

DEPARTMENT OF THE NAVY

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

> Docket No: 5881-21 Ref: Signature Date



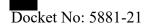
Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of the entire record, the Board for Correction of Naval Records (Board) found the evidence submitted was insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although you did not file your application in a timely manner, the statute of limitations was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 10 January 2021. The names and votes of the panel members 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, to include the Kurta Memo and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). Additionally, the Board considered a 15 November 2021 advisory opinion (AO) furnished by a qualified mental health provider, your 3 December 2021 response to the AO, and the 15 December 2021 review of your response by the AO.

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.

You enlisted in the Navy and commenced a period of active duty on 14 September 1973. On 27 March 1974, you received nonjudicial punishment for larceny. On 24 June 1974, you received nonjudicial punishment for possession of an alcoholic beverage and possession of marijuana. On 17 September 1974, the Petitioner was issued a written warning concerning the consequences of further misconduct. On 6 December 1974, you received nonjudicial



punishment for a period of unauthorized absence. On 28 January 1975, you were issued a written counseling concerning your marks of 2.0 in professional performance and military behavior. On 10 February 1975, you received nonjudicial punishment for four different periods of unauthorized absence and for disobeying an order. On 6 March 1975, you were notified of the initiation of administrative separation processing for convenience of the government. On 7 March 1975, you were discharged with a general (under honorable conditions) characterization of service.

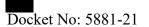
The Board carefully considered all potentially mitigating factors in your petition to determine whether the interests of justice warrant relief in your case including in accordance with the Wilkie Memo. You contend in your petition that the misconduct that you engaged in while on active duty should be mitigated by an undiagnosed mental health condition. In support of your contention, you state that you were diagnosed with in 2006, and you provided the findings of the U.S. Department of Veterans' Affairs (VA), which determined that you are have a one hundred percent service connected permanent total disability for

In connection with your assertion that you suffered from a mental health condition, the Board requested, and reviewed, the AO. The AO reviewed your service record as well as your petition and the matters that you submitted. The AO's initial review resulted in an unfavorable finding, explaining that "there is post-service evidence that he was diagnosed with a mental health condition after his military service, for which the VA has granted service connection. However, there is insufficient evidence that his misconduct could be mitigated by an unfitting mental health condition." In your 3 December 2021 response to the AO, you submitted a personal statement, historical records describing military policy and your performance, a statement of support from your spouse attesting to your mental health difficulties, medical records from 2008-2015, listing diagnoses of granting service connection for a cute grant and an August 2020 VA rating decision granting service connection for a cute grant and an August 2020 VA complete response to the AO, the preparer of the original AO explained that,

Petitioner provided new and material evidence in support of his claims, including medical records to support his claims of a diagnosis of from at least 2008. His personal statement contends that his auditory hallucinations onset during his military service. Although there is disagreement among VA examiners, it is possible that some of the Petitioner's misconduct and substandard performance, such as disobedience and perceived incorrigibility, could be attributed to observed odd behaviors that were unrecognized psychotic symptoms. However, it is difficult to attribute larceny to symptoms of based on the evidence.

The AO concluded, "based on the new evidence, there is post-service evidence that he incurred an unfitting mental health condition during military service. There is evidence that some of his misconduct could be mitigated by his mental health condition."

With respect to your request for a medical retirement or for a disability rating with retroactive compensation to the date of your discharge, the Board observed that, 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. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health of the member or to the welfare or safety of other members; the member's disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

In reviewing your case, the Board concluded the preponderance of the evidence does not support a finding that you met any of the criteria for unfitness. In your case, the Board concluded the preponderance of the evidence did not support a finding that your mental health condition met any of the criteria for unfitness at the time of your release from active duty. Further, the Board was not persuaded by the VA rating you provided since eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and without a requirement that unfitness for military duty be demonstrated.

To the extent your request sought an upgrade to your discharge characterization, based upon its review, the Board concluded the potentially mitigating factors that you raised were insufficient to warrant relief. With respect to your contention relating to a mental health condition, the Board concurred with the findings of the AO, that some of your misconduct could be mitigated by your mental health condition. The Board carefully considered the materials that you provided, including your rebuttal to the initial AO, and determined that, while some of the misconduct that you engaged in while on active duty may be mitigated by your mental health condition, not all of the misconduct may be so mitigated. In review of your entire submission, and in light of your four nonjudicial punishments for a variety of misconduct and written warnings, the Board determined that there was no error or injustice in the assignment to you of a general (under honorable conditions) characterization of service.

You are entitled to have the Board reconsider its decision upon the 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.

