



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

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Docket No. 5325-21
Ref: Signature Date

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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 26 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 reviewed the 10 August 2022 advisory opinion (AO) from a qualified medical professional and your response to the AO.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 19 October 2009. From 21 January 2014 to 7 September 2014, you deployed in support of combat operations during Operation Enduring Freedom. In October 2017, you attempted to donate blood and it was revealed that you had protein in your urine, which set forth in motion the beginning of medical evaluations and treatment for kidney conditions. In connection with review of your fitness for duty, on 5 February 2018, your commanding officer provided a non-medical assessment (NMA), in part, as follows:

[Petitioner] is an instructor for entry-level aviation support equipment Sailor and Marine students. He has performed his duties over the past two years and nine months with no significant concerns. His recent diagnosis has not impacted his performance. Although [Petitioner] is in a limited duty status, he continues to exercise at his own pace and does what is required of him.

On 17 April 2018, a medical professional prepared a Narrative Summary (NARSUM), which stated as follows:

Member is a 26 y/o USMC Sgt. who has been followed for ongoing Kidney disease. In October 2017, the member attempted to donate plasma, but was found to have protein in his urine. Repeat fasting specimen also showed high levels of proteinuria, confirmed by 24 hour urine collection. Referral was placed to Nephrology with presumptive diagnosis of nephrotic syndrome. Further labs placed him in Stage 111 chronic kidney disease. He underwent a kidney biopsy in December, 2017 which confirmed sclerosing IgA nephropathy. He was started on prednisone to try and abate some of the symptoms with minimal relief. He has also developed hypertension and lower extremity edema as a part of the kidney disease. No blood sugar issues, but Creatinine is 1.96

[Petitioner] is unable to perform the duties required of a US Marine and there does not appear to be any solution in the foreseeable future, I feel that he should be medically separated and reviewed for medical disability.

Thereafter, on 19 April 2018, a medical evaluation board (MEB) report was issued, referring you to an informal Physical Evaluation Board (IPEB). The IPEB convened 29 May 2018 and it found you fit for full duty. According to the medical officer member of the IPEB:

The member has a diagnosis of IgA nephropathy, Stage 3 kidney disease, and nephrotic syndrome based on medical documentation. Based on the evidence contained within the case file, the Informal Board has determined that the member's condition does not preclude them from the reasonable performance of their duties. Therefore, the Board finds that the member is fit to continue military service and that he/she is reasonably able to perform the duties of their office, grade, rank or rating/MOS. The Board considered the combined effect of all conditions when making its fitness determination and applied this to the final adjudication.

The Presiding Officer of the IPEB found as follows:

The evidence establishes that the member is able to reasonably perform the duties of his office, grade, rank, or rating/ Military Occupational Specialty (MOS). The non-medical assessment notes that the member is serving in his rate and favorably endorses continued service until his planned end of active service date.

On 7 June 2018, you received the findings of the IPEB. You were afforded all rights in connection with the PEB process, including the benefit of a Physical Evaluation Board Liaison Officer (PEBLO). You were provided a form, which set forth several options, one of which was to challenge the findings and to seek a higher level of review by a Formal PEB. You chose to accept the findings of the IPEB and you did not request a Formal PEB. You completed your period of active service and were released from active duty on 22 October 2018.

Subsequent to your release from active duty, you filed for disability findings with the Department of Veterans' Affairs (VA). On 5 December 2018, the VA found you to have several service connected disability conditions at a combined disability rating of 80%, and set the effective date of your disabling conditions as 23 October 2018.

In your petition you seek to have the Board find (1) that the IPEB's determination that you were fit was an error and a continuing injustice, (2) find that you were unfit due to your IgA nephropathy, stage 3 chronic kidney disease, nephrotic syndrome, and hypertension, and correct your records to so indicate, (3) use the VA schedule of disabilities as required and correct your records to set your disability rating to at least 60%, (4) order that your records, including your DD Form 214 and retirement orders, be amended to reflect a permanent medical retirement, (5) order that you be awarded past due medical retirement pay from 22 October 2018, and the value of benefits denied during that time, (6) order that you be awarded the cost of medical expenses which you incurred from 22 October 2018 as a result of being denied the military health insurance provided to medical retirees, and (7) order that you be provided medical retirement pay, military health insurance for himself and dependents, and all other benefits to which you are entitled as a result of your medical retirement.

