



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. 6210-21
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 14 November 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 26 September 2022 advisory opinion (AO) of a qualified medical professional, as well as your 2 November 2022 response in rebuttal to the AO. A copy of your rebuttal was provided to the drafter of the AO, who noted that it did not contain new clinical evidence, and that your rebuttal did not change his conclusions.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 1 May 1997. As set forth in detail in the AO, beginning in approximately 2001, you received medical treatment for a variety of symptoms relating to headache, described as, for example, tension headache, migraine headache, and chronic headache. Your medical records reflect you were also treated, from time to time, for other ailments, such as an injury to your back.

Eventually, you were reviewed for possible referral into the disability evaluation system (DES). In connection with this review, on 7 April 2011, your commanding officer prepared a nonmedical assessment (NMA). A NMA assists the Physical Evaluation Board (PEB) determine your ability to perform your duties. According to the NMA:

[Petitioner's] primary duties involve office work and 90% of it is in front of a computer screen. With his reoccurring headaches and prescribed medications he was taking, he was often unable to concentrate and stay focused. It is my belief that his condition would deteriorate if he went to sea. With his back and knee injury, it would be hard for him to traverse up and down ladder wells onboard any Navy ship.

[Petitioner] was missing approximately nine hours a week due to doctor appointments with his current physical condition coupled with his High-Year Tenure, he is not recommended to stay on active duty. However, due to his current diagnosis and the pain he has had to endure over the past three years, recommend he be placed on Permanent Limited Duty only to obtain treatment and rehabilitation for his injuries. If Permanent Limited Duty is not feasible, then recommend [Petitioner] to be medically retired from the U.S. Navy.

On 6 July 2011, a medical evaluation board (MEB) referred you to the PEB. According to the MEB, "it is the opinion of the board that this member has a condition that prevents him from performing the duties in his rank. This case is therefore referred to central physical evaluation board for further adjudication." Thereafter, you were reviewed by an Informal PEB (IPEB), which, on 9 September 2011, found you fit for duty. You sought review of the IPEB decision, and, on 25 January 2012, a Formal PEB (FPEB) found you fit to continue duty. The FPEB decision included reliance on performance evaluations. According to the formal rationale of the FPEB:

Neither the member's testimony, nor the evidence contained within the case file or provided at the formal hearing, convinced the Board that he was Unfit for continued naval service. The Board closely considered the member's clinical history, which traces each of the petitioned complaints across several years. However, the presence of a diagnosis is not necessarily indicative of an Unfitting condition.

In this case, the member provided commendable service as a Navy Yeoman right up to the point of his service-mandated High Year Tenure (HYT) separation. Contemporary with the member's HYT, the member stated his post-service intention of a return to college for degree completion in order to become a law enforcement officer, with additional plans to affiliate with the Naval Reserve. There appeared to be no personal supposition of significant limitation.

The board placed great weight in the member's performance evaluations which consistently emphasized his outstanding performance in his rank and rate, with strong recommendations for advancement. The member was regularly rated amongst the upper portion of his peers.

The Board considered these reports, based upon close leadership observation across a prolonged period, as credibly indicating that none of the petitioned conditions prevented the member from adequate service in his office, grade, rank or rate. Neither evidence nor testimony convincingly indicate that the petitioned

conditions, taken independently or together, significantly caused or contributed to the premature end of the member's career.

You filed a petition for review with the Secretary of the Navy Council of Review Boards (CORB). On 14 March 2012, the CORB denied your Petition for Review (PFR), as follows:

The Non-Medical Assessment provided by your command reinforced my decision concerning your fitness for duty. While that document refers to work-related limitations, it also recommends your continuation on active duty in a Permanent Limited Duty status if you were found unfit. That recommendation indicates your command believes you capable of performing military duties. The proffered opinion your condition could deteriorate if you were assigned to sea duty was not afforded any significant weight in the absence of corroborating medical evidence. However, even if accepted as true, the inability to deploy, in itself, cannot form the basis for an unfit determination per regulation. Finally, the fact you miss approximately nine hours per week due to medical appointments/treatment indicates you are able to substantially perform your duties without significant impact to your command.

