



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

■  
Docket No. 7151-20  
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. After careful and conscientious consideration of relevant portions of your naval record and your 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.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 5 August 2021. The names and votes of the members of the panel 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, relevant portions of your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions contained in Senior Medical Advisor CORB letter 5220 CORB: 002 of 12 June 2021 and Director CORB letter 5220 CORB: 001 of 16 June 2021 along with your response to the opinions.

A review of your record shows that you entered active duty with the active duty with the Marine Corps in December 1977. In May 1978, x-rays documented a right distal femur deformity that may have been related to a preservice fracture. After being medically cleared for mess duty, you complained of knee pain related to prolonged standing or walking. A medical report on 8 December 1978 documented that you suffered from preexisting knee pain for three years prior to entering active duty. On 6 April 1979, you were discharged for failing to meet Marine Corps standards. Post-discharge, it appears you were employed as a dry wall contractor until 2013. In addition, after initially being denied a service connection by the Department of Veterans Affairs (VA) for your right knee, you were able to obtain disability ratings for degenerative arthritis and a total right knee replacement. In addition, you received disability ratings for depressive disorder, tinnitus, lumbar scoliosis, neuritis, and a right leg discrepancy.

The Board carefully considered your arguments that you deserve to be placed on the disability retirement list. You assert that you were unfit for continued naval service at the time of your discharge due to your right knee condition. In addition, you believe that you were also unfit due to a depressive disorder. Unfortunately, the Board disagreed with your rationale for relief. In making their findings, the Board substantially concurred with the advisory opinions in your case.

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 your case, the Board agreed with the advisory opinions that the preponderance of the evidence does not support a finding that you were unfit at the time of your discharge. Despite your argument that your post-discharge employment as a dry wall contractor is not relevant to whether you were unfit for continued naval service in 1979, the Board concluded it was relevant since it shows you were able to be employed in a job that typically requires strenuous use of the legs. Since you argue that your right knee condition would have prevented you from performing the duties of your office, grade, rank or rating, in the absence of evidence to the contrary, the Board determined this evidence shows that you were, more likely than not, able to perform some duties of your paygrade in the Marine Corps. Regarding your claims of depression, the Board was unable to find any evidence that you were symptomatic in 1979. While the VA assigned you a service connection in 2018, the Board was unable to determine whether the condition existed approximately 40 years prior based on your VA rating. Further, the Board noted that 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. Therefore, even if they concluded your depression existed in 1979, they were unable to conclude it was unfitting based on your 2018 VA rating. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your record.

Regarding your request for liberal consideration of the evidence in your case, the Board determined liberal consideration policy did not apply since you are asking to be found unfit for continued naval service in order to obtain a disability retirement. A federal court concluded that the liberal consideration policies contained in the Hagel and Kurta Memoranda do not apply to unfitness or disability retirement determinations by this Board.

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,

8/9/2021

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Deputy Director

Signed by:

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