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

JRE
Docket No: 105-97
15 March 1999

[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, considered your application on 11 March 1999. 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, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the Director, Naval Council of Personnel Boards dated 8 December 1998, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board concurred with the comments contained in the advisory opinion to the effect that there is no requirement that category II conditions be rated by the Naval Disability Evaluation System. In addition, it was unable to conclude that any of the diagnoses 3-6 listed in the enclosed findings of the Physical Evaluation Board (PEB) dated 14 December 1993, should have been classified as category I or II conditions, or that you were entitled to a total rating in excess of 20%. In this regard, it substantially concurred with the enclosed rationale of the hearing panel of the PEB which considered your case on 17 November 1993. Accordingly, 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

Enclosure

DEPARTMENT OF THE NAVY
NAVAL COUNCIL OF PERSONNEL BOARDS
BUILDING 36 WASHINGTON NAVY YARD
901 M STREET SE
WASHINGTON, DC 20374-5023

IN REPLY REFER TO
5420
Ser:98-047
8 Dec 98

From: Director, Naval Council of Personnel Boards
To: Chairman, Board for Correction of Naval Records

Subj: COMMENTS AND RECOMMENDATION IN THE CASE OF FORMER [redacted]

Ref: (a) SECNAVINST 1850.4C
(b) DoD Directive 1332.18 dated 25 Feb 1986

Encl: (1) BCNR ltr JRE DN: 108-97 of 3 Nov 97
(2) NCPB Legal Opinion dtd 8 Dec 98

1. The Petitioner's case history and medical records, enclosure (1), have been reviewed in accordance with reference (a) and are returned. We have determined that the Petitioner's request warrants no change to the Physical Evaluation Board (PEB) findings for a 20% rating with entitlement to disability severance pay. A detailed discussion of our analysis is outlined below.

2. The Petitioner, in essence, requests de novo ratings or an increased rating, retrospectively for:

a. A left knee injury.

b. Several conditions listed under Category II that are not separately unfitting by the PEB review of 17 November 1993.

3. In reference to Petitioner's left knee injury, his knee condition reportedly worsened, therefore, this does not justify a retrospective alteration in his PEB finding. The Anterior Cruciate Ligament repair was properly rated; even the DVA concurred.

4. Regarding the Category II conditions in the PEB findings, the MEB addenda opined that several other medical conditions were contributing to Petitioner's unfitness. All were subsequently rated by the DVA, though only two, viz., Sinusitis and his Gastrointestinal (GI) complaints, received ratings of >0%. There is no precedent that would require the rating of Category II conditions; else, there would be little logic to maintaining that category. It is true that paragraph 2103, Enclosure (2), to reference (a), is, unfortunately ambiguously worded so as to

allow the inference of a possibility that a Category II condition might qualify for an individual VASRD rating. However, even the most liberal interpretation of the DEM, internally, somewhat contradictory language would stop short of mandating separate ratability for all Category II conditions; and, indeed, that was never the intent, nor has it, in practice been utilized, since, the overwhelming majority of qualifying Category II conditions would, simply, be "elevated" to Category I status. Use of the word "ratable" in paragraph 2103a merely allows for the possibility that a contributory condition might be ratable.

5. All that said, a detailed reading of the records reveals:

a. The first "addendum" is a statement from the Internal Medicine Department, Naval Hospital, Roosevelt Roads, summarizing the history of Petitioner's GI and Entomology (ENT) conditions. It states that Petitioner was "advised to give up scuba diving" {due to his maxillary sinusitis} but stops short of indicating that his condition was either unresponsive to prescribed agents or, otherwise, significantly impaired his ability to perform the duties required to be considered 'fit.'

b. The second "addendum", dated 17 November 1993, actually originates with the Orthopedic Department and indicates, in essence, that Petitioner's GI intolerance of Voltaren was complicating the management of his "knee condition"--an influence already reflected in his rating for the latter. Hence, an additional rating for the GI condition would run the risk of pyramiding.

6. Enclosure (2) responds to your comment on the variance in language between reference (a) and that contained in paragraph D.5.c. of reference (b).