On 27 March 2012, the FPEB notified the Chief of Naval Personnel that you were found fit for service. On 26 April 2012, you completed your required service, you were separated, and you were transferred to a Reserve status. Thereafter, the U.S. Department of Veterans Affairs awarded you a 100% disability rating effective the date after your release from active duty. Notably, despite your VA rating, according to your service record, after your release from active duty you remained affiliated in the Navy Reserve in some capacity, from which you were honorably discharged on 14 May 2015, and you were recommended for reenlistment.

You filed a previous petition with this Board in 2013 requesting relief similar to the relief you request in your current petition. In a letter dated 24 April 2014, this Board denied your petition. In denying your petition, the Board substantially relied on an AO dated 14 March 2014. According to that AO:

In summary, the evidence does not support the requested relief. The evidence suggests a chronic history of painful entities, including a 10 year history of migraine-like headaches and stress/adjustment-related depression and "bum out" regarding his Navy career. Both duty related and personal stressors appear to have increased in recent years with the approach of his HYT and associated transit through the DON Disability Evaluation System and PEB process. Despite these challenges he was able to perform his assigned duties at least at an acceptable level while completing requirements for a college degree, remain promotable, and determined to be fit for Separation/Retirement at the time of his 26 April 2012 separation.

Thereafter, you filed another petition with this Board in 2019. In your 2019 petition, you asserted that your medical conditions persisted and that you continued to struggle with depression. You also argued that the standard applicable to fitness under SECNVINST 1850.4

series is “reasonably perform,” but the previous Board and AO applied a more limited and improper standard of fitness. You also argued that at the time of your discharge, you could not perform all of the duties of your office, grade, rank or rating that may reasonably have been expected. Finally, you argued that the prior Board decision was arbitrary and capricious by improperly relying on your performance history, and it did not address the VA’s post-service determination that you had a 100% disability rating the day after your discharge. On 7 January 2020, the Board issued to you its denial of your second petition, and it addressed all of your contentions in its careful and robust analysis, as follows:

The Board reviewed the PEB’s determination of fitness for duty in consideration of the VA’s determination of 100% disability on 27 April 2012, and in light of your statements regarding the limiting impact migraines had on your ability to perform your duties. The Board noted that you state you took leave when episodes impacted your work and that more stressful assignments such as your duty with Tactical Air Control Squadron ██████ exacerbated your migraines. The Board noted, however, that SECNAVINST 1850.4 series states a finding of fitness for continued duty is based on evidence that establishes that a member is reasonably able to perform the duties of his or her officer, grade, rank or rating. Furthermore, SECNAVINST 1850.4 series states that with a finding of fit to continue naval service is the understanding that the mere presence of a diagnosis is not synonymous with a disability. The Board also noted that you had a decline in performance from 4.17 to 3.00, and considered the timing of the VA’s 100% disability determination. The Board took the VA’s determination into account, but found that the VA’s rating was not determinative on the PEB or the Navy’s issuance of a disability retirement. The VA’s rating, unlike the PEB’s determination, is not tied to unfitness for military duty. The Board found that you suffered persistent migraines during your military service, but determined that you did not provide sufficient evidence that established that you could not reasonably perform your duties due to a medical condition or disability while you were serving in the Navy. The Board concluded that the PEB’s findings were issued without error or injustice, and correction to your records to assign you a disability retirement is not warranted.

You have now filed a petition for reconsideration of this denial of your petition. According to your current petition, this Board “found that you suffered persistent migraines during your military service, but determined that you did not provide sufficient evidence that established you could not reasonably perform your duties due to a medical condition or disability while you were serving in the Navy.” As a result, you state that your current petition, “cures the deficiency identified by the Board. In your petition, you state that the new matter you provided was contained within your exhibits A through Z, which the Board carefully reviewed. In particular, the Board took note of new matter in the form of letter that you included from a former Yeoman Second Class, with whom you worked, who described the nature of the work that you performed when you worked together. You assert that, based in part on this description of the work required at the time, you were not able to perform the array of required tasks due to your disability.

