



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

[REDACTED]
Docket No: 3462-21
Ref: Signature date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED]
XXX-XX-[REDACTED] USMC

- Ref: (a) 10 U.S.C. § 1552
(b) SECDEF memo of 3 Sep 14, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD"
(c) PDUSD memo of 24 Feb 16, "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI"
(d) PDUSD memo of 25 Aug 17, "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment"
(e) USD memo of 25 Jul 18, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations"
(f) SECNAV memo of 1 Jun 16, "Disability Evaluation System Dual Processing"

Encl: (1) DD Form 149 (NR20210003462)
(2) Advisory Opinion of 27 Sep 21

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting an upgrade to his discharge to reflect an honorable characterization of service, and a medical retirement with a disability rating of 30% or higher for Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI) and lumbar strain. Enclosures (1) and (2) apply.

2. The Board consisting of [REDACTED], [REDACTED], and [REDACTED] reviewed Petitioner's allegations of error and injustice on 1 October 2021, and pursuant to its regulations, determined that the corrective action indicated below should be taken. Documentary material considered by the Board consisted of Petitioner's application together with all material submitted in support thereof, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include references (b) through (f). Additionally, the Board considered the Advisory Opinion (AO) furnished by a qualified Physician Advisor; enclosure (2).

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3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although enclosure (1) was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner enlisted in the Marine Corps and began a period of active duty on 22 February 2011.

d. Petitioner deployed to [REDACTED] from April to November 2014, earning the rank of sergeant. On 24 September 2014, Petitioner reenlisted in the Marine Corps for a period of 4 years and 6 months.

e. On 27 October 2015, Petitioner received nonjudicial punishment (NJP) for violating Article 134 (adultery) of the Uniform Code of Military Justice.

f. In November 2015, Petitioner was placed in a limited duty status for PTSD.

g. On 8 February 2016, Petitioner underwent a random drug screen and subsequently tested positive for Tetrahydrocannabinol (THC) on 9 March 2016.

h. On 9 August 2016, Commanding Officer, [REDACTED] notified Petitioner of administrative separation proceedings against him on the basis of drug abuse due to testing positive for THC. Petitioner's Commanding Officer informed Petitioner that the least favorable characterization of service he could receive was under other than honorable conditions, but recommended that Petitioner receive a general characterization of service.

i. On 11 August 2016, Petitioner's Commanding Officer completed a non-medical assessment (NMA) on Petitioner's behalf and stated that Petitioner had not taken the most recent Physical Readiness Test because it was conveyed to the command that Petitioner had a severe case of PTSD and his presence around uniformed members triggered anxiety attacks and nervous reactions. The Commanding Officer stated that Petitioner was not worldwide assignable, was unable to perform any duty required of a United States Marine, and was an alcohol treatment failure due to his refusal to participate in a medical provider directed alcohol treatment program. The NMA enumerated over a dozen diagnoses to include anxiety, TBI, upper and lower back injuries, neck injury, and noting "others stemming from finger deformity to Sinus congestions. The NMA stated "(i)f all of these are accurate, this member cannot perform any duties as a Marine."

j. On 24 August 2016, a Medical Evaluation Board found that Petitioner's PTSD was duty limiting and forwarded his case to a Physical evaluation board.

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k. On 20 September 2016, an Informal Physical Evaluation Board (IPEB) found Petitioner unfit for duty due to lumbar strain and PTSD. The IPEB incorporated the Department of Veterans Affairs (VA) Rating Decision letter and its supporting rationale.

l. On 24 October 2016, Commanding General (CG), 3d Marine Division submitted a letter to the Commandant of the Marine Corps (CMC) requesting that the PEB process in the case of Petitioner be terminated.

m. On 1 November 2016, CMC submitted a letter to the President, PEB, requesting that Petitioner's PEB process be terminated and noting that Petitioner would be administrative separated for misconduct due to drug abuse with a general discharge.

n. On 7 November 16, the President, PEB stated that no funding would be recorded due to DUOPOL.

o. On 30 November 2016, Petitioner was discharge on the basis of Misconduct (Drug Abuse), and received a general under honorable conditions discharge and a reentry (RE) code of RE-4B.