7. In summary, the Petitioner's records and documentation support the conclusion that he was properly awarded a disability rating of 20 percent for his left knee condition at time of discharge and therefore I recommend his petition be denied.

NCPB LEGAL OPINION **8 Dec 98**

SUBJ: BCNR ISSUES ICO [redacted]

1. Address Petitioner's contentions concerning his entitlement to disability rating for his conditions and particularly his contention that the PEB is required to rate all conditions which contribute to an unfitting condition.

2. The language in paragraph 2103 of SECNAVINST 1850.4C is equivocal, and at variance with that contained in paragraph D.5.c. of DoD Directive 1332.18 dated February 25, 1986.

LEGAL COMMENTS:

1. The arguments raised in the Petitioner's BCNR request, noted above, seem to support his contention on the surface, but I think they point out a classic "stiletto amongst the fronds" situation in regulatory law. What you read may seem plain to you, but it doesn't necessarily mean that's the case. You may carefully reach between the fronds of a tropical plant to pick a pretty flower, but sometimes you get impaled upon a stiletto unintentionally camouflaged therein.

2. SECNAVINST 1850.4C of 8 Mar 90 (DEM), and DOD Directive 1332.18 of 25 Feb 86 (DIR) provide controlling policy in this case. SECNAVINST 1850.4B of 7 Dec 87 (OLD DEM) cannot be ignored because the DEM is largely old wine in a new bottle.

3. The DoD Directive was included as Appendix C of the OLD DEM. Paragraph 2103 of the DEM is basically the successor paragraph, in relevant part, to paragraph 0212 of the OLD DEM. In order to determine whether paragraph D.5.c (<u>not</u> D.4.c) is at variance with DEM paragraph 2103 and OLD DEM paragraph 0212, we have to look beyond the plain language to discern the intern of the controlling policy, which is the DoD Directive.

4. DoD Directive paragraph D.5.c. directs that in making its professional judgment, the (Navy Department) will not rate those disabilities <u>neither</u> unfitting for military service <u>nor</u> contributing to the inability to perform military duty. OLD DEM paragraph 0212c references the basic guidance of the DIR (the same DIR underpins both the DEM and the OLD DEM), but adds some administrative clarification to assist other interested offices in the Navy Department (such as BCNR) and the Veterans Administration (now the Department of Veterans Administration).

5. DEM paragraph 2103, OLD DEM paragraph 0212c, and DoD Directive paragraph D.5.c provide, in essence, that if a physical impairment is ratable as the unfitting condition, all other physical impairments that are unfitting or contribute to the finding of unfitness must be given an appropriate rating. The PEB records' diagnoses forwarded to it by Medical Evaluation Boards, and distinguish between their applicability to the ratings process by reporting the findings in four distinct categories (see DEM paragraph 5011).

6. In the instant case, the Category III findings had no impact upon the Petitioner's disability rating, but may, at some later date, be considered by the Department of Veterans Affairs during their ratings deliberation process.

7. Finally, all parties appear to be protected when the medical record records all known diagnoses at the time of separation or retirement. The Petitioner is protected from the military denying knowledge or existence thereof, and the military is protected, in part, from diagnoses that could have been known, or should have been known, but for one reason or another, were not recorded in the Petitioner's medical records.

LEGAL CONCLUSIONS:

The legal arguments do not support the relief sought by the Petitioner. This is purely a medical issues' case.

[redacted]

RATIONALE

THIS 33 YEAR OLD MEMBER APPEARED BEFORE A MEDICAL BOARD AT THE NAVAL HOSPITAL, ROOSEVELT ROADS, PUERTO RICO ON 13 MAY 1993 WITH THE FOLLOWING DIAGNOSES:

(1) ARTHROFIBROSIS, LEFT KNEE, 7185
(2) DEGENERATIVE ARTHRITIS, LEFT KNEE, 7159
(3) RIGHT SUPRASCAPULAR NERVE ENTRAPMENT, 3559
(4) IRRITABLE BOWEL SYNDROME, 5641
(5) GASTROESOPHAGEAL REFLUX, 5301
(6) CHRONIC SINUSITIS, 4739

ON 03 AUGUST 1993, THE RECORD REVIEW PANEL EVALUATED THIS CASE, AND FOUND THE MEMBER TO BE UNFIT FOR DUTY WITH A DISABILITY RATING OF 20% UNDER V.A. CODE 5257-5003. THE MEMBER DISAGREED WITH THESE FINDINGS, AND DEMANDED A FORMAL HEARING.