In support of these requests, you contend that the IPEB found you fit despite uncontradicted evidence in your medical records that you could not deploy, could not perform basic military tasks, could not pass a physical fitness test, and had been diagnosed with serious kidney conditions that would need continuous and expensive medical attention to address. You further assert that those who conducted your MEB conclusively determined that you were unable to meet physical readiness requirements due to blood pressure and kidney issues, and that you were unable to complete a physical fitness test, could not run without significant pain, and you were not worldwide assignable. You also assert that the IPEB gave no consideration to whether your renal condition and/or hypertension represented a decided medical risk to you or imposed unreasonable requirements on the military to keep you safe. You further argue that the IPEB distorted the fitness criteria by relying upon factors and considerations outside of DoDI 1332.18, and proximity of the IPEB to the Marines end of active service is an irrelevant consideration.

In further support of your petition, you provided a written statement, dated 26 August 2021, in which you explained that you made the decision to not challenge the IPEB's findings based on counseling provided by your PEBLO. You stated that, at the time you received the IPEB's findings, your scheduled EAS was just over four months away, and that, based on your PEBLO's advice, challenging the IPEB's findings would require remaining on active duty for at least six months and possibly up to two years. You explained that your First Sergeant and Master Sergeant were neither supportive nor accommodating of your conditions, and you had serious concerns that six months to two years of additional active-duty service under their command would be dangerous, or even harmful for someone in your state. According to your statement, based on your PEBLO's advice that accepting the IPEB findings would not prevent you from claiming disability benefits, you signed the form indicating that you would not contest the IPEB's findings. Further, according to your statement you signed the document in order to

protect your physical health, to the extent possible, by not prolonging my active-duty service under a First Sergeant and Master Sergeant who refused to accommodate your condition.

In order to assist it in reviewing your petition, the Board obtained the 10 August 2022 AO, which was considered unfavorable to your contentions. According to the AO:

Petitioner's in-service diagnoses of Chronic Renal Disease, IgA Nephropathy, and Nephrotic Syndrome are well documented. Petitioner contended his medical condition was not understood or the severity appreciated by his command as reflected in the NMA, and that he experienced severe swelling of his extremities and accompanying pain while successfully executing his duties, and should have been found unfit at the time of discharge. He feared that continuing on active duty would lead to a possible deterioration of his medical condition, which influenced his decision to accept the PEB findings and not seek further appeal of the Board's decision.

However, review of his available records do not support his contention of unfitness for service at the time of discharge in that the diagnoses, recommended treatment, recommendations for duty limitations, and referral to PEB were appropriate for his clinical condition. Likewise, the PEB's decision appears appropriately based on available objective evidence of Petitioner's condition and ability to complete his enlistment. Command evaluations during the period of his diagnosis, treatment, post-PEB findings, up to discharge indicated Petitioner successfully executed his duties within the duty limitations imposed by his medical condition.

The AO concluded, "the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that at the time of his discharge he was unfit for continued military service and should have been medically retired."

You received a copy of the AO, and you submitted a rebuttal dated 9 September 2022. In your rebuttal, you argued that the AO failed to address all three standards by which a service members may be deemed unfit, and that adopting the opinion of the AO would be arbitrary and capricious. According to your rebuttal, your renal condition and hypertension represented a decided medical risk to you as well as well as imposed unreasonable requirements on the Marines to keep you safe. You also asserted that the AO applied an improper evidentiary standard, relying upon an unreasonably narrow view of "objective clinical evidence" to support its incorrect findings. Finally, you assert that the AO relies on an inappropriately deferential standard of review that would turn this Board into a rubber-stamp body merely looking for reasons to agree with the IPEB.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition and the Board disagreed with your rationale for relief. The Board substantially concurred with the AO. The Board did not find your rebuttal to be convincing. Your first assertion in rebuttal was that, in addition to a determination of whether you could reasonably perform duties of your rank and military operational specialty, the AO and IPEB

