



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

█
Docket No. 4816-21
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.

A three-member panel of the Board, sitting in executive session, considered your application on 24 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 considered the 22 August 2022 advisory opinion (AO) from a qualified medical professional. Although you were provided an opportunity to respond to the AO, you chose not to do so.

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 13 July 2015. While you were on deployment in March 2017, you fell approximately 10 feet off the rope during a fast roping exercise from a helicopter. Thereafter, an x-ray was conducted, and you were diagnosed with stress fractures in both femurs. You were seen by medical professional several times over the remaining course of your time in service, which are set forth in greater detail in the AO. In connection with evaluating your medical fitness for service, on 6 September 2018, your command provided a non-medical assessment (NMA). According to the NMA, you were not able to adequately perform your military

operational specialty due to your medical conditions, and you were not able to perform physical tasks such as running, marching, and hiking, or operate in the field environment.

Your medical conditions were referred to the Disability Evaluation System and reviewed by an Informal Physical Evaluation Board, which found, on 22 January 2019, that you had an unfitting service disability of left hip pain with flexion but otherwise functional range of motion (stable). The IPEB also found you had other conditions, which were considered not separately unfitting and did not contribute to your unfitting condition, as follows: right hip pain, femoroacetabular impingement, right hip labral tear secondary to femoroacetabular impingement, and right groin pain.

On 5 April 2018, the U.S. Department of Veterans' Affairs (VA) submitted your "Disability Evaluation System Proposed Rating," finding that the following conditions were service connected, and awarding you an 80% disability rating: cervical strain, 30%, major depressive disorder, 30%, degenerative arthritis of the lumbar spine, 20%, and left hip strain with limitation of extension, 10%.

On 2 May 2019, the IPEB issued its findings that your condition of left hip pain with flexion but otherwise functional range of motion (stable) (evaluated by the VA as left hip strain s/p surgery with impairment of the thigh) as an unfitting condition. The IPEB adopted the VA's finding that this condition was 10% disabling. As it noted previously, the IPEB found you had other conditions, which were not considered separately unfitting and did not contribute to the unfitting condition. Those were: right hip pain, femoroacetabular impingement, right hip labral tear secondary to femoroacetabular impingement, and right groin pain.

You were provided the foregoing information as well as an Explanation of Options form. On 20 May 2019, you signed the Election of Options form, in which you accepted the finding of the IPEB and declined further appeal. In light of the finding of an unfitting condition, and consistent with your Election of Options, on 29 June 2019, you were discharged due to disability, with severance pay, not combat related.

In your petition, you have requested this Board make a finding that you were considered unfit with an 80% disability rating, consistent with the findings of the VA. You also seek back pay and allowances. In support of your request, you contend that there was one error, namely, that the PEB failed to consider all of your unfitting conditions. In your written submission, you have provided argument as to why and how additional conditions should have been considered.

In order to assist it in rendering a decision on your petition, the Board obtained the AO. The AO was considered unfavorable to your position, and it reasoned as follows:

In summary, the evidence provides insufficient support for the request. This is due to the preponderance of the submitted evidence including the fact non-elective surgery was not pending on any past or currently petitioned condition contemporary with his separation; and PEB evaluation included consideration of "combined effect," finding that it did not apply. Moreover, despite some expressed misgivings over feeling "(apparently orthopedic) concerns were not

taken seriously at medical” in December 2019, the petitioner quickly accepted his Informal PEB findings without availing himself of the alternative appellate process and legal resources of which he was reminded (see 20 May 2019 EOO above) at that time.

With further regard to the three specific conditions upon which the current BCNR request focused (reported in §1., above as, “Cervical Strain, Major Depressive Disorder, and Degenerative Arthritis of the Lumbar Spine), none had been determined to warrant referral to the IDES/PEB by cognizant healthcare providers prior to his 29 June 2019 separation.

Indeed, regarding both Degenerative Arthritis of the Lumbar Spine and Cervical Strain, there were relatively few clinical evaluation and treatment records; and the reported VA DBQ examinations documented relatively mild findings. In contrast to the VA DBQ examination determination, Major Depressive Disorder was determined to be “in remission” and petitioner had been “Released w/o [without] Limitations” by his treating psychiatrist 17 December 2018 (nominally somewhat inconsistent with subsequent VA Compensation & Pension assessment).

Moreover, VA examiners evaluating the currently petitioned Cervical Strain and Degenerative Arthritis of the Lumbar Spine indicated their review did not include any additional record review by them, arguably diminishing the probative value of their conclusions.

Finally, the submitted record of clinic contacts/Service Treatment Record appears to end by January 2019 suggesting, at the very least, significantly reduced need for clinical attention during the subsequent over 5 month period prior to separation (including all of the conditions originally referred to the PEB). Accordingly, the available evidence supports the PEB findings in contention.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, including the documentation and supporting materials that you provided, and the Board disagreed with your rationale for relief. In reaching its decision, the Board substantially concurred with the findings of the AO, to which you did not provide any rebuttal. In the Board’s view, the AO carefully parsed the unfitting condition from the other conditions which were found by the VA to be service connected, but which were not considered separately unfitting. You have asserted that the IPEB did not properly consider all of your conditions, but there is no evidence that this occurred. Indeed, as noted by the AO, the IPEB properly found that you were unfit for left hip pain with flexion but otherwise functional and of motion (stable). Further, the Board found that the IPEB properly adopted the VA’s Disability Evaluation System Proposed Rating for this condition.

The Board further observed that, as also explained in the AO, the presence of a medical condition corresponding to a disability rating contained in VA’s Schedule for Rating Disabilities (VARSD) is not sufficient to warrant a finding of unfitness for naval service. In addition, 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. In other words, it is the job of the PEB, not the VA, to determine fitness for duty under the Disability Evaluation System. Here, the Board did not find any error or injustice in the findings of the PEB, the findings of which you promptly accepted at the time. 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,

11/8/2022

