

DEPARTMENT OF THE NAVY

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

> Docket No. 4159-21 Ref: Signature Date

Dear :

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 2 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 reviewed the 22 April 2022 advisory opinion (AO) from a medical professional, with its endorsement; copies which were provided to you. In response to the AO, you provided additional medical records.

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 Marine Corps and commenced a period of active duty on 22 August 2011. On 30 May 2017, you were discharged due to physical disability with severance pay.

In your petition, you contend that your severance pay should have been a disability retirement. In support of your contention, you assert that when the Physical Evaluation Board (PEB) found you to be unfit and did not take all of your conditions into consideration when awarding a disability percentage. You state further that you believe your medical records indicate that your

disability rating should have exceeded the 30% rating necessary to qualify for medical retirement.

In order to assist it in reviewing your petition, the Board obtained the 22 April 2022 AO. The AO reviewed your service and medical records, as well as your petition and its supporting documents. According to the AO:

In summary, the preponderance of evidence provides insufficient support for the request. This is due to the absence of objective evidence any of the additionally claimed conditions were unfitting for continued Naval service by regulations in existence at the time of the petitioner's separation incident to his Left Knee condition. None of the additional diagnostic conditions claimed to the VA had been referred to the PEB or had demonstrated evidence that any involved healthcare providers felt referral to the PEB was indicated. With specific attention to potential mental health issues, the pertinent VA DBQ examination found none, and review of the available active duty mental health related record revealed only one, technically, mental health related encounter (from 2015) for a problem of life issue noncompensable by Department of the Navy PEB action and largely related to the petitioner's desire to remain on active duty and worry his left knee condition was going to adversely affect his USMC career aspirations. The available evidence, strongly, suggests, absent the Left Knee condition which precipitated the petitioner's placements on Limited Duty and, subsequent referral to the PEB, he would have, happily, continued his USMC career as fit for same at the time of his separation with severance pay.

The Board carefully considered your arguments, including the entirety of your petition and its enclosures, and disagreed with your rationale for relief. At the outset, the Board concurred with the findings of the AO. Further, after its own careful review of the available service record documents, as well the entirety of your petition, the Board did not discern any error or injustice in connection with the disability rating for which you were discharged. In reaching its conclusion the Board also determined that the presumption of regularity applied to the process employed with respect to your service disability finding.

Finally, to the extent you assert that the U.S. Department of Veterans' Affairs (VA) later provided you service connected disability findings that were higher than the disability rating that you received at the time of your discharge, 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 Marine Corps 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.

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.