p. The Department of Veterans Affairs (VA) issued a disability decision dated 1 March 2017, rating Petitioner as follows: 50% for PTSD (to include insomnia disorder, adjustment disorder with depressed mood and ADHD); 30% for diarrhea of an unknown etiology to include GERD; 10% for bilateral tinnitus; 10% for left wrist sprain; 0% for cervical strain; 0% for deformity consistent with remote avulsion injury 5th proximal phalanx; 0% for erectile dysfunction; and 0% for hypertension. Petitioner was examined on 8 July 2016, by the VA in connection with his application to the VA for disability benefits associated with PTSD. The examination resulted in a diagnosis that Petitioner has a diagnosis of PTSD that conforms to DSM-5 Criteria and a TBI based on the 8 July 2016 evaluation. The examination also found Petitioner to have occupational and social impairment with reduced reliability and productivity.

q. In his application to the Board, Petitioner requests an upgrade from a general discharge to an honorable characterization of service, medical retirement with a disability rating of 30% or higher for PTSD, TBI, anxiety, and lumbar strain. Petitioner provides a brief in support of his request and notes that he deployed to [REDACTED] from April to November 2014; upon his return in December 2014, he began to exhibit symptoms of PTSD which led to suicidal behaviors, anxiety, and increased use of alcohol. Petitioner was hospitalized following a suicide attempt, completed a two-month intensive outpatient alcohol treatment program, and was ultimately placed in a Wounded Warrior Detachment. In May 2016, Petitioner was referred into the Disability Evaluation System (DES). Petitioner asserts that due to his disabilities, he is entitled to a medical retirement resultant from a 50% disability rating but that the Marine Corps failed to comply with the dual processing discharge processing in place at the time, and instead discharged him with general based on misconduct despite his PTSD. Petitioner claims procedural error and injustice in that he contends that he was not provided certain safeguards at the time of his administrative separation processing to include a medical opinion as to whether PTSD contributed to the misconduct for which he was being separated and that his first General Officer (GO) was required to document, in writing, that he should be separated for misconduct despite his PTSD. Petitioner states that he served his country with honor and distinction, served

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as a Rifleman in support of Operation Enduring Freedom, and earned numerous awards and ribbons. He states that his service to the Marine Corps caused his PTSD, for which he has diligently pursued treatment; he has developed severe anxiety, has been diagnosed with TBI, and lumbar strain. He claims that his misconduct was a direct result of his PTSD (a medical condition caused by his combat service) and that his first GO should have allowed the DES process to proceed.

r. As part of the review process, enclosure (2), a Physician Advisor reviewed Petitioner's contention that he was dealing with PTSD and TBI and that this diagnosis may have mitigated the misconduct that led to his general under honorable conditions characterization of service. The Advisory Opinion noted that Petitioner holds a March 2017 VA disability rating in part for PTSD to include insomnia disorder, adjustment disorder with depressed mood and ADHD) with a disability evaluation of 50% effective 1 December 2016, The Advisory Opinion further noted Petitioner's combat deployment in 2014 in support of Operation Enduring Freedom, followed by symptoms manifesting soon after his return from deployment and meeting the full range of criteria for PTSD and Major Depression. The Advisory Opinion stated that Petitioner was found that in September 2016, he was found unfit for duty to due PTSD and low back pain and processed for medical retirement. The Advisory Opinion found that Petitioner's in-service drug abuse can be seen as a typical maladaptive coping strategy to alleviate psychological distress and is frequently seen in service members with PTSD and/or TBI. The Advisory Opinion noted that his misconduct of adultery may be seen as part of the poor judgment, dysfunctional relationships, and impulsive actions frequently seen in those with PTSD and especially TBI. Based on the available evidence, the Advisory Opinion determined that the preponderance of objective evidence established that Petitioner suffered from unfitting mental health conditions (PTSD, TBI) at the time of his military service and that his in service misconduct could be attributed to his unfitting health conditions of PTSD and TBI.

CONCLUSION

The Board reviewed Petitioner's request in accordance with references (b) through (f), and carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in his case in accordance with the Wilkie Memo. The Board noted the conclusions of the Advisory Opinion, and substantially concurred with its determination that there is sufficient evidence to support a finding that Petitioner's in-service misconduct of drug abuse was mitigated by his mental health conditions. The Board noted that Petitioner's record reflects that he was found guilty of committing adultery, but that his administrative discharge separation proceedings were on the basis of drug abuse. In consideration of the analysis and conclusions of the Advisory Opinion, the Board determined that Petitioner is entitled to an upgrade to his characterization of service from general to honorable. The Board noted that it would have recommended a change to Petitioner's narrative reason for separation, his separation code, and his separation authority to reflect Secretarial Authority but for Petitioner's request for a medical retirement (transfer to the Permanent Disability Retired List (PDRL)) with at least a 50% disability rating.

