



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

█  
Docket No. 5096-21  
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 3 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 advisory opinion (AO) of a qualified medical professional and your 21 September 2022 rebuttal to the AO.

A review of your records reveal that you enlisted in the Navy and commenced a period of active duty on 3 February 2011. In December 2012, while embarked in a ship operating in the U.S. Fifth Fleet, you began to experience a constellation of psychiatric symptoms. You reported the Fleet Mental Health Unit in 2013, presented symptoms of being fidgety and inattentive, diagnosed with attention-deficit hyperactivity disorder (ADHD), and prescribed medication. On 7 March 2014, a Medical Evaluation Board (MEB) convened, and referred your case to a Physical Evaluation Board (PEB) for determination of fitness for service due to Bipolar Disorder, Type I, Most Recent Episode Mixed.

On 21 March 2014, an incident occurred on the border of █, where you were found to be in possession of cocaine. As a result, on 16 May 2014, you were notified of the initiation of administrative separation processing and your rights in connection therewith. You elected your right to an administrative hearing. In the meantime, on 27 May 2014, the PEB received the

report of the MEB and rejected the MEB because you were pending administrative separation processing. On 1 July 2014, your legal counsel requested that you receive a psychiatric evaluation pursuant to a rule applicable to courts-martial. In his request, your counsel argued that you lacked mental responsibility for any offense charged and lacked the capacity to stand trial due to a psychological disorder that may have impacted his mental responsibility at the time of the charged offenses. On 10 July 2014, your commanding officer denied the request, stating he did not have authority, because the administrative separation proceedings did not fall under court-martial jurisdiction. Your administrative hearing was held on 22 July 2014. The administrative board determined that you committed the misconduct and recommended you be discharged with an Other Than Honorable (OTH) characterization of service. On 8 October 2014, you were so discharged.

In your petition, you request that the Board correct your naval record to provide you a medical retirement with a 50% rating, or, at a minimum, a 30% rating, for your service connected Bipolar I Disorder. You request, in the alternative, that your naval record be corrected to upgrade your characterization of discharge from OTH to Honorable or General (Under Honorable Conditions), and to change your narrative reason for separation to “secretarial authority” or “miscellaneous/general.” In support of your request, you contend that under current regulations, you would not have received an administrative discharge with an OTH characterization. Instead, you assert that you would have been allowed to continue to be processed through the Integrated Disability Evaluation System (IDES), which process had begun prior to your misconduct, and you would have been provided a medical retirement due to your service-connected Bipolar I Disorder with a 50% rating, or at least a 30% rating. You explain that your Bipolar I Disorder was a direct or substantial contributing cause of the misconduct that led to your discharge.

You assert in support of your alternative requested relief that, based on recent Department of Defense guidance, your discharge should be upgraded because it was an injustice for your IDES processing to be stopped due because your mental health condition contributed to and caused the misconduct for which you were discharged. You argue that your disability, and other positive factors, including your honorable and exemplary service, outweigh the single incident of misconduct that led to your discharge.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your request for a disability retirement, and the Board disagreed with your rationale for relief. To assist it in reviewing your request, the Board obtained the 21 June 2022 AO. The AO acknowledged your mental health condition, explaining that, “[h]ad his case been adjudicated by the PEB, it is likely he would have been found unfit for duty at some level of disability.” Notwithstanding this finding, the AO also found that your “Bipolar I Disorder and TBI conditions did not lead to personal drug use to mitigate his psychological symptoms as a maladaptive coping strategy, and as such, did not directly contribute to his arrest for cocaine possession.” The AO further explained that, witnesses to your affect and behavior at relevant times “did not describe behavior suggestive of a significant hypomanic or manic episode.” Rather, as explained by the AO, “[i]n the period while he was undergoing treatment up to his discharge from service, Petitioner was consistently considered responsible for his actions by his clinical providers.” On the other hand, the AO explained that your “ongoing psychological symptoms could have contributed to his impulsive decision to go ‘touch the border with █’,

as well as getting confused and inadvertently crossing into ██████████. Of note, his consistent explanation of the cocaine belonging to a friend to whom he had lent his car, lends some credibility to his claim the drugs were not his (as well as his lack of substance abuse history).”

