



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. 2203-21
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.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitation and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 24 February 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, as well as an 18 January 2022 advisory opinion (AO) of a qualified medical professional, a copy of which was provided to you, and to which you provided a response dated 22 February 2022.

You enlisted in the Marine Corps and commenced a period of active duty on 10 February 2014. In November 2015, you were found unfit for duty due to chronic right hip pain with impairment due to limitation of flexion without limitation due to extension, adduction, femur or musculature. In April 2016, a disability rating of 40% was applied to your condition under VA Code 5024-5252, and you were placed on the Temporary Disability Retired List (TDRL) effective 30 July 2016. On 5 February 2018, you underwent a Periodic Physical Examination (PPE) as part of the TDRL process, and the reviewing medical officer determined that your condition was rated at 10% under VA Code 5024-5252. In March 2018, you requested reconsideration of this rating and later that month an Informal Physical Evaluation Board (IPEB) met to review your reconsideration request, and the IPEB did not change the recommendation. On 16 May 2018, a Formal Physical Evaluation Board (PEB) met and determined that your disability rating should be 10% based, in part, on evidence that you exhibited at least 90 degrees of hip flexion during

your hearing. Thereafter, on 16 August 2018, you were removed from the TDRL and discharged with severance pay.

In your petition, you contend that you were erroneously assigned a 10% rating by the PEB despite medical evidence that you warranted a 40% rating for chronic right hip pain. You further contend that the evidence shows that you possessed a right hip flexion of less than 10 degrees and qualify for the 40% rating and that you are currently rated by the Department of Veterans Affairs (VA) at 40% for the condition. In connection with your contentions, the Board obtained the 18 January 2022 AO, which, after a description of your medical evaluations at the pertinent times during your active service, concluded that:

the Applicant has no underlying medical etiology for her reports of pain. The clinical record establishes multiple instance of full range of motion of the right hip, coupled with reports of pain. This is appropriately rated under 38 CFR §4.59 which allows consideration of functional loss due to painful motion to be rated to at least the minimum compensable rating for a particular joint. As such, the condition is appropriately rated at 10% under VASRD Code 5024-5252. Limited examinations in disability assessment circumstances show dramatically reduced right hip range of motion. However, greater weight was applied to the full medical record, to include serial examinations by multiple primary care and orthopedic specialists during the onset of the condition while on active duty, and an extensive physical therapy functional assessment in 2020 establishing inconsistent testing performance.

In response to the AO, you provided the Board your 22 February 2022 rebuttal, in which you submitted your disagreement with the AO, including the following:

The author of the Advisory Opinion gives more weight to the casual observations in the medical record than the great weight of medical and testimonial evidence from the VA and the Applicant. In doing so, the determination is not based on a totality of the medical evidence and is without any consideration of the individual in the best position to assess the pain, the Applicant herself. The author gives too much weight to the Formal PEB which failed itself to correctly assess the goniometer range of motion exam, and testimony of the Applicant. The author notes that the VA made their decision based on the readings of the goniometer readings for flexion. This is an objective finding of a 40% disability. Despite this objective observation and reading of a disability, the author fails to consider this further and instead choses to disregard it.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, including your rebuttal to the AO. In your case, the Board determined the preponderance of the evidence did not support a finding that you met the criteria in order for you to qualify for a medical retirement. In concurring with the findings of the AO, the Board reviewed the medical evaluations conducted while you were on active duty, as well as the extensive physical therapy functional assessment in 2020, which established inconsistent testing performance. The Board reviewed the AO in light of the rebuttal assertions that you provided.

In addition, your contention that the VA later found that you were rated with a 40% service connected disability based on conditions that were diagnosed during your time in the Marine Corps did not persuade the Board because the standard the VA applies is tied to the establishment of service connection and is manifestation-based. The Board found the medical records proximate to your active duty and TDRL period to be more persuasive. The Board found the formal PEB evidence that you were able to exhibit a hip flexion of at least 90 degrees during the entirety of the PEB hearing, without any appearance of discomfort, to be particularly persuasive in making its finding. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your 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,

3/11/2022

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Deputy Director

Signed by: █