THE HEARING WAS CONDUCTED ON 17 NOVEMBER 1993 AT BETHESDA, MARYLAND, WITH COLONEL R. N. ROMAN, USMC, AS PRESIDING OFFICER, COMMANDER C. J. MCDEVITT, USNR, AND CAPTAIN D. M. GRODIN, MC, USN, AS PANEL MEMBERS. THE MEMBER'S LEGAL COUNSEL WAS LAWRENCE B. HAGEL, WITH LIEUTENANT M. G. MCALEVY, JAGC, USNR, AS CO-COUNSEL. MR. LEON LEBORGNE FROM THE PARALYZED VETERANS OF AMERICA ASSISTED COUNSEL.

THE MEMBER APPEARED AT THE FORMAL HEARING PETITIONING TO BE FOUND UNFIT FOR DUTY WITH A DISABILITY RATING OF 30% UNDER V.A. CODE 7319, 30% UNDER V.A. CODE 7346, 30% UNDER V.A. CODE 6513, 20% UNDER V.A. CODE 8513, AND 20% UNDER V.A. CODE 5257-5003, FOR A TOTAL RATING OF 80%, AND PLACEMENT ON THE TEMPORARY DISABILITY RETIREMENT LIST. AVAILABLE TO THE PANEL WERE THE CASE FILE, HEALTH RECORD AND SERVICE RECORD BOOK. ADMITTED INTO EVIDENCE WERE - EXHIBIT A: HEALTH RECORD ENTRIES AND A LETTER FROM LCDR WIESE, A MEDICAL BOARD MEMBER; EXHIBIT B: A 12 PAGE SUMMARY PREPARED BY THE PARALYZED VETERANS OF AMERICA; EXHIBIT C: ADDENDUM TO THE MEDICAL BOARD DATED 17 NOVEMBER 1993, THE DATE OF THE HEARING.

AFTER CAREFUL EVALUATION OF ALL AVAILABLE EVIDENCE, THE PHYSICAL EVALUATION BOARD FINDS THE MEMBER TO BE UNFIT FOR DUTY IN THE U.S. NAVY BECAUSE OF A CONDITION WHICH LIMITS ASSIGNABILITY AND WHICH INTERFERES WITH THE ADEQUATE PERFORMANCE OF MILITARY DUTIES. THE RECORD DOCUMENTS THAT THE MEMBER HAS THE FOLLOWING CONDITIONS - CATEGORY I: ARTHROFIBROSIS LEFT KNEE, 7185, DEGENERATIVE ARTHRITIS LEFT KNEE, 7159; CATEGORY III: RIGHT SUPRASCAPULAR NERVE ENTRAPMENT, 3559, IRRITABLE BOWEL SYNDROME, 5641, GASTROESOPHAGEAL REFLUX, 5301, CHRONIC SINUSITIS, 4739.

ENCLOSURE: (1)

