



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

█  
Docket No. 6394-20  
Ref: Signature Date



Dear █

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the United States Court of Federal Claims (CoFC) in your case, dated 15 September 2020. After careful review and consideration of relevant portions of your naval record and application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 29 April 2021. The names and votes of the panel members will be furnished upon request. 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, to include your complaint to the CoFC; relevant portions of your naval record; and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions contained in Psychiatric Advisor CORB letter 1910 CORB: 002 of 2 December 2020 and Director CORB letter 1910 CORB: 001 of 7 December 2020, along with your response to these opinions.

Your record reflects that you entered active duty in the Marine Corps on 9 January 2012. In 2014, you suffered a back injury, for which you sought treatment at various times throughout your active duty service. You also had three wisdom teeth removed, resulting in an infection, embolism, and chronic pain in your jaw. In 2015, you injured your left knee while training. This injury required two surgeries in 2016. You were placed on limited duty in December 2016 and later referred to the Physical Evaluation Board (PEB) in 2017. As part of the Integrated Disability Evaluation System, your case was referred to the Department of Veterans Affairs (VA). In August 2017, the VA diagnosed you with a thoracolumbar spine injury based on range of motion, discomfort, and pain avoidance. In addition, you were diagnosed with Temporomandibular Joint Capsulitis (TMJ) based on objective evidence of pain in your jaw. Based on your symptoms, the VA assigned proposed disability ratings of 20 percent and 30 percent for your spine and jaw conditions, respectively. Your medical board-referred left knee

condition was assigned a 10 percent disability rating by the VA. On 3 January 2018, the PEB found you unfit for left knee pain and assigned a 10 percent disability rating, consistent with the proposed VA rating. The PEB review was limited to your left knee condition, since it was the only condition referred to the PEB by the medical board in your case. Despite several attempts by you to have the PEB and Director, Secretary of the Navy Council of Review Board (CORB) to consider your TMJ and back conditions along with your left knee, only your left knee condition was considered in determining your unfitness and whether you qualified for disability retirement. Ultimately, you were discharged on 1 February 2019 after the formal PEB hearing affirmed the initial PEB findings and your Petition for Relief was denied.

Subsequent to your discharge, you underwent a medical examination on 8 February 2019. This examination documented your continued symptoms related to your left knee but noted no TMJ or back symptoms. A medical review also found no treatments for TMJ or your back in 2019 despite evidence that you suffered from mild facet arthropathy of the L3-L5 and disc desiccation with extrusion in your L5-S1 with nerve impaction in the L5. On 28 February 2020, you filed suit in the CoFC. The court remanded your case on 16 September 2020 and directed the Board to:

“ address all issues within its authority, including any pertinent issues raised by the parties, including specifically whether plaintiff ... is entitled to correction of his naval records concerning his claim that the Navy failed to properly consider whether his diagnosed low back strain and temporomandibular joint syndrome (TMJ) separately or collectively impaired his ability to perform his military duties. In addition, the BCNR shall consider any additional documents or evidence that [REDACTED] wishes the BCNR to consider during the remand proceedings, including an application for the correction of his military record with the BCNR.”

You submitted your application to this Board on 25 November 2020 along with evidence that included a medical opinion asserting that you were unfit for continued naval service due to your TMJ and back conditions. The opinion states that if all of your unfitting conditions would have been properly referred to the PEB and considered, you would have qualified for a combined 60% disability rating from the PEB.

On 2 December 2020, the CORB Medical Advisor provided an advisory opinion in your case that was endorsed by Director CORB. The opinion stated that the medical evidence in your case did not support a finding that you were unfit for a back condition or TMJ. After a review of your medical record, the author of the opinion concluded “based on the whole record, to include the PEB case file, the Applicant’s petition and supporting exhibits, and the entire available medical and dental record, the Applicant was unfit only for Left Knee Pain.” The opinion noted that your lower back pain only warranted two physician evaluations during your active duty service and involved only conservative treatments. Further, it was noted that you underwent dental examinations leading up to your release from active duty that found no dental-related duty limitations. Finally, the opinion detailed your other treated medical conditions and determined “other medical and psychiatric conditions that were potentially Service-incurred were reviewed and did not rise to the level of unfitness.”

On 16 April 2021, you submitted a response to the advisory opinion that included a second medical opinion that restated a belief that your back condition was unfitting despite the issues raised in the advisory opinion. A recent Magnetic Resonance Imaging test result was also provided that confirms you continue to suffer from conditions related to your spine. You further argued that the advisory opinion misapplied the preponderance of the evidence standard and failed to consider the “combined effect” of your back and TMJ conditions in determining whether you were unfit for continued naval service.

The Board carefully considered your arguments that you deserve to be placed on the disability retirement list based on the PEB’s failure to consider your back and TMJ conditions as unfitting. Unfortunately, the Board disagreed with your rationale for relief. In making their findings, the Board substantially concurred with the advisory opinion in your case. Ultimately, the Board concluded that you are not entitled to correction of your naval records based on your claim that the Navy failed to properly consider whether your diagnosed low back strain and TMJ separately or collectively impaired your ability to perform your military duties.