The Board considered Petitioner's request for a medical retirement with a 50% disability rating, with a resultant transfer to the PDRL as of 1 December 2016. The Board noted that Petitioner

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asserts in part that he was deprived of a medical opinion prior to his administrative discharge on the basis of drug abuse as to whether his PTSD contributed to the misconduct which formed the basis of his separation proceedings, and that his first GO was required to document in writing whether Petitioner should be separated for misconduct despite his PTSD. The Board considered both of Petitioner contentions in light of reference (f). The Board noted that reference (f) states that the appropriate Separation Authority for dual processing cases shall be the first GO in the service member's chain of command unless a higher authority is required. Additionally, the Separation Authority may direct separation prior to completion of the DES process if the Separation Authority determined and documents, in writing, that the member should be separated for the misconduct despite his medical condition. CMC, acting as the Separation Authority in Petitioner's case, administrative discharge processing for misconduct and noted in his 1 November 2016 correspondence that Petitioner was in the PEB process. The Board applied the presumption of regularity and noted that CMC's November 2016 correspondences indicate an awareness of Petitioner's medical condition prior to his separation on the basis of misconduct. The Board determined that CMC's final approval to terminate Petitioner's DES process and direct separation on the basis of misconduct despite Petitioner's medical condition appears to have been executed without harmful error.

However, the Board noted that findings of the 27 September 2021 Advisory Opinion, took into consideration Petitioner's detailed account of his in-service struggles, considered the 11 August 2016 Commanding Officer's NMA, evaluated the 24 August 2016 referral by the Medical Evaluation Board to the PEB due to a diagnosis of PTSD, carefully reviewed the findings of the 20 September 2016 IPEB, noted the March 2017 VA disability evaluation determination, and weighed the information reflected in the Department of VA, Initial PTSD Disability Benefits Questionnaire resulting from the July 2016 examination.

The Board concluded that Petitioner's administrative discharge on the basis of misconduct was executed without error and that CMC was within his authority to separate Petitioner with a general discharge on the basis of drug abuse. The Board found that although Petitioner's administrative discharge on the basis of misconduct was not erroneous, as a matter of justice, Petitioner is entitled to medical retirement with a combined disability rating of 50% on the basis of the unfitting condition documented in the 20 September 2016 IPEB: PTSD (unstable). When making its determination for the total combined disability rating, the Board considered the 20 September 2016 IPEB findings reflected to Category I, Unfitting Conditions: PTSD (unstable) and low back pain (unstable). The VA Rating Decision of 1 March 2017 granted a 50% rating for PTSD effective 1 December 2016, and a 10% rating for cervical strain (claimed as upper back). The Board noted that Petitioner's VA Rating Decision of 1 March 2017 reflects a 10% rating for cervical strain claimed as upper back but that the September 2016 IPEB noted a lower back pain condition. In consideration of the inconsistency between the two documents, the Board found that Petitioner failed to establish entitlement to a medical disability rating in connection with a transfer to the PDRL for low back pain (unstable). After careful consideration of the totality of information, the Board concluded that Petitioner is entitled to a disability rating of 50% for PTSD.

The Board noted that the 20 September 2016 IPEB findings noted that the PEB considered whether Petitioner's unfitting disability was incurred in a combat zone, during combat-related

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operations, or was combat-related. The IPEB found that the record available to the board did not contain objective evidence to show by a preponderance of evidence that Petitioner's medical condition(s) was incurred as a result of combat or in the combat zone as defined by DODI 1332.18. The IPEB found that it was unable to characterize his unfitting condition as combat-related or incurred in a combat-zone. The Board concluded that Petitioner did not provide sufficient evidence or information to overcome the IPEB's determination.

In view of the above, the Board directs the following corrective action.

RECOMMENDATION:

That Petitioner's naval record be corrected to show that on 30 November 2016, he was issued an honorable discharge upon his transfer to the PDRL.

Petitioner's naval record be corrected by placing him on PDRL for PTSD, VASRD Code 9411 (50%) for a combined rating of 50% effective 1 December 2016. Petitioner's SPD code will be changed to SFJ1 and his separation authority to MCO 1900.16 Par. 8201. Petitioner's disability condition did not result from a combat related injury as defined by Title 26, United States Code, Section 104(b)(3).

Petitioner will be issued a new DD Form 214 reflecting these changes to his record.

Defense Finance and Accounting Service will complete an audit of Petitioner's pay records to determine Petitioner's retroactive pay and allowance entitlement.

That a copy of this report of proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.
5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

11/17/2021

[REDACTED]
Deputy Director
[REDACTED]