Equitable Tolling", but found nothing in the argument that is probative of the existence of error or injustice in your naval record.

As posttraumatic stress disorder was not found to be an unfitting condition, the provisions of 38 CFR 4.129 are inapplicable to your case. As a point of information, however,

the Board noted that Department of Defense Directive 1332.39, which was in effect when your case was being evaluated by the PEB, provided, in effect, that although certain, but not all, minimum ratings specified in the VA Schedule for Rating Disabilities were to be applied by the military department PEBs, convalescent rating were not to be applied. The military departments apparently considered 38 CFR 4.129 to specify a convalescent rating, similar to that specified in 38 CFR 4.128, and they did not apply its provisions. The issue became moot on 17 July 2009 when the Deputy Under Secretary of Defense (Plans), performing the duties of the Under Secretary of Defense (Personnel and Readiness), issued a memorandum in which she directed the military correction boards to apply the provisions of 38 CFR 4.129 in the case of each applicant discharged by reason of physical disability after 11 September 2001 because of posttraumatic stress disorder "where a grant of relief is appropriate", and assign a disability rating of not less than 50% for an initial period of six months following separation, with subsequent fitness determinations and ratings to be based on the applicable evidence.

With regard to the conditions listed in "THEORY OF LAW AND ARGUMENT" paragraph d of your attorney's submission of 22 July 2009, the Board was not persuaded that any of those conditions rendered you unfit by reason of physical disability. Your contention that the Board failed to consider those conditions is not accurate, as the Board considered each of them during its initial review of your application in 2004, as well as on 23 July 2009. Neither you nor your attorney clearly or persuasively articulated in what respect the Board's consideration of your case was deficient, or why you believe the listed conditions were unfitting at the time of your discharge. Many of the conditions, or their precursors, existed prior to your reenlistment in 1989 or began shortly after you reenlisted, and did not significantly affect your ability to perform your duties for many years. As your attorney acknowledges, the fact that a veteran receives disability compensation for a condition does not establish that the condition rendered the veteran unfit for military duty. Your bilateral foot condition is a good example of this. You received a disability rating and substantial monetary compensation for that condition for about eight years after the condition reportedly became asymptomatic. The rating and compensation were suspended upon your reenlistment in 1989 and reinstated the day after you were discharged by reason of physical disability in 2002. The rating was assigned without regard to the issue of your ability to reasonably perform your military duties. Another example is your mild hypertension,

which existed throughout your career and did not significantly impair your ability to perform your military duties, but was rated by the VA at 10% because you needed continuous medication to control the hypertension.

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

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