THE MEMBER TWISTED HIS LEFT KNEE IN 1982. RECURRENT EPISODES OF GIVING WAY LED TO ARTHROSCOPY FOLLOWED BY ACL RECONSTRUCTION WITH PATELLAR TENDON AUTOGRAFT. TWO PREVIOUS MEDICAL BOARDS DATED 27 JUNE 1990 AND 22 JANUARY 1991 PERTAINED TO HIS CONVALESCENCE FROM THE ANTERIOR CRUCIATE LIGAMENT RECONSTRUCTION. HE WAS FOUND FIT FOR FULL DUTY AFTER 7 MONTHS OF REHABILITATION. HOWEVER, IN NOVEMBER 1992 HE PRESENTED WITH COMPLAINTS OF 2 YEARS OF PROGRESSIVE LEFT KNEE PAIN. IN JANUARY 1993 HE UNDERWENT ARTHROSCOPIC LYSIS OF ADHESIONS. FINDINGS AT ARTHROSCOPY REVEALED FIBROTIC SUPRAPATELLAR POUCH, GRADE IV CHONDROMALACIA OF HIS PATELLOFEMORAL JOINT, GRADE IV CHONDROMALACIA OF HIS MEDIAL JOINT COMPARTMENT, AND A PARTIAL MEDIAL MENISCUS TEAR. HE HAD A CYCLOPS LESION PINCHING HIS ACL GRAFT. THESE WERE ALL THOROUGHLY DEBRIDED. POST-OPERATIVELY HE COMPLIED WITH AN INTENSIVE REHABILITATION PROGRAM. RANGE OF MOTION WAS 5 TO 125 DEGREES. HE WAS NOT ABLE TO RETURN TO RECREATIONAL SPORTS SUCH AS KARATE, WATER SKIING AND RACKETBALL. HE CONTINUED TO HAVE WEATHER ACHE AND PAIN DURING THE LAST 2 TO 3 HOURS OF HIS SHIFT AS A WARD NURSE. HE WAS TRANSFERRED TO THE NIGHT SHIFT FOR MAXIMUM REST. THE MEMBER DESCRIBED THE NEED TO ELEVATE HIS LEG TO REDUCE SWELLING IN THE KNEE, WHICH HE WAS ABLE TO DO ON THE NIGHT SHIFT BECAUSE OF THE LIGHTER WORK DEMANDS. HE WEARS A KNEE BRACE AS NEEDED WHEN EXERCISING, AND TAKES VOLTAREN. A DISABILITY RATING FOR THE DEGENERATIVE ARTHROFIBROTIC CHANGES IN THE CASE OF LT OLIVER FALLS BETWEEN 10% AND 20%. THE MEMBER IS GIVEN THE BENEFIT OF THE DOUBT, AND THE HIGHER RATING, 20%, IS ASSIGNED UNDER V.A. CODE 5257-5003.

THE MEMBER HAS BEEN A WEIGHT LIFTER IN PHYSICAL TRAINING FOR MANY YEARS. IN JANUARY 1993, THE MEMBER HAD A HISTORY OF 6 TO 8 WEEKS OF RIGHT POSTERIOR SUPERIOR SHOULDER PAIN MADE WORSE BY BENCH PRESSING AND PUSHUPS. EMG REVEALED A PARTIAL CONDUCTION BLOCK OF THE RIGHT SUPRASCAPULAR NERVE LOCALIZED TO THE NOTCH AREA WITHOUT AXONAL LOSS AND WITH SOME SUPRASPINATUS ATROPHY. HE DID NOT RESPONSE TO NON-STEROIDAL ANTI-INFLAMMATORY MEDICATIONS, AND WAS TREATED WITH STEROID INJECTIONS. FOLLOWING REST, HE WAS ALLOWED TO RESUME WEIGHT LIFTING. A HEALTH RECORD ENTRY IN JULY 1993 INDICATES THAT HE RECEIVED 3 MONTHS OF RELIEF FROM THE LAST INJECTION, BUT SYMPTOMS RETURNED. HE WAS INSTRUCTED TO MODIFY HIS ACTIVITY FOR 2 WEEKS BEFORE RESUMING WEIGHT LIFTING AGAIN. THE MEMBER COMPLAINS OF PAIN IN THE RIGHT SHOULDER WITH OVERHEAD ACTIVITIES. THERE IS NO LIMITATION IN RANGE OF MOTION. HE CONTINUES TO PURSUE BENCH PRESSING AND WEIGHT LIFTING, BUT LIFTS LESS WEIGHT WITH HIS RIGHT ARM AND SHOULDER THAN HE HAD PREVIOUSLY. IN CONSIDERING HIS DUTIES AS A NURSE CORPS OFFICER AND IN CONSIDERING HIS ONGOING INVOLVEMENT IN PERSONAL WEIGHT LIFTING PROGRAM, THE CONDITION IS NOT CONSIDERED TO BE UNFITTING FOR DUTY. IT IS CONSIDERED TO BE A CATEGORY III CONDITION.