failed to consider that your medical conditions represented a decided medical risk to you as well as well as imposed unreasonable requirements on the Marine Corps to keep you safe. The Board did not find this convincing. There is no evidence, and you provided none, other than conjecture in your statement, that your continued service would put you at risk at the hands of aggressive leadership at your final command. Nor did you present any evidence that your conditions would have imposed unreasonable requirements on the Marine Corps to keep you safe. While you were on active duty, you were covered by the entirety of the naval medical establishment, which provides a global force of qualified medical professionals and experts, who daily attend to cases ranging from the most extreme trauma to the mundane. All the while, you were in active contact with medical providers and you were assigned a personal advocate in the form of your PEBLO. You provided no evidence of harassment or abuse, nor did you provide any evidence of any complaints made by you. If you felt some level of intimidation, the Board concluded your PEBLO could have made complaints on your behalf. The records reflects that, despite your condition, you were regarded as an effective instructor, and there was no evidence of any danger to you in any of the contemporaneous documents. Had you sought review of the IPEB, which was your right, you would have received full pay and benefits during the period of review, including free medical care and treatment, as well as the ability to be in a limited duty status if it were medically indicated. You had a host of options at your disposal, and you chose to accept the findings of the IPEB. Thus, in light of the foregoing, the Board did not find your assertion that you were under some level of duress in accepting the IPEB's finding of fitness. Rather, the Board agreed with the opinion of the AO that the IPEB decision was sound and supported by the evidence.

Similarly, the Board was not swayed by your assertions in your rebuttal that the AO relied upon an improper evidentiary standard and an inappropriately deferential standard of review. The Board found the AO's review to be comprehensive and based on the entire record. Therefore, these arguments did not convince the Board that you were entitled to a disability retirement or any other relief. Regardless, this Board carefully reviewed applicable service and medical records, the NARSUM, the report of the medical evaluation board, the IPEB, the AO, and your rebuttal, and the entirety of your petition and its enclosures, and determined that there was no error or injustice in the IPEB's finding of fitness.

In addition, the fact the VA rated you for service connected disability conditions that were determined to be service connected to your time in the Marine Corps did not persuade the Board these conditions were unfitting at the time of your discharge from the Marine Corps, 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 finding of fitness for duty. In other words, as described in the AO:

The mere presence of a medical condition corresponding to a disability rating contained in the VASRD is insufficient to warrant either a finding of unfitness for continued Naval service or a specific disability rating by the Department of the Navy PEB in the absence of demonstrated duty performance impairment of sufficient magnitude as to render a Service member Unfit for Continued Naval Service. By contrast, eligibility for Compensation & 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. Therefore, the presence of a VA assigned disability rating does not establish unfitness for continued service.

The AO further explained that:

The VA assigned disability ratings to each condition indicates it has been determined to have been incurred in the line of duty. The VA assigned those ratings based on those conditions and without regard to the issue of fitness to perform military duty. Even if supported by the Veterans Administration, VA service connection does not dictate unfitness for naval service. The Veterans Administration does not determine fitness for military duty, which is the responsibility of the Secretary and military authorities. The PEB does not determine a member's status for deployability or suitability; therefore, a PEB determination of Fit to continue naval service does not preclude subsequent non-PEB determinations of temporary unfitness for specific assignments, PRT/PFT participation, disqualification from special duties, or administrative action (including separation) resulting from such determinations

The Board believes that this foregoing explanation contained with the AO addresses your assertions concerning the application of VA findings. It also addresses your arguments concerning the fact that you were not worldwide deployable and that you were unable to perform physical fitness tests at certain times while you were on active duty.

In light of all of the foregoing, the Board did not find any error or injustice with the PEB findings in your case or your discharge from the Marine Corps. 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,

10/17/2022

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Executive Director
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