



qualified physically to enlist into another branch of the Armed Forces. The [REDACTED] Army National Guard ultimately denied your request to affiliate, apparently, because your disability ratings with the U.S. Department of Veterans' Affairs (VA) were too high. On 1 December 2018, you were released from the Marine Corps Reserve based on your failures of selection.

In your petition, you seek the award of a medical retirement or to be placed into the Disability Evaluation System (DES). In support of your request, you contend that prior to your separation from service, you were suffering from numerous debilitating medical conditions, which were incurred during his 2012 deployment to Afghanistan, which drastically interfered with your ability to perform basic military tasks. You described your medical conditions included radiculopathy of your left lower and upper extremities, multiple bulging and herniated discs, and degenerative disc disease. You argued that, according to the Navy's Disability Evaluation System governing instruction, you should have been promptly referred to the appropriate medical board for retention evaluation upon discovery of the above mentioned conditions, as those conditions prevented you from performing the duties of your office, rank, or grade. Thus, according to your petition, the failure of multiple medical professionals to refer you the appropriate medical board upon discovery of your medical conditions was in error.

In review of the entirety of your naval service record, and your petition and its enclosures, the Board disagreed with your rationale for relief. In considering your current petition, 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 order to assist it in reviewing your petition, the Board obtained the 12 July 2022 AO. According to the AO, which was considered unfavorable to your petition:

In summary, the evidence provides insufficient support for the request. This is due to a preponderance of the submitted evidence which largely documents the petitioner's Active and Reserve Component Service culminating in a DD Form 214 Reenlistment Code of 1-A (the highest rating) at the 3 July 2013 conclusion of his last period of Active Service.

Additionally, the absence of objective personnel and medical documentation of significant, consistent duty performance impairment incident to any medical condition contemporary with combat zone exposure or evidence any healthcare providers felt referral into the Disability Evaluation System was clinically indicated despite compelling retrospective accounts of incurred injuries and resulting symptom burden. Furthermore, the record includes an unexplained inconsistency of a different sort within the 2018 Inter-service Transfer application process initiated by the petitioner which included the petitioner's affirmation,

“that I am a satisfactory participant at the time this request is being made. I further affirm that I am qualified physically to enlist into another branch of the Armed Forces . . .” which is countered by the 05 June 2018 Inspector-Instructor endorsement letter from ██████████ to Commanding General, ██████ Marine division “recommending disapproval of Request for Inter-Service Transfer stating [Petitioner] had not met the minimum requirements for continued service within the United States Marine Corps, failed the FY17 Physical Fitness Test, had not completed his Professional Military Education, and had failed promotion twice.

You were provided a copy of the AO, and you provided a rebuttal dated 30 August 2022. According to your rebuttal, the AO failed to address the crucial contention, that you should have been referred into the Disability Evaluation System (DES) prior to your release from active duty on 2 July 2013. You continue:

Rather than assess the valid claims that [Petitioner’s] degenerative disc disease, radiculopathy of his left lower and upper extremities, and multiple bulging and herniated discs were unfitting conditions, the Advisory Opinion improperly focused on the 2018 language used in standard interservice transfer request. This transfer request included standard language used in every interservice transfer request. [Petitioner] was told that if he wanted to continue serving his country, then he must fill out that form with the prescribed language. The ensuing endorsements then acknowledged his physical struggles making it even more improper that he was not promptly referred into the DES while in the Marine Corps Reserve. The failure to initially refer him to a medical board while on active duty created the ultimate issue that would lead to his discharge in the Marine Corps Reserve. His desire to continue serving in the Marine Corps should not be used to his detriment.

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 referral to the DES while you were on active duty. To the contrary, you were released from your final period of active duty and issued a preferred (RE-1A) reentry code and you immediately continued in your affiliation with the Marine Corps Reserve. The Board observed there were no indications that you were referred to a medical evaluation board (MEB) while you were on active duty, nor is there evidence your reserve unit referred you to a MEB. Further, there is no indication that you submitted any applications for Line of Duty Benefits (LOD-B) as a result of any injuries that occurred during any periods of active duty or during time you drew pay as a reservist. In addition, the Board concurred with the rationale of the AO, in particular its observation of the absence of objective personnel and medical documentation of significant, consistent duty performance impairment incident to any medical condition contemporary with combat zone exposure or evidence any healthcare providers felt referral into the DES was clinically indicated. The Board carefully considered your rebuttal to the AO, but did not find it compelling, in particular, the Board did not agree with your position that your statement of physical qualification for interservice transfer was simply a use of required standard language. Ultimately, the Board took at face value your assertion that you were “qualified physically to enlist into another branch of the Armed Forces.”

Finally, the fact the VA awarded you service connected disability findings did not persuade the Board these conditions were unfitting at the time of your discharge from active duty 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 found insufficient evidence of error or injustice to warrant a change to your record.

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,

10/4/2022

