



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

JRE  
Docket No: 89-99  
24 January 2000

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) Director, NCPB ltr 5420 Ser: 99-56, 5 Nov 99  
(3) Microfiche service record  
(4) VA records w/copy of naval health record  
(5) Disability Evaluation Proceedings

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. [REDACTED] and [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 21 January 2000 and, pursuant to its regulations, recommended the corrective action specified below. 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, a chaplain, was evaluated by medical boards on 22 June 1995 and 22 February 1996, and placed on limited duty. On 22 January 1997, a medical board gave him a diagnosis of status/post attempted anterior posterior fusion, L-4 to S-1, and recommended review by the Physical Evaluation Board (PEB). The medical board report indicates that he was able to walk about one-quarter mile without having to stop, and that he had pain with

rising from a chair, sitting in a chair, and getting out of bed. He was taking several analgesic medications as well as an anti-depressant. Reportedly, he worked half-days in a chaplain's office. The range of motion in his back was described as "...flexible to the thigh, he has no extension, and he has side-to-side motion of 3-5 degrees at most." An addendum to the report, dated 16 May 1997, added diagnoses of major depression in partial remission, and restless leg syndrome. The addendum indicates his mood had been lower than normal for about one and one-half years, with loss of interests, weight gain, increased sentimentality and tearfulness, slowed thoughts, decreased irritability, and thoughts of death and suicide, but no suicide plan or action. He had been prescribed Zoloft, nortriptyline, Depakote, and lithium carbonate for his psychiatric condition. His depression had not been brought into full remission, but significant gains had been made toward relieving it. He continued to have sleep difficulties and motivation and interests below what were normal for him. On 28 August 1997, the Record Review Panel of the PEB made preliminary findings that he was unfit for duty because of the back condition and depression. The former condition was rated at 10% under Department of Veterans Affairs (VA) code 5299-5292, for slight limitation of motion of the lumbar spine, and the latter at 10% under VA code 9434, for major depressive disorder. Petitioner initially rejected those findings and demanded a formal hearing; however, he withdrew his request on 2 October 1997, and accepted the findings of the PEB. He was discharged with entitlement to disability severance pay on 4 February 1998.

d. On 9 September 1998, the VA rated his back condition at 40%, under code 5289, for ankylosis of the lumbar spine. His depression was rated at 30%, based on the results of an examination conducted on 7 August 1998. In addition, he was awarded a 10% rating for tinnitus, and 0% ratings for several other conditions.

e. In correspondence attached as enclosure (2), the Board was advised by the Director, Naval Council of Personnel Boards (NCPB), in effect, that there was no basis for granting Petitioner's request. He noted that Petitioner's depressive disorder was an improving condition compatible with the "expectation of adequate job adjustment potential in a relatively sedentary setting." With regard to the back condition, the Director noted that there was an improvement in the range of motion in Petitioner's spine following discharge. He had 5 degrees of extension in contrast to the "no extension" noted by his 22 January 1997 medical board, as well as 3-5 degrees of side-to-side motion, and flexion to 45 degrees. ( Note: Normal range of motion in the lumbar spine is considered to be 35 degrees extension, 40 degrees side-to-side, and 95 degrees of flexion.)

f. Disability rating guidance in SECNAVINST 1850.4D, enclosure (9), provides, in effect, that a rating is given for ankylosis of a spinal segment only when the range of motion of the whole segment is absent or negligible. If some degree of useful motion remains, the rating will be for limitation of motion. Severe, moderate and slight limitation of motion of the lumbar spine are rated at 40, 20 and 10%, respectively. Guidance for rating mental disorders is to the effect that a 30 percent rating will be assigned when there is occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with routine behavior, self-care, and normal conversation, due to such

symptoms as depressed mood, anxiety, suspiciousness, panic attacks weekly or less often, chronic sleep impairment, and mild memory loss. The 10 percent rating is applicable in those cases where the occupational and social impairment is due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or where the symptoms are controlled by continuous medication. There is no requirement that all of the foregoing characteristics be present to warrant a given rating.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the comments contained in enclosure (2), the Board concludes that Petitioner should have been retired by reason of physical disability. In this regard, it concludes that although Petitioner did not meet the criteria for a 40% rating for ankylosis of the lumbar spine, as there was residual motion in the lumbar spine, the limitation of motion in that spinal segment was at least moderate in degree, and therefore ratable at 20% under VA code 5292. With regard to the depression, the Board concluded that although Petitioner did not meet all of the criteria for a 30% rating, his condition was more severe than reflected by the criteria for a 10% rating. His symptoms were not transient, and were more than mild, and not controlled by continuous medication. In addition, his decrease in work efficiency and ability to perform the duties of his office were not transient, and were severe enough to warrant his separation from active duty. Accordingly, the Board concludes that it would be in the interest of justice to resolve doubt in his favor and assign a 30% rating for major depression.

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 not discharged from the Navy on 4 February 1998.
- b. That his record be further corrected to show that he was released from active duty on 4 February 1998, and transferred to the Temporary Disability Retired List on 5 February 1998, with a 20% rating under VA code 5299-5292, for limitation of motion of the lumbar spine, and a 30% rating under VA code 9434, for major depression, for a combined rating of 40%.
- c. That he be accorded a periodic physical examination as soon as possible. Current address: [REDACTED]
- d. 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 conclusion and recommendation:

FEB 16 2000



CHARLES L. TOMPKINS  
Deputy Assistant Secretary of the Navy  
(Personnel Programs)