



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

█  
Docket No. 5194-21  
Ref: Signature Date

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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 22 July 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, as well as the 6 April 2022 advisory opinion (AO) from a qualified medical professional, your 1 May 2022 rebuttal to the AO, the 22 June 2022 review of your rebuttal by the preparer of the original AO, and your two rebuttals to that review.

The Board determined that your 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 Navy and commenced a period of active duty on 29 November 2001. In November 2018, you were issued a written counseling/warning concerning your performance and conduct deficiencies. On 18 January 2019, you received nonjudicial punishment (NJP) for a period of unauthorized absence. On 20 February 2019, you received NJP again due to insubordination and unauthorized absence. On 21 June 2019, you were separated as a result of being non-retained on active duty due to reaching high-year tenure. Post-service, on 1 May 2021, the U.S. Department of Veterans' Affairs (VA) granted you a 100% service connected disability finding.

In your petition, you seek a change to your naval records to reflect your correct paygrade, title, and pension/compensation. In support of your request, you contend that you served 17.5 years without any discrepancies, then you were transferred to Naval Air Station, J [REDACTED], and thereafter you were forced out of the Navy. You stated that you believe a Senior Chief made it difficult for you to care for your dying mother. You further explain that while you were on active duty, you were unfit for continued naval service due to a number of disability conditions including traumatic brain injury, PTSD, vertigo, blackouts, GERD, hiatal hernia, back pain, anxiety, depression, hemorrhoids, loss of hearing and vision, sleep apnea, insomnia, and sleep disorder.

The Board carefully considered your arguments, including the entirety of your petition and all of its enclosures. In order to assist it in reviewing your petition, the Board obtained the 6 April 2022 AO. The AO surveyed the extent of your medical history while you were in service, and noted as follows:

Of note, at no time during the course of his treatment was he considered unfit for continued service or not responsible for his actions. His treating providers did not initiate any medical boards or referrals to the Physical Evaluation Board. His limited duty limitations were to ensure his conditions were not further exacerbated during his courses of treatment, as the goal of the LIMDU periods were to make him available for treatment to return him to full duty and resumption of his military career.

Unfortunately, disciplinary and administrative events resulted in his separation from service before completion of his treatment plans. As the Navy Manual of the Medical Department (MANMED) requires a separation examination and evaluation to be conducted on all separating service members within 180 days of the member's last active duty day, the presumption of regularity is Petitioner was evaluated and found physically qualified for separation at the time of his discharge from service.

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Additionally, the objective evidence does not support his contention of unfitness for duty as throughout his periods of limited duty, he continued to function successfully in various roles and responsibilities, to include Assistant Leading Petty Officer and staff member of the NAS [REDACTED] Quarterdeck. His satisfactory occupational functioning was reflected in his performance evaluations during this period, which consistently rated his performance as "3.0, Meeting Standards" with consistent recommendations for promotion, even a recommendation for selection to Chief Petty Officer.

The AO ultimately determined that that "the preponderance of evidence provides insufficient support for the request...Had referral to the PEB occurred, a finding of fit to continue naval service would have been the likely result."

You were provided a copy of the AO for comment, and you provided the 12 May 2022 rebuttal. In your rebuttal, you argued that you had been placed on four periods of Limited Duty, that your 6 December 2018 Limited Duty Board was your third and that you should have been either referred to the PEB for medical retirement or permission sought from PERS-454 for a third period of continued Limited Duty. You further argued that your command did not honor the restrictions on your duty and requirements for medical treatment during your Limited duty periods at NAS [REDACTED], that your medical treatment at Naval Hospital, [REDACTED] was delayed in scheduling and availability for mental health treatment, that there were administrative discrepancies in your billet coding that may have led to delayed treatment, and that your command's counseling and disciplinary actions against you led to your nonjudicial punishment and the separation for high-year tenure were unfair.

Your rebuttal to the AO was reviewed by the preparer of the AO, who opined that you provided no new evidence to support your contention of unfitness at the time of discharge. Further, the AO found that, although you contended at least three periods of limited duty should have resulted in referral to the PEB, or seeking authorization from PERS, in your case, your first period of Limited Duty in 2014 resulted in a successful return to a full duty status, and your contended second period of Limited Duty in May 2017 is not documented in available records. You were furnished a copy of this review, and you provided two responses, which discuss, essentially, performance matters, and your assertion of unfair treatment by your command.

After review of your petition, and all documents, including the AO, your responses in rebuttal to the AO, and their attachments, the Board disagreed with your rationale for relief. 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. In denying your request for a medical discharge or retirement, the Board observed that there were no findings that you had a qualifying disability condition while you were on active duty. Rather, the Board found that you were in fact non-retained based on your high year tenure. In reaching its decision, the Board substantially concurred with the findings of the AO. Despite your rebuttals, which the Board carefully considered, the Board noted that your periods of Limited Duty did not amount to a requirement that you be sent to the PEB or that authorization from PERS was required. In addition, the Board observed that your performance evaluations did not note any deficiencies in your performance that could be based upon any findings of unfitness based on a qualifying disability condition.

To the extent you assert that the VA later provided you a 100% service connected disability finding, the Board noted that 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 Navy, because 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.

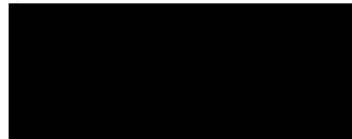
Regarding your request to correct your rank, title, and place you on the retired list, the Board found the preponderance of the evidence does not support relief. Specifically, the Board determined you were properly reduced in paygrade based on your two NJPs that led to your high year tenure discharge from the Navy before you reached retirement eligibility. In making this

finding, the Board relied on the presumption of regularity that your NJPs were properly imposed. The Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. The Board determined your assertions of unfairness and mistreatment were insufficient to overcome the presumption. Accordingly, after review, the Board did not find an error or injustice in your service record and denied your requested 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,

8/8/2022

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Executive Director

Signed by:

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