



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. 2728-21
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 limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 10 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, as well as the 8 February 2022 advisory opinion (AO) of a qualified medical professional, as well as your responses to the AO of 20 February 2022 and 25 February 2022.

A review of your record shows that you enlisted in the Navy and began a period of active duty on 16 June 2003. As described in detail in the AO, commencing in late 2006, you were evaluated and treated by various medical professionals, including mental health providers, from time to time while on active duty. On 1 September 2012, you were separated with an honorable characterization of service due to a reduction in force.

In reviewing your current petition, the Board considered all of your contentions and the material that you submitted in support of your petition. You request to have your reason for separation changed from reduction in force – manpower separation to a disability retirement based on depression and chronic adjustment disorder, both combat related. You have alternatively requested that you be placed on the temporary disabled retired list. You have also requested back disability retirement pay and combat related special compensation. In support of your request, you contend that your multiple contacts with mental health providers while you were on

active duty demonstrate that you should have been placed in the disability evaluation system due to unfitness based on your mental health conditions. In addition, you contend that the Department of Veterans' Affairs (VA) rated you with a 70% service connected disability for depression and post-traumatic stress disorder (PTSD) and also found you to be 100% unemployable.

In connection with its review of your petition, the Board obtained the AO, which was considered unfavorable to your request for relief. The AO's conclusory statement is as follows:

In summary, the evidence does not support the Applicant's request for a disability retirement. Liberal consideration under the Kurta and associated memoranda applies to petitions for changes in discharge characterizations, not to BCNR determinations with respect to disability benefits (*Phillipeaux v. United States*, 20-275 (Fed. Cl. 2020)). While the Applicant contends he met criteria for a Chronic Adjustment Disorder at the time of his active service (subsequently made a potentially compensable condition in 2013) and was prescribed psychotropic medication for several years of his service, he was consistently found psychologically fit for duty by competent mental health providers. The mere presence of a condition does not establish unfitness. In this case, the record shows no limitation of health condition via light or limited duty, no personnel records establishing duty limitations, and affirmative findings of fitness by clinical providers. The issue of Combat Related Special Compensation given his Adjustment Disorder condition is determined as fit. As such, a medical retirement cannot be recommended. Should any further evidence surface supporting unfitness or a disability retirement, resubmission would be appropriate.

You provided two responses to the AO, which the Board carefully reviewed. In your initial response to the AO, you state that you found it odd that the AO determined that you met psychological and fitness standards, despite the fact that you had received multiple nonjudicial punishments, had low marks, and struggled with your marriage and duty commitments, which negatively impacted your performance of duty. In your second response to the AO, you provided a legal case, which you posit supports your position that the Secretary of Defense's Supplemental Guidance to Military Boards of Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD of 3 September 2014 (Supplemental Guidance), applies to your petition.

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; 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. In reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met any of the criteria for unfitness at the time of your discharge from the Navy. Rather, the Board

substantially concurred with the finding of the AO. Specifically, the AO found, and the Board agreed, that, while you were on active duty, you were “consistently found psychologically fit for duty by competent mental health providers.” The Board also noted that your record shows no limitations based on health condition by way of being placed on light or limited duty. Similarly, there are no personnel records establishing duty limitations, nor are there any affirmative findings of fitness by clinical providers. Finally, while the Board considered your misconduct and poor performance, the Board was unable to find a nexus between those incidents and your diagnosed adjustment disorder.

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. With respect to your assertion that the Supplemental Guidance should apply to your petition, the Board noted that the Supplemental Guidance applies to petitions for changes in discharge characterizations, not to BCNR determinations with respect to disability benefits. In making this finding, the Board relied on the more recent case cited in the AO that involved a former Navy member seeking disability benefits. 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,

3/25/2022

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Deputy Director

Signed by: █