In order to assist it in reviewing your petition, the Board obtained another AO, dated 26 September 2022, from a different medical professional from the preparer of the 2014 AO. The current AO surveyed your history of service as well as a relatively lengthy discussion of your treatment while in service. The AO then reviewed your performance evaluations, edited for formatting, as follows:

Review of the available objective clinical and non-clinical evidence documented Petitioner successfully executed the full range of responsibilities of his rate and rank up through the 2009-2010 period, when his Evaluations reflected some decreases in his assigned duties. Prior to his transfer from [REDACTED] to [REDACTED], his duties included Administrative Leading Petty Officer, and primary responsibility for several administrative programs.

Following transfer, his evaluations reflected smaller scopes of responsibility, which he contended were due to his worsening migraines, and negatively affected his opportunity for promotion to YN1. Notably, his evaluations remained competitive up to his final evaluation. During his 2008JUL11-2009MAR15 evaluation his trait average was 3.83 (above the summary group average), his promotion recommendation was "Early Promote," and his narrative stated "#1 of 3 Second Class Petty Officers; highly recommended for Petty Officer First Class." His 2009MAR16-2010MAR15 evaluation contained an individual trait average of 4.33 (above summary group average of 4.26), his promotion recommendation was "Early Promote," and his narrative comments included "Strongest Recommendation for Petty Officer First Class."

His 2010MAR16-2011MAR15 Evaluation contained an individual trait average of 4.17 (summary group average was 4.16), his promotion recommendation was "Must Promote," and his narrative included "#2 of 4 outstanding Petty Officers Second Class. Strong recommendation for advancement to E6." His 1-of-1 separation evaluation (due to HYT-10) from 2011MAR16-2012APR26 contained a trait average of 3.0, promotion recommendation of "Promotable," and comment his HYT-10 date was 22 May 2011, but he was kept on active duty to await the results from the PEB.

Though Petitioner's contention his migraine condition resulted in duty limitations of reduced hours, reduced responsibilities, and interrupted availability, his evaluations throughout his YN2 [rate] (with the exception of his separation evaluation) were competitive and reflected his ability to adequately perform the range of duties commensurate with his rate and rank within his prescribed duty limitations as set forth by his medical providers.

The AO then reviewed your NMA, as follows:

His Commander's Non-Medical Assessment (NMA) indicated Petitioner was working within his occupational specialty, participated in a partial PRT/PFT (sit-ups and run were waived due to knee and chronic lower back pain), and remained

within weight and body fat standards. The Commander also stated Petitioner missed nine hours a week for medical appointments, was not world-wide deployable, and did not recommend Petitioner remain on active duty due to missing work for doctor appointments, current physical condition, and status of reaching his HYT.

Next, the AO discussed your duty limitations in the context of your referral to a MEB and, ultimately to the PEB, as follows:

Except for intermittent periods of “SIQ” and light duty, Petitioner continued to function successfully without limitations to his full duty capacity until July 2011 (less than one year before discharge from service) when a Medical Evaluation Board convened and referred him to the PEB, and his first period of limited duty was initiated. Though Petitioner contended his MEB was delayed, despite his frequent requests for a medical board, his healthcare providers did not feel his condition was compromising his ability to serve until July 2011, and the appropriate referral to the PEB for fitness determination was made. Of note, service instruction specifically cites request for referral to the PEB by the service member as a circumstance not justifying referral to the PEB, as well as the presence of a physical defect without a medical board opinion the defect materially interferes with the member’s ability to reasonably perform the duties of his or her office, grade, rank, or rating/MOS on active duty.

Likewise, the decisions rendered by the IPEB, FPEB, Director CORB, and two prior cases before the BCNR appear appropriately based on available objective evidence of Petitioner’s condition at the time of his discharge and ability to complete his enlistment. Command evaluations during the periods of his Migraine Headache diagnosis, treatment, IDES referral and processing, up to discharge indicated Petitioner adequately executed his military occupational responsibilities within the duty limitations imposed by his medical providers.

The AO concluded, “in my medical opinion, 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.”

