



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

█
Docket No. 5934-21
Ref: Signature Date



Dear █,

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 6 January 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. In addition, the Board considered the advisory opinion contained in Commander, Navy Personnel Command letter 5400 Ser 95/519 of 5 November 2021; a copy of which was previously provided to you for comment.

A review of your record shows that you entered active duty with the Navy in November 1988 and earned approximately 16 years of qualifying service for retirement prior to your separation on 1 February 2014. During your service, you were mobilized in support of Operation Enduring Freedom on 27 June 2008 until 16 April 2009. During this period of active duty, you suffered neck and shoulder injuries that resulted in the approval of line of duty (LOD) benefits and referral to the Physical Evaluation Board (PEB). However, the PEB found you fit for active duty on 20 September 2011. There is no record you acknowledged the PEB findings in your case, however, the PEB findings were mentioned in the LOD closure letter provided to you on 16 November 2011. You subsequently continued your service and earned a fitness report ending on 30 November 2012 that documented a 3.33 trait average and recommendation for promotion to O4. You then failed to select to O4 for the second time and were notified on 29 July 2013 that you would be discharged on 1 February 2014 unless you requested continuation. You were subsequently discharged honorably on 1 February 2014 for failure to select twice to O4. Prior to

your discharge, you were issued an adverse fitness report on 31 January 2014 due to poor performance related to not performing production duties, misrepresenting aspects of your military record while applying for a community transfer, an unauthorized absence, and failing to demonstrate initiative. This fitness report also documented that you were authorized six months of excused absences during the reporting period in order to care for an ill family member. On 8 September 2014, the Department of Veterans Affairs (VA) provided a letter certifying you were issued a combined service connected disability rating of 60%. This Board previously denied your request to be retired under Temporary Early Retirement Authority on 6 July 2017. You provided a VA disability ratings letter from September 2018 documenting that you were rated for Left upper extremity radiculopathy (20%), Right upper extremity radiculopathy (20%), Post Traumatic Stress Disorder (PTSD) (30%), Traumatic cervical strain (10%), and Left occipital neuralgia (0%).

The Board carefully considered your arguments that you deserve to be placed on the disability retirement list or, in the alternative, to have your case referred back to the Disability Evaluation System for readjudication. You also request to be retroactively promoted to O4 based on your arguments on error and injustice. Unfortunately, the Board disagreed with your rationale for relief. In making their findings, the Board substantially concurred with the advisory opinion in your case.

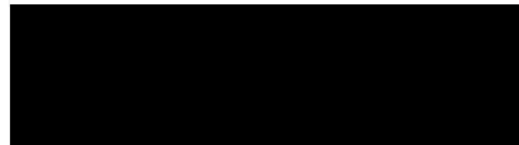
In order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found 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 that the preponderance of the evidence does not support a finding that you met any of the criteria for unfitness. Ultimately, the Board agreed with the 20 September 2011 PEB finding that you were fit for continued active duty service. This finding was based on your superior performance in the year after you were found fit by the PEB. Further, while the Board acknowledged that it appears you may not have properly acknowledged your PEB findings, they concluded this fact should not result in a finding that you were unfit at that time or a readjudication of your case. In the end, the Board determined the error was harmless based on your notification of the PEB findings in the 16 November 2011 LOD closure letter and your continued service in the Navy Reserve for over two years after the PEB findings were made. During this time, your performance was superior except for poor performance unrelated to the disability conditions claimed in your application. Additionally, the Board found no evidence that you contested the PEB findings during that period of service, leading them to conclude no injustice exists with the failure to have you formally acknowledge the findings. Moreover, while the Board considered your post-discharge VA ratings, they did not find them probative on the issue of unfitness 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 requirement that unfitness for military duty be demonstrated. Therefore, the Board concluded you were properly discharged in accordance with law after failing to twice select for promotion to O4. Finally, the Board agreed with the advisory opinion that there was no basis for your retroactive

promotion to O4 based on the errors you argue since the preponderance of the evidence does not support a finding that you were negatively affected by the alleged errors during the promotion board process. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your record.

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,

1/10/2022



Deputy Director

Signed by:

