



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. 3904-21
Ref: Signature Date

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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 28 July 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 10 May 2022 advisory opinion (AO) of a medical professional, as well as your 20 July 2022 response to the AO.

A review of your record shows that you enlisted in the Marine Corps Reserve on 14 February 2013. While in the Marine Corps Reserve, you served various periods of active duty and reserve duty. You received a fitness report through 31 March 2017, which reflected that you were recommended for retention and promotion. On 17 August 2017, you received a non-medical assessment (NMA) from your command, which stated that you had:

the mental capacity and requisite knowledge to perform assigned tasks however, the symptoms associated with his medical condition make it difficult for him to concentrate or remember tasks assigned that aren't written, or sit/stand for extended periods. More specifically, his condition, which causes severe migraines and anxiety periodically throughout the week, can only be managed by prescribed medication. These migraines cause [Petitioner] to have severe sensitivity to light and noise. [Petitioner's] anxiety attacks cause him to tremble and become dizzy, which lead to him feeling overwhelmed.

The NMA continued:

[Petitioner's] chronic lower back pain in his lumbar region causes numbness and pain that shoots down to his legs and cannot be managed which causes pain in both knees and his left foot. As a result, his assigned workload must be limited, in both volume and length. The medication prescribed for his condition makes him drowsy and impacts faculties such as concentration, as well as preventing his ability to safely operate a motor vehicle. Due to these constraints, he is unable to take the medicine during waking/work hours.

The NMA also discussed that you were unable to participate in strength training and that your medical appointment volume makes it difficult to maintain your work schedule. Thereafter, you underwent an "Impartial Medical Review" at [REDACTED], which stated that you reported intermittent bilateral knee pain since 2014 and received physical therapy which helped. In addition, an MRI of your left knee showed various indications of knee conditions.

On 9 November 2017, you were reviewed by an Informal Physical Evaluation Board (IPEB), which found you fit to continue active duty. The adjudicators of your IPEB recommended against a formal PEB, finding that you remained fit, and that the NMA was not consistent with your performance. The IPEB explained that you were working within your Military Occupational Specialty (MOS) and you recently were awarded a Navy and Marine Corps Achievement Medal. Accordingly, on 24 January 2018, your request for a formal hearing was denied. On 31 May 2018, you completed your service and received an Honorable discharge.

After your separation from the Marine Corps Reserve, the U.S. Department of Veterans' Affairs (VA) determined that you had service connected disabilities rated at (1) 30% for adjustment disorder with mixed anxiety and depressed mood, chronic with residuals of traumatic brain injury, (2) 20% for left knee chondromalacia, (3) 10% for right knee chondromalacia, and (4) 20% effective 1 June 2018, 10% effective 27 August 2018, for chronic lumbar strain.

In your petition, you requested to be placed on the disability retirement list at 60% for the combined rating of chronic lumbar strain (10%), chronic posttraumatic headaches (30%), bilateral chondromalacia (20% and 10% with bilateral factor). In the alternative, you seek an order that (i) the PEB's fit findings be reassessed through a replacement PEB proceeding and (ii) the final combined disability rating decisions for me be recalculated by combining the disability rating(s) awarded by the replacement PEB; order that the PEB allow you to submit new evidence on any nonreferred or any previously determined improperly referred condition; order that the PEB require a new narrative summary (NARSUM) addendum be submitted to the PEB; order that the PEB conduct an informal and, if requested, a formal PEB evaluation, with all the protections afforded, to review de novo the fitness of all nonreferred and all previously determined improperly referred conditions; and order that the PEB assign the disability rating established by the VA at the time of discharge for all my unfitting conditions and apply the appropriate duty or retirement status.

In support of your request, you contend that the PEB failed to consider all potentially unfitting conditions and that you were denied a formal hearing based on the "properly referred condition"

policy that was rescinded. You argue that you were unfit and should be rated a combined 60% for bilateral chondromalacia, chronic posttraumatic headaches, and chronic lumbar strain based on the medical evidence.

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, in part:

In summary, the submitted evidence provides insufficient support for the request. This is due to a preponderance of the available evidence including the brief (perhaps less than one month) period of observation and inadequate quantification in the Command Non-Medical Assessment (NMA) of the degree of duty performance functional impairment incident to the petitioned medical conditions placing a heavy emphasis on lack of availability to his command incident to a demanding clinic appointment schedule (apparently applying to all petitioned conditions—see §3.f(4-5) above) during the period preceding his MEBR/NARSUM submission, along with ancillary, objective evidence suggesting significantly greater functionality.

While designated as non-deployable, the petitioner continued to perform in his MOS; and it is, additionally, noted non-deployability, per se, is not, automatically, considered unfitting. Moreover, when specified, health record entries commonly closed with the determination “Released without limitation.” Moreover, the requirement for submission of the previous 24 months of Fitness Reports was insufficient as the data submitted was limited to a single “Non-observed” USMC fitness report covering only the two-week period prior to his WRNMMC Medical Board evaluation as noted above. Furthermore, the additional information noted by the PEB included “recent” receipt of a NAMCAM (Navy and Marine Corps Achievement Medal) suggesting a greater capacity for productivity than implied in the above noted NMA. Unfortunately, a more detailed personnel proficiency and conduct data record was neither submitted nor, otherwise, readily available during the current Advisory Opinion evaluation process; to wit, it is noted the SECNAVCORB is not an investigative body and, hence, must rely on submitted records sufficient to make a timely, informed recommendation. In accord with Reference (b) APPENDIX 2 TO ENCLOSURE 3, consideration was given to unfitness due to Combined Effect, noting, Combined Effect includes the pairing of a singularly unfitting condition with a condition that standing alone would not be unfitting.

You received a copy of the AO, and you provided a response dated 20 July 2022. According to your response, which was considered by the Board in its entirety including its enclosures, you asserted in part that the Board considered materials that were outside of the period that you were on limited duty, such as your Navy and Marine Corps Achievement Medal, and your evaluation.

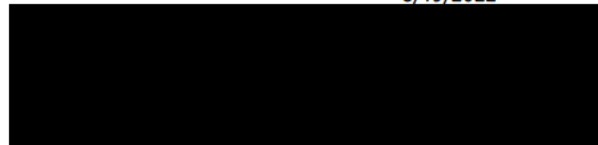
In review of the entirety of your naval service and medical records, your petition and its enclosure, as well as the AO and your response, the Board disagreed with your rationale for

relief. At the outset, the Board concurred with the AO. In reaching its decision, the Board observed that you continued to perform in your MOS, and as noted by the AO, non-deployability is not automatically considered unfitting. In addition, the Board observed that, when specified, health record entries commonly closed with the determination that you were “Released without limitation.” With respect to your contention that the AO considered materials outside of your limited duty period, the Board determined that your overall quality of service as demonstrated in the fitness reports were of sufficient weight when considered in light of all of the factors in your service and medical records. Ultimately, the Board concluded that there was no error or injustice apparent in your processing of your case through the Disability Evaluation System, nor did it find any errors or injustices in the determination of the PEB in your case. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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,

8/19/2022



Executive Director

Signed by:

