



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

SJN
Docket No: 5085-14
3821-12
12 December 2014

5 U.S.C. 552(b) (6)

Dear 5 U.S.C.
552(b) (6)

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.

Pursuant to the U.S. Court of Federal Claims order in the case of *Russell J. Young v. United States*, No. 14-528C, a three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 18 November 2014. The court order directed the Board to consider your application "in accordance with the supplemental guidance issued by the Secretary of Defense to military correction boards regarding the treatment of discharge upgrade requests by veterans claiming Post-Traumatic Stress Disorder (PTSD)."

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 original application and those submitted for reconsideration of your case, 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 the evidence submitted was insufficient to establish the existence of probable material error or injustice. The names and votes of the members of the panel will be furnished upon request.

You enlisted in the Navy and began a period of active duty on 20 March 1987. You served without incident until 12 December 1990, when you were convicted by general court-martial (GCM) of 54 days of unauthorized absence, and 59 specifications of uttering bad checks with intent to defraud. You were sentenced to confinement, a reduction in paygrade, a forfeiture of pay, and a bad conduct discharge (BCD). You received the BCD on 3 March 1992, after appellate review was completed.

The Secretary of Defense memorandum of September 3, 2014, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder" directs the Board to fully and carefully consider every petition based on PTSD to include a comprehensive review of all materials and evidence provided by the petitioner. The memo requires special consideration of Department of Veterans Affairs (VA) determinations of PTSD and, if reasonably determined to have existed at the time of discharge, to be considered as a potential mitigating factor in the misconduct that caused the under other than honorable characterization of service.

The Board, in its review of your entire record and applications, carefully weighed all potentially mitigating factors, such as your record of service, desire to upgrade your discharge, your youth at the time of the offenses, the other matters you requested the Board consider in your request for reconsideration that we received on 22 April 2014, and the court order remanding your case for further review. It also considered your assertions of PTSD and that your belief that the disorder was not taken into consideration during your court-martial conviction. In this regard, the Board noted that you provided a diagnosis of PTSD administered by the Department of Veterans Affairs.

As directed by the Secretary's memorandum, the Board provided special consideration of the VA's determination of PTSD and provided you the benefit of the doubt by considering the existence of PTSD as a mitigating factor in the misconduct for which you were discharged and awarded a BCD.

After consideration of the evidence, the Board concluded that your misconduct was premeditated and that the PTSD was not the causal factor in your extended unauthorized absence or 59 separate instances of uttering bad checks; it could not find any causal link between the PTSD and the misconduct based on the evidence. After making that determination, the Board considered the existence of the PTSD as a mitigating factor in your misconduct. In their opinion, the severity of the long period of unauthorized absence combined with the large number of bad checks you wrote substantially outweighed the mitigation provided by the existence of PTSD.

As you requested in your letter seeking reconsideration, the Board reviewed the record of trial in your case and found that you were represented by counsel and that you entered into and received the benefit of a pretrial agreement. In fact, the record reveals that at the time, you wanted to get out of the Navy and valued limiting any term of confinement more than avoiding a BCD. You and your counsel negotiated a pre-trial agreement in which you agreed to a nine month cap on confinement

but agreed to receive any punitive discharge that the court may adjudge. During the sentencing phase of your court-martial, your attorney argued on your behalf that you wanted out of the Navy and asked the military judge to limit any confinement to "four or five months" if he awarded a BCD. The military judge awarded a period of confinement for 12 months, reduction to the paygrade of E-1, forfeiture of \$482.00 a month for 12 months and a BCD. Pursuant to the pre-trial agreement the convening authority reduced your term of confinement to nine months.

The Board considered carefully your assertion that the GCM overlooked the possibility that you had PTSD, but its review of the court transcript did not find any instance where you or your counsel either claimed or presented evidence that you had PTSD. Per your request, the Board considered the emotional stressors you experienced during your period of unauthorized absence, and note that you and your counsel did mention some of those stressors to the military judge during your court-martial. However, the Board did not find sufficient evidence to disagree with the court's conclusion that the severity of your misconduct outweighed those mitigating factors.

Finally, you fault your GCM for not considering that you were separated from your wife during your period of unauthorized absence and that she died in 1991 during the eruption of the Mount Pinatubo volcano in the Philippines. The Board's review of the record of trial revealed that you did present evidence of your marital trouble and separation to the military judge but further testified during sentencing that you intended to divorce your wife after you left the Navy and resume your relationship with your girlfriend. The Board also noted that your court-martial took place on 12 December 1990 while Mount Pinatubo erupted in June of 1991. The GCM could not have considered your wife's tragic death because it had not yet happened.

The Board further considered your assertion of an improperly conducted appellate review of your GCM. The Board concluded that the appellate review was properly conducted. In this regard, the Board considered evidence that on 12 December 1990, you signed a special power of attorney that appointed your appellate defense counsel to represent you before the Court of Criminal Appeals.

Based on the information currently contained in your record, the Board concluded insufficient evidence exists to warrant changing your characterization of service or narrative reason for discharge given the seriousness of your misconduct. Accordingly, 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 within one year from the date of the Board's decision. New evidence is evidence not previously considered by the Board prior to making its decision in your case. 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,

5 U.S.C. 552(b) (6)

ROBERT J. O'NEILL
Executive Director