You were provided a copy of this AO, and you provided a response in rebuttal dated 2 November 2022, which the Board carefully reviewed. According to your response, you reiterated that your present petition “focused intently on an extensive analysis of [your] performance evaluations spanning your entire Navy career and it submitted affidavits by fellow service members to show [your] medical condition did, in fact, interfere with your ability to carry out the duties of your office, grade, rank or rating.” You then identified four errors contained in the AO.

The first error you identified, is that the AO incorrectly attributed a statement made in the IPEB to your Commander. You state that it was false that your Commander stated you

were working within your rate and could do your job except your PRT. The second error you identified is that the AO incorrectly cited the Director, CORB, as stating that the NMA recommended continuation on active duty in a Permanent Limited Duty status if found unfit, stating the PLD recommendation “‘indicates your command believes you capable of performing military duties’ and ‘the fact you miss approximately nine hours per week due to medical appointments/treatments indicates you are able to substantially perform your duties without significant impact to your command.’” The third error that you cite faults the AO for summarizing the 2014 AO as reflecting that one of your evaluation reports noted a trait average of 3.00 (meets all standards) and promotion recommendation of ‘Promotable.’ You further argue that the preparer of the current AO carelessly used the word “Evaluator.” According to your third error, the person who noted the decline in your duty performance and attributed the decline to stress attending to high-year tenure challenges was the 2014 AO, and not the evaluator of your 2011/12 evaluation report. You assert that this created a false narrative that you had stress due to pending high-year tenure, which was perpetuated by the 2011 IPEB and the 2014 AO, not anyone from your Chain-of-Command or any of your medical providers. The fourth error you identified relates to the AO’s statement that “‘in the last 2-3 years of his career, [you] presented more frequently for care with subjective complaints of the migraines becoming more intense and frequent.” You argue that there is nothing in your extensive medical history suggests that the nature or symptoms of your migraines changed from “objective” to “subjective” at any point in time.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, including your written materials containing new arguments, the new matter that you provided, the new AO, and your response in rebuttal to the new AO. Ultimately, the Board disagreed with your rationale for relief. In reaching its decision, the Board observed that, in order to qualify for military disability benefits through the DES 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; 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 record, the Board concluded the preponderance of the evidence does not support a finding that you met any of the criteria for unfitness at the time of your discharge. At the outset, the Board substantially concurred with the most recent AO. The Board found that the AO provided a fulsome description of your medical history, your performance traits during service and NMA, the new arguments and new matter that you presented, as well as your review by the IPEB, the FPEB, and your first and second petitions to this Board. The Board also noted that, in addition to these several layers of review, you also filed and petition for review, which was denied. The Board considered your response to the AO, but determined that the four errors that you identified were not dispositive factors upon which any of the prior findings relating to your condition were based. And, even if these errors were true, the Board determined they did not diminish the significance of the AOs findings. As noted above, the issue at hand, as

described by the FPEB, is whether the your “petitioned conditions, taken independently or together, significantly caused or contributed to the premature end of the member’s career.” The FPEB found that none of your conditions met this standard, and in rendering an unfavorable opinion, the AO essentially endorsed the finding of the FPEB. And, none of the four factors that you raise with respect to the AO tend to change this critical finding, which ultimately, is the critical finding with respect to your conditions. Indeed, as set forth in the AO, “[c]ommand evaluations during the periods of his Migraine Headache diagnosis, treatment, IDES referral and processing, up to discharge indicated Petitioner adequately executed his military occupational responsibilities within the duty limitations imposed by his medical providers.”

In its review of the new matter that you provided, in particular statements by co-workers concerning your (in)ability to perform within your rate of Yeoman Second Class, the Board determined that, despite the observation of co-workers, your command performance evaluations did not reflect any such inability to perform the functions of your rate. In weighing the evidence, the Board concluded your performance evaluations was more persuasive, than the provided statements, on the issue of whether you were able to perform the duties of your office, grade, rank or rating. Finally, the Board noted that you did not provide any additional clinical information to support your new petition, nor did you provide any additional clinical information in support of your response in rebuttal to the new AO. Thus, in light of all of the foregoing, the Board determined there was no error or injustice in your naval record and it denied your request for reconsideration.

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,

12/12/2022



Executive Director

