



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

[REDACTED]
Docket No: 6374-21
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED],
[REDACTED]

Ref: (a) Title 10 U.S.C. 1552
(b) SECDEF memo, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD," of 3 September 2014
(c) USD memo, "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or Traumatic Brain Injury (TBI)," of 24 February 2016
(d) USD memo, "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment," of 25 August 2017
(e) USD memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 July 2018

Encl: (1) DD Form 149 w/attachments
(2) Advisory opinion by medical professional dated 15 Mar 2022
(3) Petitioner response to Advisory opinion

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected to change by changing his discharge to medical retirement of at least 30%; remove references to adjustment disorder/condition, not a disability from his record; grant all prospective and retroactive benefits for medical retirement.

2. The Board, consisting of [REDACTED], reviewed Petitioner's allegations of error and injustice on 22 July 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of naval records, and applicable statutes, regulations and policies, and references (b) through (d), which consist of the 25 August 2017 guidance from the Under Secretary of Defense for Personnel and Readiness regarding requests by Veterans for modification of their discharge due to mental health conditions, sexual assault, or sexual harassment (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). The Board also considered

enclosure (2), the advisory opinion (AO) from a medical professional and enclosure (3), Petitioner's response to the AO.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. Although Petitioner did not file his application in a timely manner, the statute of limitation was waived in accordance with the Kurta Memo.

b. Petitioner entered active duty with the Navy and commenced a period of active duty on 30 June 2003. On 5 August 2004, the Petitioner received nonjudicial punishment for disobeying an order. Thereafter, he was issued a formal written warning concerning his misconduct. In October 2007, the Petitioner had several contacts with medical professionals concerning his mental health, which are set forth in more detail in enclosure (2). On 8 October 2007, he made a written statement to his commanding officer, explaining that he experienced suicidal ideations. On 24 October 2007, the Petitioner was notified of the initiation of administrative separation processing and rights in connection therewith. On 27 November 2007, the Petitioner was discharged with an honorable characterization of service due to a condition, not a disability.

c. In his petition to this Board, Petitioner contends that he was improperly diagnosed with adjustment disorder and discharged. He states that he actually suffers from major depressive disorder, and that his health, safety, and symptoms were inadequately considered. Further contends that his contemporaneous medical records, as well as post-service records from the U.S. Department of Veterans' Affairs (VA), as well as independent medical records, support his position. He asserts that he was deprived of being able to be reviewed through Disability Evaluation System (DES), that the VA rated his major depressive disorder at 30% retroactive to the day after his discharge, and that his rating has increased since. Finally, the Petitioner cites references (b), (d), and (e) in support of his petition.

d. In order to assist it in evaluating the Petitioner's contentions, the Board obtained the enclosure (2). The enclosure (2) AO from a medical professional was considered unfavorable to Petitioner. According to the AO:

In-service records did contain consistently documented evidence of a diagnosis of Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, with clinical documentation of specified occupational and personal stressors that precipitated Petitioner's mental health condition. Throughout his in-service course of treatment, clinical documentation supported the diagnosis of Adjustment Disorder. Post-discharge, Petitioner's Adjustment Disorder diagnosis was continued until the range of symptoms and their severity progressed to a diagnosis of Major Depressive Disorder and Generalized Anxiety Disorder. His contention of unfitness is not supported by the objective evidence as his in-service record demonstrated successful performance of his duties and completion of demanding in-service schools and training. His performance evaluations and

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record of achievement throughout his military service do not demonstrate compelling evidence of unfitness for duty.

The AO thus concluded the “preponderance of evidence provides insufficient support for the request. This is due to the presence of objective evidence that the applicant’s duty performance was judged to have been adequate at the time of separation and he was consistently found responsible for his actions and fit for duty. Had referral to the PEB occurred, a finding of fit to continue naval service would have been the likely result.”

e. The Petitioner submitted enclosure (3), in response to the AO, in which he argued that the Navy misdiagnosed his major depressive disorder. In addition, he argues that the AO erred when it gave more weight to the medical evaluators rather than to the statements of the Petitioner, which according to the Petitioner, failed to provide requisite liberal consideration under the Kurta memo.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting partial relief. Specifically, the Board determined that the interests of justice supports changing Petitioner’s narrative reason for separation to Secretarial Authority, along with associated changes to his separation authority and separation code, in order to eliminate any stigma associated with Condition, Not a Disability being listed on his DD Form 214 as the reason for his discharge. In reaching this conclusion, the Board reviewed the guidance set forth in references (b) and (c). In other words, the Board determined that the Petitioner is deserving of clemency in the form of removing the stigma of having a potentially negative narrative reason for separation noted on his DD Form 214.

Despite the Board’s recommendation to grant partial relief as a matter of injustice, the Board concluded the preponderance of the evidence does not support any other relief requested by the Petitioner, including providing him a disability retirement. The Board noted 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 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 the Petitioner’s record, the Board concluded the preponderance of the evidence did not support a finding that he met any of the criteria for qualifying unfitness at the time of his discharge from the Navy. The Board observed the Petitioner’s actual reason for separation was a result of a finding that he had a Condition, Not a Disability, and that there were no findings that he had a qualifying disability condition that rendered him unfit. In reaching this conclusion, the Board substantially concurred with the finding of enclosure (2). The Board carefully considered enclosure (3), Petitioner’s rebuttal to the AO, but observed that the Petitioner misstated the

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applicability of the Kurta Memo, when Petitioner argued that the AO “erred when it gave more weight to the medical evaluators rather than to the statements of the Petitioner, which, according to the Petitioner, failed to provide requisite liberal consideration under the Kurta memo.” The Board determined that the Kurta Memo applies to consideration of the upgrade of discharge characterization, but it does not change the standard of medical findings required for a service member to be found unfit for the purposes of a disability retirement, which is, essentially, a medical determination.

Finally, to the extent the Petitioner asserted that the VA later provided him service connected disability findings, the Board noted that any such findings from the VA for service connected disability conditions did not persuade it that these conditions were unfitting at the time of his discharge from the Navy because 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.

RECOMMENDATION

In view of the above, the Board directs the following corrective action.

Petitioner be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214) reflecting that at the time of his discharge his narrative reason for separation was “Secretarial Authority,” separation authority as “MILPERSMAN 1910-164,” and SPD code was “JFF.”

That no further changes be made to Petitioner’s naval record.

That a copy of this report of proceedings be filed in Petitioner’s naval record.

4. It is certified that a quorum was present at the Board’s review and deliberations, and that the foregoing is a true and complete record of the Board’s proceedings in the above entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

8/2/2022

[REDACTED]