



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. 3239-22
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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 24 June 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. The Board also considered the 31 March 2022 advisory opinion (AO) of a medical professional as well as your 11 June 2022 rebuttal to the AO.

The Board determined that a 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.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 24 June 1996. Your record reflects several contacts with medical personnel during your tenure in service, which are described in greater detail in the AO and associated documents. Notably, but not exhaustively, your medical record reflects you had a medical encounter for back pain on 3 March 1997. A medical record dated 6 February 2001 reflects that you had a long history of lumbar pain. You were provided magnetic resonance imaging (MRI) services on 5

April 2004, and again on 19 May 2004. These MRIs indicated, respectively, that you had osteoarthritic changes to your spine and a slight extrusion of disk material.

Your medical record also reflects that during your service, you encountered pain and discomfort of your feet of such a degree that a medical board referred you to the Physical Evaluation Board (PEB). On 30 November 2004, an Informal Physical Evaluation Board (IPEB) indicated that you were unfit for duty based on bilateral congenital pes planus (75461) with a combined disability rating of 20%, which was based on a 10% finding for each foot under VASRD Diagnostic Code (DC) 5279 (Bilateral Factor Applied). You were also found to have two related diagnoses, which did not change the rating percentage, namely, bilateral plantar fasciitis and bilateral tarsal tunnel syndrome. Despite your history of evaluation and treatment for back pain conditions and medical documentation available during your service, there is no indication that any medical provider found that you were unfit due to these back pain conditions, and these conditions were not referred to the PEB. On 27 December 2004, the PEB issued a decision consistent with the IPEB, rating you with a 20% disability based on the foot conditions. On 22 March 2005, you were discharged with severance pay based on your disability finding.

On 18 August 2006, you received a rating from the Department of Veterans Affairs (VA), which granted you a 10% service connected disability rating for your back conditions. In 2015, you filed a case with the Physical Disability Board of Review (PDBR) for review of your PEB findings. On 17 November 2016, the PDBR unanimously recommended no change in your PEB findings.

In your petition, you requested that your Disability rating be raised to at least 30%, by “providing a retroactive rating increase of at least 10% under VA Diagnostic Code 5243 for the back injuries the PEB erroneously failed to rate, and a retroactive rating increase to at least 30% for the collective impact of all of [your] unfitting conditions at the time of [your] discharge.” You also seek an award of Combat Related Special Compensation after your record is corrected by awarding you a medical retirement, because, you contend, that your injuries were aggravated in combat, contrary to the PEB’s notes.

In support of your petition, you assert that the PEB failed to properly evaluate your back condition resulting in your discharge with only a 20% disability rating. You further assert that had the PEB properly evaluated your back and feet conditions, you would have been assigned a disability rating of at least 30%. Further, you provide information that you contend supports the granting of CRSC, describing an incident that occurred while participating in an underway refueling operation.

The Board carefully considered your arguments, including the entirety of your petition and all of its enclosures. To assist it in review medical information, the Board obtained the AO, which was considered unfavorable to your contentions. According to the AO:

The preponderance of evidence provides insufficient support for the request. This is due to insufficient evidence of separate unfitness for continued Naval service attributable to the petitioner’s, now, additionally appealed spine condition (with limited left leg symptoms) contemporary with his 2004 discharge. The four

periods of Limited Duty and MEBR referring him to the PEB appear to have been solely for the petitioner's bilateral foot related conditions. Moreover, the submitted Command Non-Medical Assessment attributed its assessment of impairment solely to the petitioner's bilateral foot condition. Also, it appears fairly clear that none of his providers of medical-orthopedic care felt referral to the PEB was warranted for his thoracolumbar spine condition.

It is noted the 'disabling back injuries' were neither referred to the PEB nor raised as a concern by the petitioner during PEB processing, including when the petitioner chose not to accept the PEB offer of appellate review (e.g., Formal PEB... etc.) despite the retrospectively claimed symptom burden associated with his thoracolumbar spinal condition. Nor did the VA's initial post separation Compensation and Pension evaluation find a level of impairment beyond their minimally compensable level of 10%. It is noted general physical examinations required during the PEB process are not limited to conditions being referred to the PEB. In that context, mention was made of the petitioner's currently appealed thoracolumbar spine related condition and need for body composition related management but with no indication further medical referral was warranted.

You were provided a copy of the AO, and you provided a rebuttal dated 11 June 2022. The Board considered the entirety of your rebuttal. According to your rebuttal, in part:

While the evaluator continually references [Petitioner's] 'failure' to seek earlier appeal, either at the time of the PEB decision or at the Physical Disability Board of Review (PDBR), this Board exists to correct errors of exactly this nature.

[Petitioner] was neither a medical expert, nor qualified to accurately review the decisions made by the PEB during his separation. [Petitioner] conceded that he only recognized the error after later review; he should not be held accountable for his failure to understand the ramifications of waiving PEB appellate action.

The wealth of supporting documentation included in [Petitioner's] original application more than substantiates both the existence of a debilitating back condition, and the failure of the PEB to properly rate said condition. The evaluator, like the PEB, failed to accurately rate [Petitioner's] symptoms collectively as required by the statute.

In review of the entirety of your naval service and medical records, your petition and its enclosure, the AO, and your rebuttal to the AO, the Board disagreed with your rationale for relief. At the outset, the Board concurred substantially with the AO. In reaching its decision, the Board observed that you were never placed on limited duty as a result of your back conditions. The Board further observed that, despite your several contacts during your service with medical providers relating to your back condition, none of the providers determined to have your back conditions reviewed by a medical evaluation board. There is no evidence that you or your providers were precluded from presenting for evaluation any other conditions to the PEB, including the back conditions.

The Board also noted that, according to the AO, your Command's Non-Medical Assessment did not address as a disabling condition your back condition. In applying a presumption of regularity, the Board determined that, had your back condition appeared to rise to the level of an unfitting condition during service, one of your providers that you had seen several times concerning your back may have placed you on limited duty and, importantly, referred your back condition to a medical evaluation board for further determination of fitness. None of these occurred. In addition, the Board was not persuaded by the arguments you made in rebuttal to the AO. Notably, with respect to your arguments concerning your failure to raise your back condition during the PEB process, the Board understands that it exists to correct errors. But, in view of the entirety of the information that was available while you were in service, the Board determined that had your back condition been of such a nature deserving of review the PEB, one of your providers, or you, would have raised the issue at the appropriate time.

Further, to the extent you assert that the VA later provided you service connected disability findings relating to your back condition, the Board noted that any such findings from the VA for service connected disability conditions did not persuade the Board these conditions were unfitting at the time of your discharge from the Navy 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. Accordingly, the Board denied your requested relief.

Finally, because it denied your relief requesting a disability retirement, the Board need not make a determination concerning CRSC applicability, because that is only available for retired service members.

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,

7/11/2022



Executive Director

Signed by:

