



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

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Docket No. 1125-21
Ref: Signature Date



Dear Petitioner:

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.

A three-member panel of the Board, sitting in executive session, considered your application on 3 March 2022. 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, to include the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness regarding modifications of discharge due to mental health conditions, sexual assault, or sexual harassment (Kurta Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). Additionally, the Board considered the 14 December 2021 advisory opinion (AO) of a qualified medical professional and its endorsement, and your 25 February 2022 response to the AO.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 17 August 2016. On 4 June 2018, you reported to Naval Medical Center Portsmouth with suicidal ideation. On 26 June 2018, you were notified of the initiation of administrative separation processing and your rights in connection therewith based on drug abuse. Your processing was based on an incident relating to your possession of LSD, in which you describe self-reporting your possession of the drug. You elected to speak with counsel but contend that you never spoke with counsel and, instead, spoke with a chief in your unit. On 29 October 2018, you received a mental health review at a Navy Branch Medical Clinic. According to the mental health review, you were diagnosed with Persistent Depressive Disorder and Borderline Personality Disorder. Further, the evaluation stated that your mental health diagnoses “did

contribute to the actions for which he is pending administrative action.” (Emphasis in original.) On 20 February 2019, the discharge authority directed that you be discharged with a general (under honorable conditions) characterization of service), and on 22 March 2019 you were so discharged. After your discharge, on 6 June 2019, you were admitted to a civilian hospital based on mental health concerns. On 7 August 2020, you were notified by the Department of Veterans’ Affairs (VA) that you received a 70% rating and finding of service connection for Major Depressive Disorder with Generalized Anxiety Disorder, and Borderline Personality Disorder, effective 23 March 2019.

In your petition, you contend that the Navy failed to refer you to the disability evaluation system (DES) based on your mental health conditions, that you received ineffective assistance of counsel, and that your discharge characterization was improper based on an offense that you did not commit. In support of your petition, you have provided a several exhibits, to include written personal statement, enlisted performance evaluations, medical records, service record entries, and material from the VA. You also provided a rebuttal to the AO. The Board reviewed all of these materials that you provided in making its decision.

In order to qualify for military disability benefits through the DES 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; the member’s disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting. Here, as described below, the Board determined that you do not qualify for such military disability benefits.

In connection with your assertion that your mental health condition should have resulted in your referral to the DES and, ultimately, a military retirement, the Board obtained an AO. The AO was considered unfavorable to you, and stated, in part, that your active duty medical record showed:

appropriate consideration of Persistent Depressive Disorder (service connected by the VA as Major Depressive Disorder), but the condition was consistently found fit. Instead, the record reflects significant concern for the Applicant’s suitability, which references an inability to continue service secondary to a personality disorder or other condition not constituting a disability. The mere presence of disease or injury alone does not justify referral to the Physical Evaluation Board. The subsequent finding of Major Depressive Disorder by the VA does not establish unfitness due to a physical disability at the time of separation. Lastly, the Applicant underwent a separation physical examination at which time the evaluating physician specifically determined the ‘patient does NOT meet criteria for a PEB.’ As such, a disability retirement cannot be recommended.

In your 25 February 2022 rebuttal, you provide several arguments explaining your perceived deficiencies within the AO. In your rebuttal, among your several arguments which the Board

fully considered, you assert that the Advisory Opinion failed to understand that the Petitioner was not referred to the DES, or to any suitability evaluation, before he was separated from the Navy. You also assert that the finding that you were fit for duty was made after your discharge was directed. In its review of the medical evidence, the Board concurred with the finding of the AO. The Board believed that the AO reasonably explained the basis for you not being referred to the DES:

the medical record establishes that while Persistent Depressive Disorder was present, it did not rise to the threshold of DES referral - the Applicant remained psychiatrically fit throughout. Instead, the co-morbid condition of Borderline Personality Disorder was considered to make his suitability questionable. This finding does not require PEB referral, and, had the member definitively been found unsuitable and not had concurrent misconduct proceeding, would have resulted in administrative separation processing via MILPERSMAN 1900-120.

In other words, at the relevant time when a fitness determination was made, your Borderline Personality Disorder made your suitability for service questionable. And, Borderline Personality Disorder is considered a condition, not a disability. In your case, however, you were processed for misconduct, and thus not process for condition, not a disability. Further, in making their finding that you do not qualify for military disability benefits, noted that you were processed for misconduct that qualified for an Other than Honorable characterization of service. Therefore, they concluded that you were appropriately processed and separated for your drug related misconduct rather than referred for disability processing.

With respect to your assertion that you were found to have a service connected disability rating from the VA. The fact that the VA rated you for service connected disability conditions did not persuade the Board these conditions were unfitting at the time of your discharge from the Navy because 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 addition, you have requested that your discharge characterization be upgraded because you did not commit the offense that formed the basis of your separation, that you were provided ineffective assistance of counsel, and that your discharge should be considered in light of your mental health conditions at the time of your service. The Board reviewed all of your contentions and it reviewed those contentions in light of the Kurta and Wilkie Memos. Based upon its review, the Board concluded the potentially mitigating factors that you raised were insufficient to warrant relief. With respect to your administrative separation due to misconduct based on drug abuse, the Board noted that “drug abuse” is an encompassing phrase that, in terms of enlisted administrative separations, includes possession of illegal substances; an offense you admitted to committing in your application to this Board. With respect to your claim of ineffective assistance of counsel, the Board observed no defects in your administrative processing paperwork, which demonstrates you elected your right to speak with counsel. Further, you have not identified any particular counsel that you believe was ineffective.

The Board acknowledged that you have diagnosed mental health conditions, but the Board considered it appears you were granted clemency prior to your discharge when you did not receive nonjudicial punishment and you received a general (under honorable conditions) (and not an other than honorable) characterization of service for a charge based on drug possession with an administrative board waiver. The Board observed that you did not provide additional material to be considered in terms of clemency, such as post-service activities in accordance with the Wilkie Memo. Accordingly, in view of the entirety of your record and your submission, the Board determined that your request does not merit relief.

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,

3/11/2022

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