



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

JRE
Docket No: 8509-97
14 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 w/attachments
(2) OrthoSpec ltr 5890 Ser 04/526, 26 May 98
(3) DNCPB ltr 5420 Ser:99-26, 16 Mar 99
(4) 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 not discharged from the Marine Corps, that he be reinstated on active duty with full pay and allowances, and that his reenlistment code be changed so that he will be able to reenlist in another branch of service.

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 enlisted in the Marine Corps on 26 April 1990. He underwent right knee anterior cruciate ligament repair in 1994. He was honorably discharged from the Marine Corps on 8 August 1996, for the convenience of the government, for a condition, not a disability, interfering with the performance of his duties, namely, bilateral patellofemoral pain syndrome. He did not demand a hearing before an administrative discharge board, or otherwise contest his discharge at that time. He underwent arthroscopic debridement of a

graft tear in the right knee on 10 June 1997. As he was a military dependent, the surgery was performed at a military health care facility. Three Navy physicians who examined Petitioner in 1997 have submitted statements to the effect that he was fit for further service after recuperation from his surgery in 1997, and, in effect, that he would have been fit for retention had the surgery been done prior to his discharge.

d. In correspondence attached as enclosure (2), the Specialty Advisor for Orthopedic Surgery advised the Board, in effect, that it is difficult to determine if Petitioner's knee pain was due to instability of the knee joint or patellofemoral dysfunction. A post-discharge MRI demonstrated an anterior cruciate ligament tear, and revision reconstruction surgery has returned him to his pre-morbid state. The documentation of the injury and persistent pain suggests, but cannot establish, that the injury may have existed prior to his discharge. Petitioner's administrative separation was erroneous, as he should have been evaluated by the Physical Evaluation Board (PEB). Had the case been referred to the PEB, he may have been found unfit for service and separated with entitlement to disability severance pay. The Specialty Advisor recommended that Petitioner be permitted to reenlist, and in the event that he is unable to pass a physical examination or perform his duties, he should then be referred to the PEB. The Specialty Advisor recommended against restoration to active duty with entitlement to back pay and allowances, because he believes Petitioner was provided competent orthopedic care prior to his discharge, and that the failure to order an MRI, which might have disclosed an injury, was not an act of malpractice or negligence.

e. In correspondence attached as enclosure (3), the Board was advised by the Director, Naval Council of Personnel Boards, in effect, that Petitioner was unfit for duty because of his knee condition, and should have been discharged by reason of physical disability with a rating of 10%.

CONCLUSION:

Upon review and consideration of all the evidence of record and especially in view of the comments contained in enclosures (2) and (3), the Board concludes that Petitioner's administrative discharge was erroneous. It finds that he was unfit for duty and should have been discharged with entitlement to disability severance pay. The Board did not accept the contention that Petitioner had a remediable knee injury when discharged, and that he would have been fit for further service had he been retained on active duty and undergone additional medical treatment. In this regard, it notes that he also suffered from a left knee condition, which contributed to his unfitness for duty. That condition improved after he was discharged and no longer participating in the rigorous physical activities required of a Marine infantryman.

The Board notes that as a result of being discharged for the convenience of the government, Petitioner became indebted for the unearned portion of his reenlistment bonus. Correction of the basis of his discharge to physical disability will cancel that indebtedness.

As reenlistment codes RE-3P and RE-4 are the only codes authorized in this case, there is no

basis for changing the RE-3P code he was assigned at discharge.

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 discharged from the Marine Corps on 8 August 1996, by reason of physical disability, with entitlement to disability severance pay, because of patellofemoral pain syndrome, bilateral, ratable at 10% under VA code 5299-5003.

b. That Petitioner's requests for restoration to active duty and amendment of his reenlistment code be denied.

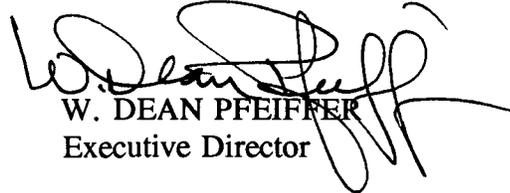
c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

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.

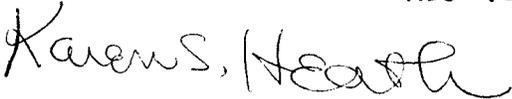
ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

Reviewed and approved: **AUG 12 1999**



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