



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. 5565-21
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.

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 24 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 14 August 2022 advisory opinion (AO) from a qualified medical professional, as well as your 27 September 2022 rebuttal to the AO.

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 Reserve and commenced a period of active duty for training in January 1990. Thereafter, you were released to the Reserve. According to your petition, in 1997, you left the reserve to pursue employment as a police officer. Then, according to your petition, you reenlisted in the Marine Corps Reserve in 1999. Eventually, you deployed to █ from February 2004 to October 2004. On 31 December 2005, you commenced active duty on another set of orders. On 10 March 2006, your unit deployed to █ On or about 4 August 2006, you were injured by the explosion of an improvised explosive device. On 2 October 2006, your unit returned from █ On 23 January 2007, your medical condition was reviewed by a medical board, which placed you on limited duty status for six

months. Next, as reflected in your medical record, you were referred for physical therapy for six weeks. You were released from active duty on 25 November 2008. According to your Certificate of Release or Discharge from Active Duty (DD Form 214), you receive an RE-1A reentry code, which meant that you were preferred for reenlistment in the service. You state in your petition that you were forced out of the Marine Corps a year and a half short of 20 years, which deprived you of a retirement. Your official military personnel file does not contain any final discharge documents from the Marine Corps Reserve, nor does it contain any evidence of your efforts to remain in the Marine Corps. The Board was also unable to ascertain any such documentation from your petition or its enclosures.

In your petition, you request that you be granted a military retirement or a medical disability retirement, which you assert you should have received in lieu of disability separation; or that all of your conditions be referred to the integrated disability evaluation system (IDES) to determine your overall rating. In support of your petition, you provided a legal brief which described your assertions supporting your petition, which included attachments, which included a personal statement from you, as well as medical documentation, service record documents, among others. You state that your record was spotless, that you were selected for promotion to Master Sergeant, and that your intention was to continue in the Marine Corps. You argued that, after you returned from your Iraq deployment in 2006, you were maintained in a medical hold status for treatment of your medical conditions, including left shoulder and right knee injuries. You further argued that you were continuously reviewed by examiners at the Navy Bureau of Medicine and Surgery (BUMED) and granted extensions to remain on active duty with an expectation of appearing before a medical board for referral to the PEB for medical retirement, which never occurred.

In order to assist it in reviewing your petition, the Board obtained the 14 August 2022 AO. According to the AO:

Petitioner's conditions of left shoulder injury with subsequent surgical repairs, right knee injury with subsequent surgical repair, head injury, and right wrist injury are documented as having occurred during his deployment to █ in 2006. Less well documented in the available records are his contentions of back pain and PTSD, though both conditions are briefly noted in post-discharge VA clinic notes. The lack of documentation regarding any Line of Duty, Administrative Proceeding, and BUMED decisions to extend his active duty status for medical treatment (or subsequently find him physically qualified for separation) renders any comments or opinions on the propriety of Petitioner's separation from military service as speculative.

On the issue of Petitioner's fitness for continued service due to his cited conditions of back pain, shoulder pain, leg pain, and PTSD, the available objective evidence shows that Petitioner continued to successfully perform the duties of office, grade, rank or rating as reflected in his performance evaluation reports. Even after his injuries and extended medical treatment following his 2006 IED explosion, his performance evaluations continued to note his successful participation in command activities and continued to consistently rated him as 'One of the many highly qualified professionals who form the majority of this

grade.’ Positive comments in his evaluations during his period of ongoing medical treatment included his Reviewing Officer stating he was ‘well suited for promotion to Master Sergeant,’ a rank for which he had been previously selected. His periods of light or limited duty were in the context of maximizing his chances for successful response to his medical treatments with the anticipation of return to duty. There is no evidence Petitioner was being considered for referral to the PEB for possible medical retirement.

The AO concluded, “the preponderance of available 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. Had referral to the PEB occurred, a finding of fit to continue naval service would have been the likely result.”

You received a copy of the AO, and you provided a rebuttal dated 27 September 2022, which the Board carefully reviewed. According to your rebuttal,

[t]he record is clear that he was repeatedly placed on limited duty – for the same condition – then unnecessarily forced to separate in a rushed manner, without a final physical. The Advisory Opinion also seems to focus on [Petitioner’s] positive performance to suggest that he was “fit” for duty. This conclusion does not factor in the context of his performance and duties, which was to primarily attend medical appointments and conduct administrative duties. The command had initially told [Petitioner] that he would remain on active-duty orders until his injuries resolved. They never did, and in fact got worse. Even today, he still suffers from these injuries sustained from combat. The solution should not have been to continue to extend limited duty orders, but instead convene a medical evaluation board. Had this occurred, a disability retirement would have been recommended. We respectfully request this honorable Board to remedy this severe injustice. In support of this request, we also include a statement from [Petitioner] (Enclosure 1) and additional medical records since the filing of the Original Petition (Enclosure 2).

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, including the medical documentation and supporting materials that you provided, as well as your rebuttal to the AO, and the Board disagreed with your rationale for relief. As a threshold matter, the Board determined the preponderance of the evidence did not support a finding that you met any of the criteria for unfitness in order for you to qualify for a medical retirement. In denying your request, the Board observed that, in order for you 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. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members; or the member’s disability imposes unreasonable requirements on the military to maintain or protect the member. In your case, the Board concurred with the findings of the AO observing that there was no indication that you were unfit for service at the relevant time.

When you were released from your latest period of active duty, you receive a reentry code that reflected you were qualified for reenlistment. The Board observed that, had you been considered unfit for service, you would not have received an RE-1A reentry code. Despite this fact, you assert your Reserve Unit did not authorize you to reenlist, however, there is no evidence in your OMPF that you sought to reenlist in the Marine Corps (or any service) despite your reentry code. Similarly, you did not provide any administrative documentation from your Reserve Unit relating to your separation from service, nor is any available in your OMPF. In addition, as the AO noted, your performance evaluations were positive and they reflected you were recommended for promotion to Master Sergeant; they did not reflect that you were considered unfit as that term is used in the disability evaluation system. Further, your record does not demonstrate any referrals to a medical board for perceived unfitness for duty. Accordingly, in light of all of the foregoing, the Board did not discern an error or injustice in your naval records and 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, _____

11/7/2022

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Executive Director

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