In order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members; or the member’s disability imposes unreasonable requirements on the military to maintain or protect the member. In addition, as you correctly pointed out, the combined effect of two or more disabling conditions may result in a finding of unfitness even though each of the conditions, standing alone, would not qualify for referral to the Disability Evaluation System or a finding of unfitness. The Board considered these criteria in evaluating whether your back condition and TMJ were also unfitting conditions.

### **Low back strain**

In reviewing the medical evidence regarding your back condition, in addition to the conflicting medical opinions, the Board concluded that the preponderance of the evidence does not support a finding that your back condition was separately unfitting. While the Board acknowledged the fact you received multiple treatments for your back condition throughout your active duty service, the Board considered the fact none of your medical providers considered your symptoms serious enough to merit a referral to a medical board or the PEB. This was persuasive evidence to the Board that your symptoms did not cause of serious enough occupational impairment to be considered unfitting for continued naval service. Most importantly, the Board felt that your 8 February 2019 medical examination for employment purposes was telling evidence of whether an occupational impairment existed at the time of your discharge from the Marine Corps. This medical examination was conducted one week after your discharge and conducted specifically to determine whether you could be employed post-discharge. The medical report documents your continued issues with your left knee but documents no symptoms with your back at that time. The fact this medical examination documented no issues with your back one week after your discharge, along with the absence of any further back treatment in 2019, led the Board to conclude that your symptoms were not sufficiently severe to require treatment. So despite evidence that you possessed defects in your spine, the Board did not find evidence that these

defects were sufficiently symptomatic to cause an occupational impairment. In the Board's opinion, the lack of any documented symptoms on 8 February 2019 was consistent with the decisions of Navy medical providers not to refer your back condition to the PEB.

The Board disagreed with your argument that the Navy should have referred your back condition to the PEB based on the "combined effect" policy. Department of Defense Instruction 1332.18 states that a service member "may be determined unfit as a result of the combined effect of two or more impairments conditions even though each of them, standing alone, would not cause the Service member to be referred into the DES or be found unfit because of disability." The instruction states that a medical board must document "whether the Service member has medical conditions, whether singularly, collectively or through combined effect, that will prevent them from reasonably performing the duties of their office, grade, rank, or rating." In your case, the Board found that your back condition was insufficiently impairing to require a referral from the medical board to the PEB. In making this finding, the Board again relied on the 8 February 2019 medical examination that documented no symptoms with your back. The Board concluded the lack of back pain symptoms one week after your discharge was sufficient evidence of fitness to meet the preponderance of evidence standard when considered in totality with several Navy medical provider decisions not to refer your case to a medical board or the PEB. In the Board's opinion, in order to qualify for a referral under the "combined effect" policy, there must be some evidence of an occupational impairment. Since none related to your back were documented one week after your discharge, the Board felt your back condition did not qualify for referral under the policy. Accordingly, the Board determined insufficient evidence of error or injustice exists regarding the Navy's decision not to consider your back condition as unfitting for continued naval service.

## **TMJ**

In reviewing the medical evidence regarding your TMJ condition, in addition to the conflicting medical opinions, the Board concluded that the preponderance of the evidence does not support a finding that your TMJ condition was separately unfitting. The Board found the dental examination results from 23 January 2018 and 8 November 2018 compelling as evidence that your TMJ condition did not create an occupational impairment. After both examinations, you were classified as a "Class 1," meaning that your dental status did not create any duty limitations including your ability to be assigned world-wide. As a result, the Board felt the preponderance of the evidence did not support a finding that your TMJ condition met any of the criteria for unfitness for continued naval service. The Board also considered the 8 February 2019 medical examination that did not document any symptoms for your TMJ condition. This was further evidence that the Navy did not err by not finding your TMJ condition unfitting. Regarding your argument that your TMJ should have been considered under the "combined effect" policy, the Board again found the evidence lacking since there was no evidence your TMJ caused any occupational impairment at the time of your discharge. As a result, the Board found that the medical evidence supported the Navy's decision not to refer your TMJ to a medical board or the PEB.

**VA ratings**

The Board also considered the fact that the VA assigned you ratings of 30% and 20% for your TMJ and back conditions, respectively. In the Board's opinion, this was evidence was not persuasive evidence of unfitness since eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated. In particular, in reviewing your 30% TMJ rating, the Board noted that this rating alone would have qualified you for placement on the disability retirement list. However, as discussed above, the Board found no evidence that your TMJ condition was remotely unfitting based on two dental examinations that cleared you for world-wide deployment with no duty limitations.

**Conclusion**

The Board acknowledged that you were diagnosed with a number of disability conditions throughout your active duty service. However, the existence of a disability condition alone is insufficient to merit referral to the Disability Evaluation System and, as you correctly pointed out in your response to the advisory opinion, the Board had to weigh evidence of whether your back pain and TMJ conditions significantly interfered with your ability to perform your military duties against evidence that it did not. After considering the totality of the evidence, the Board felt the quality and quantity of the evidence weighed in favor of a finding that the Navy properly considered whether your diagnosed low back strain and TMJ separately or collectively impaired your ability to perform his military duties when it chose not to refer either condition to a medical board or the PEB. Based on this finding, the Board determined your PEB record remains accurate and you did not meet the criteria for placement on the disability retirement list. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your record.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or 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,

5/3/2021



Deputy Director

Signed by 