



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

█
Docket No. 3756-21
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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 3 October 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 reviewed the 3 August 2022 advisory opinion (AO) of a qualified medical professional, your rebuttal to the AO dated 24 August 2022, as well as the review of your rebuttal dated 23 September 2022.

The Board determined that your 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 25 May 2011. As set forth in more detail in the 3 August 2022 AO, during your service, you had several medical visits. On 5 November 2014, you were reviewed by an abbreviated medical evaluation board (MEB). The MEB placed you on limited duty until 5 April 2015. On 24 June 2015, you were released from active duty due to completion of your obligated active service, assigned an RE-RE1 (preferred) reentry code, and you transferred to the reserve. On 21 February 2019, you were discharged from the reserve due to the end of your required reserve service, and you were recommended for reenlistment. You provided documentation that, on 31

August 2020, the U.S. Department of Veterans' Affairs (VA) determined that you had a service connected disability for fibromyalgia rated at 40% effective 17 October 2019. In your petition, you seek Medical retirement.

In your petition, you request that you be reviewed by a MEB for the consideration of a medical retirement. In support of your request, you contend that your fibromyalgia was diagnosed in service and that it worsened when you left the service, and that you are now rated by the VA for the condition.

In order to assist it in reviewing your petition, the Board obtained the 3 August 2022 AO. According to the AO, the evidence that you provided contained "insufficient support for the request." The initial AO explained that there was a "near absence of objective evidence contemporary with the petitioner's active service documenting a consistent, sustained pattern of significantly impaired duty performance incident to the petitioned conditions despite the reported symptom burden and compelling submitted 'witness letter.'" The AO set forth additional information that would be required for it to provide a more complete opinion.

You received a copy of the AO, and in response, you provided a written statement, and you attached medical records as requested by the initial AO. This material was reviewed by the preparer of the initial AO for further review. On 23 September 2022, a new AO was issued, and explained as follows:

the evidence in this case fails to establish unfitness for Fibromyalgia during the period of active service. Although the Applicant was placed on a period of Limited Duty from 5 Nov 2014 to 17 Jun 2015, she was returned to full duty by the same evaluating provider after an exhaustive work-up identified no "diagnosis to explain her symptoms." Further, the Applicant was found fit for separation, synonymous for fit for continued service. It was not until post-service that the Applicant was diagnosed with Fibromyalgia. By regulation, the mere presence of a medical condition and manifestation of symptoms is insufficient to warrant either a finding of unfitness for continued Naval service or a specific disability rating by the Department of the Navy PEB in the absence of demonstrated duty performance impairment sufficient to render a Service applicant Unfit for Continued Naval Service.

By contrast, eligibility for Compensation & 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. Therefore, the presence of a VA assigned disability rating does not establish unfitness for continued service. The Navy's medical analysis of the Applicant's pain symptoms spanned multiple medical specialties and thorough physical examination, laboratory, and radiological testing. Ultimately, a competent rheumatologist affirmatively determined the Applicant does not have fibromyalgia and the evaluation pain medicine physician who had previously initiated Limited Duty restrictions via a Medical Evaluation Board returned the Applicant to full duty, concluding "Yes" in response to whether she was

“worldwide assignable without limitations for duties consistent with rate/rank/designator.”

The AO concluded, “[i]n consideration of the whole record, there is insufficient evidence to reach a conclusion that Fibromyalgia was unfitting. As such, a disability retirement cannot be recommended.”

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, including the medical documentation that you provided, and the Board disagreed with your rationale for relief. In reaching its decision, the Board observed that, 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. At the outset, the Board substantially concurred with the AO’s opinion. The supplemental AO carefully reviewed the rebuttal medical evidence that you provided and determined that there were no findings of unfitness during your period of active duty and that a disability retirement is not recommended. The Board also observed that, not only were you found fit for separation, you were issued a preferred reentry code and you were transferred to the Navy Reserve. You spent approximately four more years after your active duty release in the Navy Reserve in some capacity. Additionally, when you were discharged from the Navy Reserve, you were considered eligible for reenlistment. Had you incurred any unfitting conditions over that period of time, the Board determined you would not have been considered fit for separation, issued a preferred reentry code, transferred to the Navy Reserve, served four more years in a reserve capacity, and later determined to be recommended for reenlistment. To the contrary, these are all indications that you were considered fit for duty within the meaning of the disability evaluation system.

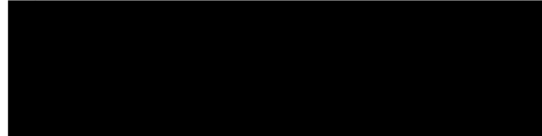
The Board further observed that the AO correctly explained that the findings by the VA years after your discharge from active duty are not persuasive because, not only are they remote in time, but they also apply a different standard. In other words, the fact that the VA rated you for a disability condition that it determined were service connected to your time in the service 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. Thus, in light of all of the foregoing, the Board determined there was no error or injustice in your naval record and it denied your petition.

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,

10/27/2022



Executive Director

Signed by: █