The AO ultimately concluded, “Petitioner was diagnosed in-service with potentially unfitting mental health conditions. However, the preponderance of evidence provides insufficient support for his request to be placed on the disability retirement list. In my clinical opinion, objective evidence at the time of separation indicated Petitioner’s drug possession misconduct was not directly attributable to his mental health conditions.”

You received a copy of the AO, and you submitted a rebuttal to the AO, dated 21 September 2022, which the Board carefully reviewed. In your rebuttal, you found fault with the AO because it was authored by an anonymous doctor who does not appear qualified to opine on the core issues of this petition, it failed to address Department of Defense guidance applicable to your petition, it applies an inappropriate standard to review your petition, and reaches inconsistent and meaningless conclusions regarding your fitness to serve at that time of your discharge.

After careful review of your petition and all associated documentation, the Board disagreed with your rationale for relief. In reaching its conclusion, the Board observed, at the outset, that, at the time of your discharge, administrative processing due to misconduct superseded any disability evaluation processing. The Board concluded that is what occurred in your situation. You cited a Secretary of the Navy memorandum dated 1 June 2016, which directs a standardization in the method of processing individuals for misconduct when the Service Member has a medical condition that may have been a contributing factor to one or more of the basis supporting the administrative separation. You were discharged, however, in 2014, and this memorandum did not apply to your situation. The Board further observed that, even had the memorandum applied, your separation processing, more likely than not, would have been approved by a Flag Officer as required under the dual processing guidelines based on the nature of your misconduct. Additionally, in your case, the Board observed that you availed yourself of an administrative discharge hearing, and you were represented by counsel. The Board further observed that your counsel raised the issue of your mental health condition during the administrative separation process. Thus, the Board was satisfied that you received substantial due process with respect to your administrative separation processing on the issue of your mental health.

In addition to the foregoing, in reaching its decision, the Board substantially concurred with the finding of the AO. The Board carefully reviewed your rebuttal to the AO. With respect to the deficiencies that you perceived in the AO, the Board determined that the preparer of the AO is a medical doctor with a specialty in psychiatry. The Board was also satisfied with the AO’s discussion of the administrative process that you were afforded, and did not perceive the application of an inappropriate standard to review your petition. In any case, the Board reviewed the entirety of your petition, its attachments, your service records, and all associated documents, and came to its own conclusion.

In reviewing your alternative requested relief, in which you seek an upgrade of your discharge characterization based on your assertion of a mental health condition, as well as your overall

positive record of service, the Board afforded your request liberal consideration, and applied the factors set forth in the following memoranda: the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness regarding requests by Veterans for modification of their discharges due to mental health condition, sexual assault, or sexual harassment (Kurta Memo) and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). In reaching its decision, the Board observed that the AO provided an opinion that could be construed as favorable to this aspect of your request; specifically the AOs finding that “ongoing psychological symptoms could have contributed to his impulsive decision to go ‘touch the border with █’ as well as getting confused and inadvertently crossing into █. Of note, his consistent explanation of the cocaine belonging to a friend to whom he had lent his car, lends some credibility to his claim the drugs were not his (as well as his lack of substance abuse history).” Notwithstanding the AOs position here, and despite its provision of liberal consideration to your request, the Board determined that your request does not, at this point, merit relief. In considering this aspect of your petition, the Board found that your misconduct was of such severity that, even assuming some level of mitigation based on your mental health condition, relief was not warranted under the circumstances. In addition, with respect to the applicable clemency factors, the Board determined that you fell short and did not provide sufficient facts and circumstances to support relief based on clemency alone per the Wilkie Memo. Accordingly, in light of all of the foregoing, the Board determined that there was no error or injustice in your naval records and it denied your petition.

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,

10/27/2022

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Executive Director

Signed by: █