



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. 5756-21
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 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 reviewed the 1 September 2022 advisory opinion (AO) from a qualified medical professional and your 5 October 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, after a period service in the Army National Guard, you enlisted in the Navy and commenced a period of active duty on 17 January 2002. In November 2006, you served in █ where you were injured in an explosion. Despite this incident, you continued in service. In 2013, you received LASIK eye surgery, after which your vision encountered complications. Your medical condition and fitness for service was therefore evaluated. In connection with that evaluation, on 28 December 2016, your commanding officer prepared a non-medical assessment (NMA), which found that you could not work in your current position due to a vision problem. On 9 March 2017, you were evaluated by an Informal Physical

Evaluation Board (PEB), which concluded that you were unfit for service with a 10% disability, which entitled you to severance pay.

The IPEB explained that you were a candidate for presumption of fitness due to your proximity to retirement and that you were an excellent candidate for permanent limited duty. There is no indication in your record that you followed up on the suggestions by the PEB, including no evidence that you sought permanent limited duty. In fact, in your personal statement, you stated that you “couldn’t do it at the time, I was a hard charger,” you “tried and [you] put [your] papers in to separate.” Thereafter, you were separated on 23 June 2017 with severance pay.

In your petition, you seek to be awarded a permanent medical retirement with 30% disability; back pay to the date of your medical retirement; and combat related special compensation. In support of your petition, you contend that, based on your medical records, you should have had a higher level of disability finding at discharge, and you provided a legal brief containing argument concerning the severity of your in-service medical conditions.

To assist it in reviewing your petition, including the arguments that you made in your written submission relating to your medical conditions, the Board obtained the 1 September 2022 AO. The AO reviewed all of the materials that you presented as well as your service and medical records, including your PEB file. According to the AO:

Petitioner’s in-service diagnosis of Ocular Hypertension, Bilateral (Stable) as unfitting at 10% Disability Evaluation that resulted in an Honorable Discharge from Active Duty with Severance Pay is well documented, and not in contention. Review of his available records does not support his contention of unfitness for service at the time of discharge for Post-Traumatic Stress Disorder, Migraine Headaches, Obstructive Sleep Apnea, or Plantar Fasciitis with Pes Planus.

There was no objective clinical evidence in the in-service medical or personnel records the Petitioner experienced occupational impairment from Obstructive Sleep Apnea, Migraine Headaches, PTSD, or Planter Fasciitis with Pes Planus during his military service.

The Commander’s Non-Medical Assessment documented Petitioner continued to work within his rate/specialty, had taken the most recent full PRT, and was within weight and body fat standards. The Commander specifically stated that Petitioner’s ability to perform diving and parachuting duties required of an EOD Technician, and execute the roles and responsibilities required of his rate, rank, and specialty were ‘challenging due to his impaired vision.’ Command evaluations during the period of his diagnosis and treatment up to discharge indicated Petitioner successfully executed his duties within the duty limitations imposed by his medical condition, without evidence of significant occupational impairment outside of the specifically proscribed diving and parachuting restrictions due to his unfitting eye 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 due to other medical conditions than his identified unfitting condition of Ocular Hypertension, Bilateral (Stable).”

You received a copy of the AO, and you provided a rebuttal, dated 5 October 2022. According to your rebuttal, you provided the “Board with evidence and argument in his original DD-149 filing, all of which supports his request for relief.” You further explained that the evidence enclosed in your original filing includes a declaration, “which constitutes evidence” which evidences how and why your conditions were unfitting. You further asserted that the AO failed to address any of the substantive facts or legal issues raised in this case, and thus it was entirely useless. You did not provide any new or material evidence in your rebuttal.

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. At the outset, the Board observed that you had previously been found unfit by the IPEB due to your eye condition. The Board did not discern that any other conditions were referred for review to the IPEB. In your written submission, you recount several conditions for which you have later received service connected disability ratings from the U.S. Department of Veterans’ Affairs (VA), arguing that these conditions correspond to a disability rating contained in the Veteran Affairs Schedule for Rating Disabilities (VASRD). However, the Board observed that 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. In your case, the IPEB found you to unfit for continued naval service based on your eye condition. As noted, there were no other conditions referred to the IPEB from any medical providers, and your commanding officer’s NMA explained that it was your eye condition that rendered you unfit to perform service within your rating, and he did not describe any other conditions that caused you occupational impairment. Finally, the Board concurred substantially with the AO, which provided a fulsome explanation of why there was insufficient support for your petition. Your rebuttal to the AO consisted of argument, but did not provide facts that tended to rebut the findings of the AO.

Thus, in light of all of the foregoing, the Board found no error in your naval records with respect to the findings of the IPEB in your case and your separation from service. With respect to a review from the perspective of injustice, the Board observed that the IPEB encouraged you to seek to remain in the Navy through retirement by applying for permanent limited duty, and by your own explanation, you did not follow through on this suggestion. Thus, the Board could not discern any injustice in your naval records. 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,

11/7/2022