THE MEMBER HAS HAD A SYMPTOMATIC HIATAL HERNIA FOR THE PAST 8 YEARS. HE SEEKS ATTENTION FOR REFLUX ESOPHAGITIS AND EPIGASTRIC DISTRESS, WITH EXACERBATIONS 2 TO 3 TIMES MONTHLY. HE TAKES ANTACIDS AND ZANTAC ON A REGULAR BASIS. HE SLEEPS PROPPED UP ON

PILLOWS, AND WHEN BENCH PRESSING WEIGHTS AT THE GYM, HE AVOIDS LYING FLAT TO REDUCE REFLUX. HE FINDS IT NECESSARY ON OCCASION TO PRESENT IN THE EMERGENCY ROOM FOR A "G.I. COCKTAIL" OF DONNATAL, MYLANTA, AND ZYLOCAINE JELLY. THIS USUALLY PROVIDES RELIEF, AND HE RETURNS TO WORK ON THE WARD. ON ONE OCCASION HE DID NOT RETURN TO WORK FOLLOWING A G.I. COCKTAIL. HE STATED THAT HE HAS TRIED TO CUT DOWN ON COFFEE AND ALCOHOL PER MEDICAL ADVICE. THE HIATAL HERNIA, THOUGH A LONGSTANDING SOURCE OF DISTRESS TO THE MEMBER, DOES NOT INTERFERE WITH THE PERFORMANCE OF DUTIES TO SUCH A DEGREE THAT IT WOULD BE CONSIDERED UNFITTING FOR DUTY.

THE MEMBER HAS IRRITABLE BOWEL SYNDROME WHICH HE HAS HAD FOR THE PAST 3 TO 4 YEARS. HE REPORTS THAT HE IS USUALLY CONSTIPATED, AND EXPERIENCES A FEW DAYS OF DIARRHEA AND CRAMPS APPROXIMATELY 2 TO 3 TIMES PER MONTH. HE MAINTAINS A HIGH FIBER DIET, INCLUDING FIBER SUPPLEMENTS, AND TAKES FLEETS ENEMAS AS NEEDED FOR CONSTIPATION. THE VOLTAREN WHICH HE TAKES FOR HIS KNEE MAY NEGATIVELY AFFECT THE IRRITABLE BOWEL SYNDROME. HE STATED THAT HE BELIEVES THAT STRESS IS A CONTRIBUTOR. HE STATED THAT HE HAS HAD TO LEAVE THE WARD WHEN HE HAS HAD DIARRHEA. HOWEVER, HIS CONDITION IS NOT CONSIDERED TO BE SUFFICIENTLY INCAPACITATING TO SIGNIFICANTLY IMPAIR HIS PERFORMANCE AS A NURSE.

THE MEMBER HAS HAD CHRONIC SINUSITIS SINCE COLLEGE, AND HAS SUFFERED HEADACHES FOR THIS LONG. THREE TIMES IN HIS LIFE TIME THE HEADACHES HAVE BEEN SUFFICIENTLY SEVERE TO REQUIRE NARCOTIC MEDICATION. HE HAS BEEN TREATED WITH NUMEROUS STANDARD PREPARATIONS FOR SINUS INFLAMMATION. SURGICAL INTERVENTION FOR THE MAXILLARY SINUS HAS NEVER BEEN SUGGESTED. THE MEMBER STATED THAT THE HEADACHES CAN INTERFERE WITH DUTIES SUCH AS "TAKING OFF DOCTOR'S ORDERS". REVIEW OF THE RECORD DID NOT INDICATE CURRENT INCAPACITATION FROM THE SINUSITIS OR THE SINUS HEADACHES, AND THE CHRONIC SINUSITIS IN THE CASE OF LT OLIVER WAS NOT CONSIDERED TO BE UNFITTING FOR DUTY. IT IS DESIGNATED TO BE A CATEGORY III CONDITION.

THEREFORE, A TOTAL DISABILITY RATING OF 20% IS ASSIGNED UNDER V.A. CODE 5257-5003.