



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

JRE
Docket No: 5773-98
19 July 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
(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, in effect, that his naval record be corrected to show that he was retired by reason of physical disability.
2. The Board, consisting of Ms. Moidel and Messrs. Lightle and Morgan, reviewed Petitioner's allegations of error and injustice on 27 May 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 released from active duty on 4 December 1989 and transferred to the Temporary Disability Retired List (TDRL). On 30 June 1994, the Record Review Panel (RRP) of the Physical Evaluation Board (PEB) reevaluated his condition, and made preliminary findings that he was unfit for duty because of right femur fracture, healed, which it rated at 10% under VA code 5299-5003. Petitioner rejected those findings, and demanded a formal hearing. On 11 January 1995, a hearing panel of the PEB determined that he was unfit for duty because of peroneal nerve palsy, rated at 20% under VA code 8523. The condition of the right femur, which had been rated by the RRP, was reclassified as a category III condition, i.e., one which did not render him unfit for duty or contribute to the unfitting peroneal nerve palsy. In the opinion of the hearing panel, the residual effects of the

fracture had decreased substantially following the removal of surgical hardware from the leg on 1 December 1994, and no longer warranted a rating. Petitioner submitted a petition for relief from final action on 5 October 1995, in which he contended, in effect, that he still had pain in all of the joints of his right leg with weight bearing, which was separate from the effects of the peroneal nerve palsy. He noted that when he appeared before the hearing panel, he was still recovering from the hardware removal surgery. Although his leg pain had decreased, he was still taking (pain) medication and the fracture should not have been characterized as "well healed". The petition for relief from final action was denied, and he was discharged with entitlement to severance pay effective 1 February 1996.

d. The Department of Veterans Affairs has rated Petitioner's disabilities as follows: chronic lumbosacral strain, 20% from 5 December 1989; reflex sympathetic dystrophy, right leg, 10% from 5 December 1989 and 20% from 26 September 1996; tinnitus, 10% from 5 December 1989; and 0% for residuals of a fractured finger.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that in addition to the peroneal nerve palsy, the residual effects of the fractured femur right femur were separately unfitting and ratable at 10%. Accordingly, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

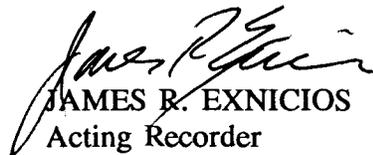
a. That Petitioner's naval record be corrected to show that he was not discharged from the Marine Corps on 1 February 1996.

b. That Petitioner's naval record be further corrected to show that he was retired by reason of physical disability on 4 December 1994, pursuant to 10 U.S. Code 1201, with a 20% rating under VA code 8523, and 10% under code 5299-5003, for a combined rating of 30%.

c. 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 PFHIRFER
Executive Director