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

[redacted]
Docket No. 5412-21
Ref: Signature Date

[redacted]

Dear [redacted]

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 25 July 2022 advisory opinion (AO) from a medical professional. You were provided an opportunity to respond to the AO but chose not to do so.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 8 July 1999. As set forth in more detail in the AO, from the period 17 April 2001 to 27 April 2006, your medical records chronicled your repeated instances of ankle sprain, chronic pain, and subsequent treatment regimens, culminating in orthopedic surgery on two occasions. Your second orthopedic surgery involved an open reduction, internal fixation, procedure, leaving you with surgical hardware within your ankle area. Following both procedures, you were returned to full duty, but you later presented with acute exacerbations of right ankle pain due to physical training. On 16 May 2006, you were medical evaluated for recurrent right ankle pain and placed on 30 days light duty. On 17 July 2006, you were seen for post-surgical follow-up by the orthopedic specialists who recommended that you stop running on a track and instead use an elliptical trainer or treadmills, and you were released without limitations.

Next, as detailed by the AO, on 5 September 2006, you were placed on your first period of limited duty (LIMDU) due to chronic right ankle pain, migraine headache, and depression with

history of two prior right ankle surgeries. Your limitations were to "run at own pace" with treatment continuing with "NSAIDS, physical therapy, activity restrictions." Although you were diagnosed with depression, your duty limitations were a result of your diagnosis of chronic right ankle pain. Records indicated that your mental health treatment was stable with use of medications and counseling, and your records do not indicate any diagnosis of post-traumatic stress disorder or periods of light or limited duty due to a mental health condition.

You were reevaluated by Sports Medicine on 31 January 2007, after being returned from a pre-deployment screening where you were found not fit to deploy due to your LIMDU status. The records note that you were released without limitations and to follow up as needed with the Sports Medicine Clinic. You underwent a pre-separation physical on 26 April 2007, during which the physician took note of the several conditions that you described, such as migraines, depression, anxiety, allergies, right ankle arthralgia/arthropathy with retained foreign body status-post ankle surgery, and arthralgias (joint stiffness) to left wrist. The physician further noted that these conditions were well controlled with medications or did not interfere with your activities of daily living. Consequently, the physician found that you were physically qualified for separation and you were directed to follow up with a primary care physician after separation. On 15 May 2007, you were discharged due to condition, not a disability.

In your petition, you request a permanent disability retirement. In support of your request, you contend that you were administratively separated for medical issues without proper review and adjudication via a medical evaluation board (MEB) and physical evaluation board (PEB). You further state that this occurred after you were placed on LIMDU and then notified you were being deployed despite being in a LIMDU status. You explained that, while you were undergoing pre-deployment screening, your record was flagged because you were in a LIMDU status, and you were removed from the deployment. Upon your return, your executive officer ordered that your diagnoses be reevaluated so that you could be deployed to Cuba. After reevaluation, you were found unfit to deploy to [redacted] after reevaluation. After your command was notified that you were found not eligible for deployment you were notified that you would be administratively separated from the Navy. You assert that you were never afforded the opportunity to be evaluated by the PEB, which you contend was required for separation due to medical injury and illness. You provided documentation from the U.S. Department of Veterans' Affairs (VA) in support of your request.

To assist it in reviewing your petition, the Board obtained the AO. The AO described the purposes of the PEB, and explained that 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." In other words, the fact that you were found to be unsuitable for deployment does not necessarily mean that a PEB would be required to determine your fitness within the meaning of the Disability Evaluation System. The AO further explained, with format changes:

> The available administrative and clinical records did not support Petitioner's contention of unfitness for military service and placement on the Permanent Disabled Retirement List.

> Petitioner's medical conditions had been well documented as arising from active military service and had been appropriately treated. He had received periods of light or limited duty appropriate to his status following acute injury and re-injury of his right ankle, as well as to allow rehabilitation and convalescence following his two orthopedic surgical procedures. The inservice records document a return to occupational functionality though with the anticipated chronic pain and stiffness as cautioned by his orthopedic surgeons.
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> His evaluations and reports from his commands did not indicate significant occupational impairment or an inability to perform his military occupational duties. The examining physician at his separation physical examination reviewed his history, noted his right ankle history of surgeries and repeated injuries, depression, and migraine headaches and deemed him physically qualified for separation for service with recommendations to seek care post discharge with a primary care provider.
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> Throughout his military treatment, there was no discussion or documentation his conditions rose to the level of unfitting medical conditions; there were no referrals to the Physical Evaluation Board for any of his treated conditions. Though the separation package was not available for review, the available service records indicated that the Petitioner incurred a chronic condition(s) that was/were not considered a disability, and was therefore administratively separated with an Honorable Discharge.

Thus, in light of the foregoing, the AO concluded that, "the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that he was unfit for continued naval service at the time of his separation from active service and should have been placed on the Permanent Disability Retirement List."

In review of the entirety of your naval service record, and your petition and its enclosures, the Board disagreed with your rationale for relief. At the outset, the Board substantially concurred with the findings of the AO, and you provided no information to rebut those findings. As the AO explained, there is a distinction being not qualified for deployment based on a condition, not a disability, and those qualifying conditions that render a service member unfit for continued service. In your case, your medical records demonstrated that you were returned to occupational functionality by your physicians, and there was never any referral to a MEB. In fact, the Board observed that your command did not indicate significant occupational impairment or an inability to perform your military occupational duties. It should be noted that a finding of "fit" by a PEB does not necessarily indicate that a member would not suffer temporary unfitness, such as restrictions on participation in physical fitness tests, disqualification from special duties, or the like. In your case, the physician at your pre-separation physical found you fit for separation from the Navy.

In addition, the fact the VA rated you for service connected disability conditions that were diagnosed during your time in the Navy did not persuade the Board these conditions were

unfitting at the time of your discharge from the Navy since 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 the AO explained, disability rating determinations by the Navy are "designed to determine unfitness to perform the duties of office . . . . In contrast, the VA determines disability ratings based upon an evaluation of whether and how an individual's capacity to perform in the civilian world is diminished by a disability." In light of all of the foregoing, including the findings of the AO, the Board denied your request.

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

[redacted]

Executive Director

Signed by: [redacted]