

NVLSP Files Class Action Lawsuit Challenging U.S. Navy's "Properly Referred Policy"

-Estimated 10,000 Navy and Marine Corps Veterans Wrongfully Denied Military Disability Retirement-

On February 2, 2021, the National Veterans Legal Services Program (NVLSP) and Perkins Coie LLP, filed a class action complaint in the United States District Court for the District of Columbia, on behalf of Oscar D. Torres and former members of the U.S. Navy and Marine Corps who were wrongfully denied military disability retirement. The lawsuit challenges the Navy's use of the "Properly Referred Policy" to deny military disability retirement to Torres and other similarly situated servicemembers. A Sailor or Marine who is retired for disability is entitled to monthly retirement payments and military medical care ("Tricare") for the servicemember, his or her spouse, and the servicemember's children while they remain dependents.

At the time of Torres's referral into the Navy's Disability Evaluation System (DES), the Navy Council of Review Boards followed the "Properly Referred Policy." That policy, which has since been revoked by the Navy, explicitly barred the Navy Physical Evaluation Board (PEB) from considering the disabling impact of any condition not "properly referred" to the PEB by listing it on the form used to initiate the DES process.

The lawsuit claims that the "Properly Referred Policy" violated the legal obligation of the Navy, under statutory law and Department of Defense instructions, to consider all medical conditions, including their combined effect, in making

fitness determinations, not just those the Navy deemed “properly referred” on a particular form.

Torres served on active duty and in the reserves of the U. S. Marine Corps from August 29, 2007 until January 27, 2018, when he was honorably discharged from the military due to disability. The rigors of military service left Torres with disabling conditions of the back, shoulder, wrist, fingers and knees, ankles and hips as well as sleep apnea. He was referred into the Disability Evaluation System (DES) for review of these injuries. Yet, the Navy Physical Examination Board (PEB) deemed only his back condition and his sleep apnea to be “properly referred.” As a result, the PEB failed to consider whether Torres’ shoulder, wrist, finger, knee, ankle and hip issues rendered him unfit for continued military service. Torres was denied a military disability retirement and provided only a one-time lump sum disability severance payment. The lawsuit argues that the Navy’s failure to consider all of Torres’ medical conditions pursuant to the Navy’s unlawful “Properly Referred Policy” was arbitrary, capricious, unsupported by substantial evidence, and contrary to law.

The “Properly Referred Policy” was enforced from September 12, 2016, until June 11, 2018. It is estimated that 10,000 U.S. Navy and Marine Corps veterans were wrongfully denied military disability retirement as a result of this unlawful policy.

The Navy’s “Properly Referred Policy” was an outlier among the military branches. The Army, Air Force, and Coast Guard each have military disability evaluation procedures, but none of these other branches had a policy restricting the conditions that can be considered when making a fitness for duty determination like those contained in the Navy’s “Properly Referred Policy.”

Notably, the suit explains that “For years, the Program Manager for the Navy Disability Evaluation System Counsel

Program decried the policy as ‘wrong’ and ‘contrary to both law and regulation.’”

In the lawsuit, NVLSP and Perkins Coie LLP represent Torres and a putative class of thousands of other veterans, who, like him were illegally denied military disability retirement due to the challenged Navy policy. They ask the Court to order new disability evaluation proceedings in which the Navy should consider all of the class members’ medical conditions, not just the subset of all the conditions that the Navy previously deemed “properly referred.”

If you are a Navy or Marine Corps veteran who was denied a medical retirement as a result of the “Properly Referred Policy,” NVLSP encourages you to email properlyreferred@nvlsp.org to learn more about this case.