



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

JRE
Docket No. 02436-03
29 August 2003



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 28 August 2003. 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.

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.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

The Board found that you underwent a pre-separation physical examination on 17 May 1999, and were found physically qualified for separation, notwithstanding the fact that you were experiencing lower back and right leg pain, which had been diagnosed as atypical sciatica and possible degenerative disc disease. As you were about to depart on terminal leave, you

apparently elected to undergo an MRI examination in order to document the condition of your spine. The results of the MRI indicated that you had no bulging, extrusion or protrusion at the L3-4 level; circumferential bulging of the annulus indenting the thecal sac without impingement of the L5 nerve root; and a large right paracentral extrusion at the L5-S1 level compromising the right foramina, with impingement on the S1 nerve root. A note at the bottom of the MRI "wet read" report indicates that you were going on terminal leave, and would follow-up with the Department of Veterans Affairs. You were voluntarily released from active duty on 20 June 1999, and assigned a reenlistment code of RE-1A, to indicate that you were eligible and recommended for reenlistment.

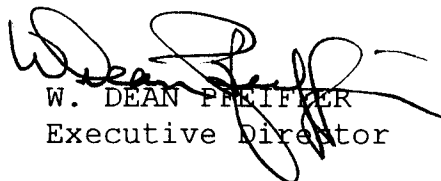
On 21 June 1999, based on a review of your service medical records, the VA assigned you a 10% rating for a herniated nucleus pulposus at the L5-S1 level, based on the mild symptoms of intervertebral disc syndrome reflected in those records. You were examined at a VA facility on 15 July 1999. You reported that despite your back symptoms, you were able to perform your duties as an EMT for two ambulance companies, which involved lifting heavy stretchers. You also stated that your back was very sore by the end of a day at work, but you did not report any gait disturbance. You were found to have good range of spinal motion, with slight sensory deficit. On 5 October 1999, you underwent an examination in connection with your request for an increased VA disability rating. You stated that your condition had been aggravated on 6 September 1999. You reported that you had played golf that day, which you did every day, and then went home and watched television. You were unable to get up from the floor because of back pain, which radiated to the right lower extremity. You were brought to a hospital, and underwent a hemilaminectomy with discectomy at the L4-5 level on 9 September 1999. You did well post-surgically, and were cleared to return to work on 1 November 1999. You received a convalescent rating of 100% from 5 September to 1 November 1999; thereafter, a 40% rating was assigned, based on your report that your back pain had become more severe, and was constant. That rating was confirmed on 12 June 2000, based on the results of an examination conducted on 1 June 2000. During that examination, you complained of continued pain and fatigue, and stated that you had missed three days of work because of your symptoms. You reported that you could stand and sit for two to three hours, walk five miles a day, and climb and descend stairs without problems. In addition, you stated you did not take any medications, use a brace, or apply heat or cold. On 28 January 2002, the rating was increased to 60% based on an increase in

your symptoms, and a 10% rating was added for a scar at the site of your back surgery. On 26 March 2002, you were granted individual unemployability.

The Board noted that in order for a service member who has not completed twenty years of active duty service to be retired by reason of physical disability, he must be unfit for duty because of a condition or conditions ratable at 30% or higher. Although you had symptoms of spinal pathology prior to your release from active duty, it does not appear that you were unfit for duty at that time. As noted above, you received a reenlistment code of RE-1A, which indicates that you could have reenlisted and remained on active duty had you wanted you. Your condition was apparently stable for several months following your release from active duty, and you were able to engage in strenuous physical activities during that period. The unfortunate increase in severity of your condition that occurred after you were released from active duty, and particularly after you underwent surgery, is a matter within the purview of the VA, rather than the Department of the Navy.

In view of the foregoing, your application has been denied. 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