



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

█
Docket No. 5042-21
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 8 September 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 19 July 2022 advisory opinion (AO) of a medical professional, a copy of which was provided to you and to which you did not provide a response.

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 in 1994, and subsequently served periods of reserve and active duty through your separation date of 13 March 2007. Your final period of active duty began on 1 June 2004. From 23 August 2004 to 23 March 2005, you deployed to Iraq. As set forth in a 6 March 2005 Post Deployment Health Assessment form, described by the AO, after your Iraq deployment, you endorsed symptoms consistent with bilateral knee and left shoulder conditions. On 28 April 2006, your commanding officer prepared a non-medical assessment, which stated that you were deemed not worldwide assignable, you were not recommended for Permanent Limited Duty Status, and that your injury occurred after your deployment to █

On 16 August 2006, you were reviewed by a medical evaluation board (MEB), which referred you to an Informal Physical Evaluation Board (IPEB). The IPEB issued its report on 13 September 2006, finding the unfitting diagnoses of Left Shoulder Impingement rated at 10% and Status Post Left Knee Anterior Cruciate at 10%. The IPEB further found that the conditions did not result from a combat related injury. You sought reconsideration of these findings to a Formal Physical Evaluation Board, and on 20 October 2006, the Formal Physical Evaluation Board (PEB) reviewed your conditions, and reported its findings as the same as the IPEB. On 28 December 2006, you accepted the findings of the PEB. On 10 January 2007, the President of the PEB reported its results to Commandant of the Marine Corps. On 15 March 2007, you were discharged due to your disability condition with separation pay based on the 20% disability finding.

After your discharge, you filed a petition with the Physical Disability Board of Review (PDBR). The PDBR convened on 18 October 2011 to review your disability rating relating to your medical separation. After reviewing your application and medical separation file, by a majority vote, the PDBR recommended that there be no modification of your previously assigned disability rating. The minority opinion recommended that you receive a 30% disability retirement based on an additional finding of unfitness to be added to your existing 20% disability finding based on Left Knee ACL Revision: Instability rated at 10%. On 16 November 2011, the Assistant General Counsel for the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (AGC (M&RA)) reviewed the results of the PDBR and approved the recommendation of the majority of the PDBR that your record not be corrected to reflect a change in your disability rating previously assigned by the PEB.

In your petition, you seek the award of a permanent medical retirement with at least a 30% rating, back pay of the medical retirement pay, and any other relief. In support of your request, you provided current rating documents from the Department of Veterans' Affairs (VA) as well as medical records. You contend that, based on the medical evidence you provided, you should have been transferred to the Permanent Disability Retired List (PDRL) with at least a 30% rating based on your assertion that you were unfit for continued naval service due to Post-Traumatic Stress Disorder, Migraine Headaches, Obstructive Sleep Apnea, Degenerative Arthritis of the cervical spine, Degenerative Arthritis of the lumbar spine, Left knee instability, Degenerative joint disease of left knee, and Bilateral foot peripheral neuropathy.

To assist it in reviewing your petition, the Board obtained the 19 July 2022 AO. The AO was considered favorable to your petition with respect to your left knee instability, finding that there was clinical evidence of continued pain and instability of the left knee persisting at the time of separation despite your three surgical procedures in-service. The AO did not find sufficient evidence of unfitness for the other conditions that you asserted were unfitting. According to the AO, the preponderance of objective clinical evidence provided sufficient support for your contention "that in addition to his previous unfitting conditions, he was also unfit for Left Knee ACL Revision: Instability at 10% disability rating and should be considered for placement on the Permanent Disability Retirement List with a combined disability rating of 30%."

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

concurrent with the AO finding that there was insufficient support that the following conditions were unfitting: Post-Traumatic Stress Disorder, Migraine Headaches, Obstructive Sleep Apnea, Degenerative Arthritis of the cervical spine, Degenerative Arthritis of the lumbar spine, Degenerative joint disease of left knee, and Bilateral foot peripheral neuropathy. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Regarding the disability conditions previously considered by the PDBR, the Board noted that you were informed that the AGC (M&RA) decision of 16 November 2011 represented a final Department of the Navy action in your case and is not subject to further Board review. Therefore, the Board took no action to review those disability conditions.

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,

9/23/2022

A large black rectangular redaction box covering the signature of the Executive Director.

Executive Director

A black rectangular redaction box covering the name of the Executive Director.