



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

JRE
Docket No: 8774-97
13 April 1999

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 w/attachments
(2) Dir, NCPB ltr 5420 Ser:98-033, 5 Nov 98
(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 retired by reason of physical disability, vice discharged with entitlement to disability severance pay.
2. The Board, consisting of Mses. Humberd and Moidel and Mr. Lippolis, reviewed Petitioner's allegations of error and injustice on 18 March 1999 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 was evaluated by a medical board on 7 September 1995, and given a diagnosis of left iliotibial band syndrome, refractory to conservative management. In his undated rebuttal to the medical board report, he indicated that he wanted the problems he was experiencing with his hips and shoulder to be considered along with the diagnosed knee condition. The members of the medical board did not comment on his request in the medical board surrebuttal. On 18 August 1996, the Record Review Panel of the Physical Evaluation Board (PEB) made preliminary findings that he was unfit for duty because of the condition diagnosed by the medical board, which it rated at 10% under Department of Veterans Affairs

code 5003 for degenerative arthritis. Petitioner accepted those findings on 14 August 1996, conditioned on his being extended on active duty for a short period of time. He was discharged with entitlement to disability severance pay on 13 November 1996. On 12 September 1997, the VA awarded him a combined rating of 80% for the following conditions: degenerative joint disease of the lumbar spine, 40%; traumatic arthritis, left knee, 30%; traumatic arthritis, left hip, 30%; left scapula fracture, 20%; traumatic arthritis, right hip, 10%; and 0% ratings for conditions of his left great toe, left foot, and scars on face, left ear and left arm. (Note: ratings are combined, not added, to yield a final rating of 80%.)

c. On 5 November 1998, the Board was advised by the Director, Naval Council of Personnel Boards (NCPB), in effect, that Petitioner had a long history of recurrent bilateral hip pain which began during basic training, with an existed prior to enlistment history. On 8 July 1992, a motor vehicle accident left him with left shoulder lacerations, which resolved; left comminuted femur fracture, which went on to healing after successful rodding, with hardware removal during December 1993; left great toe fracture, which resolved; and left scapular fracture, which healed without involvement of either glenoid or acromioclavicular joints, but, apparently remained symptomatic. It was the persistent, residual knee pain which led to his 7 September 1995 medical board and subsequent PEB finding. The Director, NCPB, noted that in Petitioner's rebuttal to the medical board report, he indicated that "my knee problems may keep me from being able to be assigned to a ship... The ladders and steel decks are causing more problems for my knee/hips; therefore, I would like to stay at a shore command until my EAOS...If a discharge is recommended I would like my past/present hip problems also addressed and the fact that the hospital did not set my shoulder after my accident...causing me to not be able to properly lift items above my head without abnormal motion. I would like all of this considered if I am to be medically discharged." In the Director's opinion, the latter comment implied that Petitioner considered the additional conditions important only if he were found unfit, presumably for the left knee condition. Moreover, the rebuttal focused primarily on his contended difficulty with shipboard duty, which, by regulation, could not be the sole basis for a finding that he was unfit for duty. In the Director's opinion, the evidence suggests possible progression, at least symptomatically, of Petitioner's condition over the eight month period following his discharge on 13 November 1996. There is, however, a lack of documentation that any significant, i.e., to a separately unfitting degree, deterioration occurred in any of his conditions in sufficient proximity to his discharge to warrant a retrospective change in his PEB findings. Accordingly, the Director recommended Petitioner's request be denied.

d. Petitioner's counsel contends, in effect, that Petitioner was discharged on 12 November 1996, about fourteen months after the medical board evaluation on which the PEB based its findings and 10% rating. The VA examined Petitioner only eight months after he was discharged, and granted a 30% rating for the knee condition. Counsel contends that the "...period of progression is 21 months since last medical examination, not 8 months since discharge", and that the results of the VA examination more clearly reflect his condition at discharge than the medical board evaluation completed fourteen months earlier. He noted that no attempt was made to evaluate the additional problems with Petitioner's hips and

shoulder, even though he had brought them to the attention of the medical board and PEB. Counsel believes that given the 80% rating Petitioner received following discharge, he would have received a rating of at least 30% had all conditions been evaluated by the PEB.

CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the findings of the Physical Evaluation Board, and the comments of the Director, Naval Council of Personnel Boards contained in enclosure (2), the Board finds that Petitioner should have been retired by reason of physical disability rather than discharged with entitlement to severance pay. In this regard, it substantially concurs with Petitioner's counsel's contention that the results of the examinations conducted by the VA approximately eight months post-service more clearly reflected Petitioner's condition at discharge than did findings made by a medical board approximately fourteen months prior to his discharge. It concludes that he was unfit for duty because of conditions of the left lower extremity, rated at 30 % under VA code 5255 as impairment of the femur, with marked knee and hip disability.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

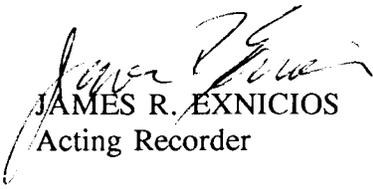
a. That Petitioner's naval record be corrected to show that he was released from active duty on 16 November 1996, and transferred to the Temporary Disability Retired List the following day, pursuant to 10 U.S. Code 1202, with a disability rating of 30% under VA code 5255, for impairment of femur, with marked knee and hip disability; and that the disability is not combat related as defined by title 26 U.S. Code, section 104(b)(3).

b. That he be accorded a periodic physical examination as soon as practicable. Current address: Rural Route 2, Box 348, Erwin, TN 37650

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

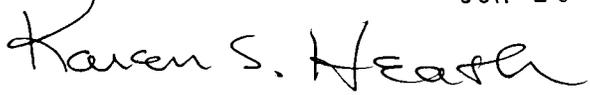
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

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 JUN 25 1999


KAREN S. HEATH
Principal Deputy Assistant Secretary of the Navy
(Manpower and Reserve Affairs)